

28th Annual Ounce of Prevention Seminar

Welcome

Predicting the Future: Federal Contracting in an Election Year

crowell  **moring**

© Crowell & Moring LLP 2012

OOPS2012
Crowell & Moring LLP

TOP LABOR AND EMPLOYMENTS ISSUES FOR GOVERNMENT CONTRACTORS IN 2012 AND BEYOND

Jeff Pagano
Ellen Dwyer
Kris Meade
Rebecca Springer

Top Labor & Employment Topics for Federal Contractors

- A Mad, Mad World: The OFCCP's Breath-taking Regulatory and Enforcement Agenda
- Trade Secrets Litigation: Protecting Valuable Assets
- Interplay Between Executive Order 13495, the SCA and the NLRA: Potential Leverage Opportunities for Bidders

A Mad, Mad World: OFCCP's Agenda – Revised Scheduling Letter

- May 12, 2011 Notice – Seeking OMB Approval and Comments
- September 28, 2011 Notice – Final 30-Day Period for Comments
- Approval still pending; extensions on prior scheduling letter

A Mad, Mad World: OFCCP's Agenda – Revised Scheduling Letter

- Key Changes
 - Personnel activity data by job title and by racial subgroup
 - “Actual pools of candidates” – promotions and terminations – mini-OWBPA
 - Individualized compensation data for “all employees”
 - As of most recent February 1
 - “Employee” definition
 - “Compensation” definition

A Mad, Mad World: Section 503 Proposed Rule

- Proposed Rule – issued December 9, 2011; comment period closed February 21 , 2012
- Final rule expected 2012
 - Final rule likely to include many of the obligations in proposed regulation
 - **Substantial** increase in contractors' obligations

A Mad, Mad World: Section 503 Proposed Rule

- Utilization Goals
 - 7% disabled in each job group
 - Possible 2% “sub goal” for severe disabilities
 - Must conduct annual evaluation of utilization
 - If under 7%, additional action-oriented programs
- Invitation to Self-Identify
 - Must invite applicants to self-identify as disabled and, if disabled, must discuss accommodations
 - Must continue to ask new hires to self-identify
 - Conduct annual anonymous survey to invite employees to self-identify

A Mad, Mad World: Section 503 Proposed Rule

- Adverse Impact Analyses
- Review of selection decisions
- Annual Reviews
 - Personnel Processes
 - Mental and physical qualifications
 - Technology review

A Mad, Mad World: Section 503 Proposed Rule

- Outreach Efforts

- Prescribed efforts must include:

- Posting at “one-stop career center”
 - “Linkage agreements” with specified agencies

- Annual review of effectiveness of outreach efforts

- Number of disabled candidates from each effort
 - Number of disabled referrals, applicants and hires for current year and two prior years
 - If not effective, must add one more outreach effort

- Training and Meetings

A Mad, Mad World: Section 503 Proposed Rule

- Reasonable accommodations policy
 - Written or oral request
 - Request made to any manager
 - Process request within prescribed time period
 - Inform all applicants of accommodations process
 - **Written explanation of each denied request**
 - **Must include statement that individual can file complaint with OFCCP**

A Mad, Mad World: Section 503 Proposed Rule

- Five-year recordkeeping obligation
- Complete EEO clause in all subcontracts
- Braille, large print and other versions of AA poster; electronic posting required if electronic application process
- Job postings must say employer will not discriminate on basis of disability
- Possible EEO-1/Vets 100 type report for disabled

A Mad, Mad World: VEVRAA Proposed Rule

- Proposed Rule – Published April 26, 2011
- Final Rule expected 2012
 - Likely to include many of the obligations in Proposed Rule
 - **Substantial** increase in contractors' obligations

A Mad, Mad World: VEVRAA Proposed Rule

- Many similarities to Section 503 Regulations
 - Prescribed, enhanced outreach efforts
 - Request veteran status of all applicants
 - Adverse impact analysis of selections
 - Annual review of personnel processes, job qualifications
 - Mandatory meetings and trainings
 - Five-year record keeping requirement

A Mad, Mad World: VEVRAA Proposed Rule

- Hiring Benchmarks
 - % of total hires who will be Protected Veterans
 - Establishing Benchmarks
 - % of Protected Veterans in labor force
 - Referral, applicant and hiring ratios for prior year
 - Assessment of outreach and recruitment efforts

Protection Beyond Trade Secrets

- Commercially sensitive business information
- Employee and client information

Securing Protection at Time of Hire

- Contractual restrictions
 - Non-competition agreements
 - Forfeiture for competition
 - NDAs

Trade Secret Theft Becomes Key to Enforceability of CNCs

- CNCs historically enforceable where narrowly tailored
- CNCs preferred over USTA
- But, CNCs increasingly disfavored by courts
 - Concerns about job insecurity
 - Concerns about employee mobility

Hostility to CNCs Underscores Importance of Proving Trade Secret Theft

- CNCs routinely found unenforceable in CA
- Section 16600 of CA Business & Professions Code prohibits enforcement of “every contract that restrains a person from engaging in a lawful profession, trade or business of any kind”
- *Richmond Technologies v. Aumtech Business Solutions*, (N.D. Cal. 2011) creates new avenue for CA employers

Richmond Technologies Breathes New Life Into CNCs in CA

- At issue in Richmond -- teaming agreement that included a one year:
 - NDA that barred Aumtech from disclosing/using confidential information
 - Non-solicit that barred Aumtech from soliciting Richmond's employees
 - Prohibition against Aumtech doing business with Richmond's customers

Richmond Technologies Breathes New Life Into CNCs in CA

- Court found CNC enforceable when necessary to protect trade secrets
 - Richmond employee resigned, became President of Aumtech
 - Employee used three different programs to delete data from company-issued laptop
 - While employed by Richmond, employee participated in trade show for Aumtech
 - While employed by Richmond, employee used Aumtech email to solicit Richmond customers
 - Employee collected and diverted to Aumtech information about customer preferences and specialized requirements

Availability of CFAA as Remedy for Theft

- Computer Fraud and Abuse Act, 18 U.S.C. § 1030(a)
 - Private right of action against person
 - Who knowingly and with intent to defraud
 - Accesses a protected computer without authorization, or exceeds authorized access

Availability of CFAA as Remedy for Theft

– Circuit split about use against employees

1) 5th, 7th and 11th Circuits -- employee status alone will not preclude showing of unauthorized access

– CFAA may be available where:

» Employee had access to computer system, but exceeded access when he used information to perpetuate a fraud on customers. *U.S. v. John*, 597 F.3d 263 (5th Cir. 2010)

» Employee violated company computer access policy that prohibited access to computer database for personal use. *U.S. v. Rodriguez*, 628 F.3d 1258 (11th Cir. 2010)

Availability of CFAA as Remedy for Theft

- 2) In April 2012 decision, the Ninth Circuit refused to extend CFAA coverage to employees who accessed employer's computer, downloaded customer lists, and gave them to newly-formed competitor. *U.S. v. Nosal*, __ F.3d __ (9th Cir. April 10, 2012)

Practical Guidance for Employers Seeking to Protect Confidential Information

- Computer use restrictions
- Physical and information technology security
- Departure protocol
 - Directive to return all company-owned property and devices
 - Secure written affirmation that employee has complied with NDA and commitment prospectively
 - Prohibition on inserting any external device capable of data storage in company devices
 - Prohibition on accessing shared drives/databases
 - Prohibition on sending emails from company account to yourself or others outside company

EO 13495, the SCA, and the NLRA: Prepare to Bargain

- **Intersection of EO 13495, SCA, and NLRA Obligations – Opportunities for Bidders**
- **Executive Order 13495 - Nondisplacement of Qualified Workers Under Service Contracts (Jan. 30, 2009)**
 - **Requirements** – contractors/subcontractors for government service contracts must offer employment to incumbent’s “qualified employees”
 - **Exclusions and Exceptions** - various
 - **Practical Result** - increase the prevalence of organized labor in government service contracts , when the incumbent is organized
 - **Status**
 - DOL Final Rule (76 Fed. Reg. 53720-62) implementing EO 13495 issued, but . . .
 - New contract provision not applied to contracts until recently-issued FAR Council Proposed Rule is finalized; FAR Council proposed rule issued May 3, 2012 – 60-day comment period

EO 13495, the SCA, and the NLRA: Prepare to Bargain

- **SCA – Key Requirements**

- Must pay wages and fringes set by: (1) geographic Wage Determinations (WD) issued by the DoL; or (2) signed Collective Bargaining Agreements (under “successorship rule” of Section 4(c) of the SCA)
 - Successorship Rule of 4(c) does NOT apply to other terms of the predecessor’s CBA
- 41 U.S.C. § 6707(d) and 29 C.F.R. § 4.6(b)(3) - all service contracts are subject to an adjustment of wages and fringes after one year and no less often than once every two years
- As long as successor does not assume and become party to predecessor’s CBA, successor must pay Section 4(c) wages and fringes for one year only
 - Thereafter, successor free to alter wages and fringes as long as the wages and fringes do not fall below the geographic WD

EO 13495, the SCA, and the NLRA: Prepare to Bargain

- **NLRA Obligations**

- Successor who hires a majority of predecessor's workforce
 - must recognize and bargain with the predecessor's union
 - NOT obligated to assume predecessor's CBA unless "perfectly clear" exception applies or stock transaction
- Successor (except in stock transactions) normally free to set all initial terms and conditions on which employees will be hired - including wages and fringes
- SCA and EO 13495 Impacts NLRA Rights
 - Section 4(c) – must retain the predecessor's wages and fringes for the 1st year of the contract
 - EO requires that job offers be made to the predecessor's employees

EO 13495, the SCA, and the NLRA: Prepare to Bargain

- **Strategic Decisions and Opportunities - Bidding Process**

- Pricing strategy should differ depending on whether the incumbent is unionized
- Potential problem - existence of a signed CBA is not currently advertised in bid solicitations and DoL has rejected request that bid solicitations include such information
- Solution - perform additional due diligence on prospective contracts

- **If Non-Union Bidder and Incumbent is Unionized - Opportunities**

- Can issue employment offer with a CLEAR notice that Bidder is establishing initial terms and conditions that differ from those of the predecessor, as to: (a) conditions of employment other than wages and fringes in year one; and (b) all terms in year two and beyond; and
- Can specify that, as is required under the SCA, wages and fringes will remain at the Section 4(c) level for one year, but will be adjusted to a level no less than the geographic WD during year two and beyond.

The NLRA, SCA, EO 13495, the DOL's Final Rule and Proposed Regulations from the FAR Council: Prepare to Bargain

- **If Unionized Bidder and Incumbent is Union**
 - Steps
- **If Non-Union Bidder and Incumbent is Non-Union**
 - Only concern is EO 13495 and SCA – make offer of employment and offer wages/fringes at least at the geographic WD