

# A Sea-Change Year for Federal Contractor Employers: Revised Regulations and New Executive Order Obligations

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**F**ederal contractor employers have special obligations — not just with nondiscrimination and equal employment laws that are including Title VII of the Civil Rights Act of 1964,<sup>1</sup> — but also equal employment and affirmative action laws. They were put in place to improve employment opportunities for individuals who were traditionally underrepresented in various employment positions, including women, minorities, individuals with disabilities, and protected veterans.<sup>2</sup>

Based on substantial changes to those nondiscrimination and affirmative action laws that were phased in during 2014, along with a series of employment-based Executive Orders issued by President Obama, 2014 was a sea-change year for employers that are federal contractors. While some changes were predicted by way of updated regulations associated with two of the three major laws applicable to federal contractors, other changes that came by way of a series of Executive Orders were less predicted and have presented challenges with respect to implementation. When finalized, regulations associated with five separate employment-based Executive Orders issued in 2014 will impact a range of issues from minimum wage and compensation protections to the extension of protections for sexual orientation and gender identity to employees of federal contractors. Attorneys working with federal contractors as employers should be aware of these changes in order to assure consistent and full compliance. This article will cover the laws applicable to em-

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ployers as federal contractors and will overview the significant recent changes to these laws.

## Laws applicable to federal contractor employers

There are three federal laws that uniquely apply to federal contractors:

- Executive Order 11246, as amended, which was first issued in 1965 and prohibits federal contractors from discriminating on the basis of race, color, religion, sex,<sup>3</sup> or national origin (associated plans have become known as plans for “women and minorities”);<sup>4</sup>
- Section 503 of the Rehabilitation Act (Section 503), as amended,<sup>5</sup> which was enacted in 1973 and prohibits discrimination against individuals with disabilities; and
- The Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA), as amended,<sup>6</sup> which was first passed in 1974 and protects certain groups of protected veterans including those who are disabled or recently separated.<sup>7</sup>

The United States Department of Labor is responsible for oversight and development of implementing regulations associated with these

federal laws.<sup>8</sup> The division within the Department of Labor responsible for enforcement of these laws applicable to federal contractors is the Office of Federal Contract Compliance Programs (OFCCP). The OFCCP’s mission “is to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal government.”<sup>9</sup>

## Employers as federal contractors

Jurisdiction for various federal and state employment laws is normally based on the number of employees who are employed at particular points in time for the employer in question. The same holds true, in part, for various aspects of the nondiscrimination and affirmative action laws applicable to federal contractors. But jurisdiction is first premised on the volume of work that a company contracts with the federal government.

Generally, federal government employers with a government contract of a certain threshold amount, varying from \$10,000 - \$100,000 on an annual basis, must take certain

steps to not discriminate and take affirmative action to improve the pool of qualified women, minorities, disabled individuals, and protected veterans for application and promotion.<sup>10</sup> Federal contractors with 50 or more employees and meeting certain annual dollar volume threshold requirements must prepare an annual written affirmative action plan that sets out, among other things, its prior effort at improving this pool and its progress toward goals it may set.

Compliance with tracking data, formalizing plans, and preparing for occasional audits by the OFCCP can be quite onerous and, as such, when a private sector employer considers contracting with the federal government, these ongoing management and personnel tasks must be evaluated as a part of the business decision to become a federal contractor. For certain employers, such as a financial institution or bank, compliance with these laws is an inherent part of doing business.<sup>11</sup>

Notably, not just prime contractors of the federal government are subject to these obligations. Subcontractors that meet the various threshold tests may also be required to comply with these nondiscrimination and affirmative action obligations.<sup>12</sup> For example, the Boeing Company is federal prime contractor. A company in turn providing certain supplies or services at a minimum level to Boeing might be a subcontractor also subject to these laws. According to the various regulations, a subcontract that would trigger jurisdiction would be

“any agreement or arrangement between a contractor and any person (in which the parties do not stand in the rela-

tionship of an employer and an employee):

For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or

Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.”<sup>13</sup>

### The need for change

In September 2013, the OFCCP published long-discussed final rules that substantially changed regulations applicable to Section 503 and VEVRAA. These changes were necessary to update regulations that had remained substantially unchanged since the 1970s. The changes were also necessary to mirror current statutory definitions in other disability laws, specifically the 2008 amendments to the Americans with Disabilities Act (now known as the Americans with Disabilities Act Amendments Act or “ADAAA”),<sup>14</sup> and to address the continued high unemployment rates for both individuals with disabilities and protected veterans. Certain requirements outside of the formal affirmative action plans went into place on March

24, 2014, and affirmative action plan changes will take effect with the federal contractor’s next affirmative action plan period after March 24, 2014. For example, for contractors with January 1 affirmative action plan dates, these changes must be in place January 1, 2015.

Changes in these regulations now require, among other things, that federal employer contractors collect and analyze the number of protected veterans hired and compare those numbers with an annual hiring benchmark for those veterans. The federal contractor can establish its own benchmark based on certain criteria or can use the national percentage number (equal to the national percentage of veterans in the civilian workforce) that will be updated annually by the OFCCP (in 2014, the national benchmark was set at 7.2%). To accomplish this, federal contractors will be required to ask applicants both before and after an offer of employment to self-identify as a protected veteran.

Similar changes in the Rehabilitation Act’s Section 503 regulations require federal contractors to set utilization goals, currently set at 7%, for individuals with disabilities. In a controversial final part of the regulation and contrary to traditional ADAAA compliance requirements, federal contractors will also

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be required to ask applicants both before and after an offer of employment to self-identify (on a mandated federal form) as an individual with a disability.<sup>15</sup> Failure to meet the benchmarks and goals is not itself a violation, but federal contractor employers are now required to evaluate the effectiveness of their outreach programs to meet these benchmarks and goals.

Additional updates in the regulations mandated changes to forms, advertisements, processes, and recordkeeping, among other things.

### **And still more change through executive orders**

As if substantial change to two of the three major laws governing federal contractors was not enough, a series of Executive Orders issued by President Obama in 2014, with more expected, will also impact federal contractors in 2015 and beyond. In his January 28, 2014 State of the Union address, President Obama declared this the “Year of Action.”<sup>16</sup> Federal contractors have seen that promise play out through a series of Executive Orders issued by the President to address a number of employment law topics that have over recent years stalled in Congress.<sup>17</sup>

For each of the Executive Orders and one Presidential Memorandum, the President ordered the Secretary of Labor to issue regulations through the normal rulemaking process to provide further guidance and interpretation.

A summary of each of these Executive Orders and the Memorandum, along with the status of the regulatory rule making process for each, follows:<sup>18</sup>

- Executive Order 13658. This Executive Order was signed in February 2014 and established a new minimum wage for federal contractors. That minimum wage, \$10.10/hour,

applies to covered contracts where solicitation for the contract takes place on or after January 1, 2015. Final rules were published in October 2014.<sup>19</sup>

- Executive Order 13665. This Executive Order was signed in April 2014. It is intended to promote pay transparency by prohibiting retaliation by federal contractors against their employees for discussing their compensation with fellow employees or

The proposed regulations would require federal contractors to maintain and submit additional data on compensation that could indicate pay gap trends between men and women.



inquiring about their compensation. A Notice of Proposed Rulemaking was published in September 2014 and the regulations will go into effect after the rules are published.

- Presidential Memorandum on Pay Equity. This Memorandum was published in April 2014 and a Notice of Proposed Rulemaking was published in August 2014. As of the submission of this article in November 2014, the comment period was extended to early January 2015. The purpose of this Memorandum was to increase attention to and enforcement of actions to close the pay

gap between men and women. The proposed regulations would require federal contractors to maintain and submit additional data on compensation that could indicate pay gap trends.

- Executive Order 13672. This Executive Order was signed in July 2014 and added sexual orientation and gender identity to the list of protected statuses for federal contractors. It will apply to contracts entered into on or after the effective date of the implementing regulations and as of the submission of this article, proposed or potential final rules have not been published. The OFCCP also published a directive related to gender identity and sex discrimination, Directive 2014-02, on August 19, 2014, providing guidance — without legally binding effect — with respect to these added protected statuses.

- Executive Order 13673. This Executive Order was also signed in July 2014 and Notice of Proposed Rulemaking is pending as of the submission of this article in November 2014. According to the Department of Labor’s news release with respect to this Executive Order, “As part of his Year of Action, President Obama signed an executive order on July 31 that requires companies competing for federal contracts to disclose labor law violations [across all agencies, not just the OFCCP, to include EEOC, Wage and Hour, and OSHA violations, among others] and gives agencies more guidance on how to consider labor law violations when awarding federal contracts.”<sup>20</sup>

These Executive Orders and the largely pending implementing regulations have added even more complexity to the heightened compliance requirements for federal contractors.

## Conclusion

Federal contractor employers are required to comply with separate and unique affirmative action obligations as a part of the benefit and bargain of contracting with the federal government. Attorneys representing federal contractors should ensure that their clients are fully apprised of those affirmative action obligations. The last year has been a year of considerable change — and confusion — with respect to compliance with significant new regulations and with a series of Executive Orders. As we begin 2015, we anticipate these many changes will continue to take shape and to present particular challenges for these employers.

## Endnotes

1. 42 U.S.C. 2000e *et seq.*
2. Affirmative action is an enhanced obligation beyond the nondiscrimination obligations found in the various equal employment laws and is applicable only to the federal government and certain contractors of the federal government. By definition, affirmative action is a systematic process of improving the pool of qualified applicants for hire and promotion comprised of women, minorities, individuals with disabilities, and protected veterans.
3. As will be referenced later in this article, a July 2014 Executive Order amended Executive Order 11246 to include sexual orientation and gender identity.
4. Exec. Order No. 11246, 30 Fed. Reg. 12319, 12935 (Sept. 24, 1965).
5. 29 U.S.C. § 793 *et seq.*
6. 38 U.S.C. § 2012 *et seq.*
7. "A protected veteran means a veteran who is protected under the non-discrimination provisions of the Act; specifically, a veteran who may be classified as a 'disabled veteran,' 'recently separated veteran,' 'active duty wartime or campaign badge veteran,' or an 'Armed Forces service medal veteran,' as defined by this section." See 41 C.F.R. § 60-300.2(q).
8. Current regulations interpreting Executive Order 11246 can be found at 41 C.F.R. § 60-1.1 *et seq.*; regulations for Sec-

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tion 503 are found at 41 C.F.R. § 60-741.1 *et seq.*; and those for VEVRA are found at 41 C.F.R. § 60-300 *et seq.*

9. The OFCCP's website can be found at: <http://www.dol.gov/ofccp> (last accessed Nov. 11, 2014).

10. This generally describes supply and service contracts as defined in 41 C.F.R. § 60-1.3. Construction contractors, for example, are covered by separate regulations.

11. Financial institutions with federal share and deposit insurance, i.e., covered by the Federal Deposit Insurance Corporation, or that are an issuing and paying agent for U.S. savings bonds and savings notes, are considered federal contractors. See, e.g., 41 C.F.R. § 60-1.40(a) and 60-2.1(b).

12. As such, references to federal contractors in this article would also apply to federal subcontractors.

13. 41 CFR § 60-1.3; 41 CFR § 60-250.2; and 41 CFR § 60-741.2.

14. 42 U.S.C. § 12101 *et seq.*

15. Only federal contractors should solicit such information on a pre-offer basis in compliance with these affirmative action regulations. Private-sector employers in compliance with the ADA should never solicit disability status on a pre-offer basis.

16. President Barack Obama's State of the Union Address, Office of the Press Secretary, January 28, 2014, available at [www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address](http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address) (last accessed Nov. 11, 2014).

17. Executive Orders dealing with employment obligations apply only to the federal government, but, assuming appropriate legislative or constitutional

authorization, federal contractors are subject to these Executive Orders and their implementing regulations. See, e.g., *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940) ("Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.").

18. This status of the rulemaking process is current as of the submission of this article in November 2014.

19. These regulations can be found at 29 C.F.R. § 10.

20. Leveling the Playing Field for Federal Contracts, Dept. of Labor News Briefs, July 31, 2014, available at [www.dol.gov/\\_sec/newsletter/2014/20140731.htm#VGFnwVJ0zIU](http://www.dol.gov/_sec/newsletter/2014/20140731.htm#VGFnwVJ0zIU) (last accessed Nov. 11, 2014).

## About the Author

**Kara Heikkila** has worked for more than 25 years in human resource and attorney roles advising employers on personnel and employment law matters. She is a member of Hawley Troxell's employment and litigation practice groups and heads a specialty group for the firm offering employment support to federal contractors, including development of affirmative action plans and administrative practice before federal administrative agencies and in federal court.

