

## Revisiting OFCCP Jurisdiction: The Basics Differ for Companies and Local Governments

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It's a new era for government contractors. Over the last few years, they have been front and center as waves of new and revised affirmative action Executive Orders and implementing regulations have swept through business and government communities leaving contractors struggling to keep their heads above water. Executive Orders impacting the contractor community have set new minimum wages; required paid medical leave, compensation data collection and reporting of adverse decisions from other agencies; instituted prohibitions against gender identity and sexual orientation discrimination; and prohibited retaliation for disclosure of compensation information. New mandates are still being interpreted, and compliance requirements assessed, because of the lack of uniformity of the coverage of the new edicts. In light of these changes creating increased exposure and the Office of Federal Contract Compliance Programs' ("OFCCP") related aggressive enforcement posture, if a company or local government does business with the federal government or federal contractors it would be prudent to revisit the question of whether it falls under OFCCP jurisdiction and its basic compliance obligations under federal affirmative action laws. And, if a company or local or state government has never considered itself to be a federal government contractor but does business with the federal government or its contractors, it may be time for a second look.

OFCCP jurisdiction questions are important not only to assess your organization's compliance requirements but also when determining whether, if faced with an OFCCP review, the review should be allowed to go forward. Determining whether a company, or local or state government falls under the purview of one or more of the three affirmative laws – OFCCP's Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) – is the first step in determining affirmative action obligations. Whether an organization must comply with a particular set of federal affirmative action regulations depends on a number of considerations, and admittedly the analysis has become more complicated with recent legislative action. However, these basic considerations remain the starting point for the analysis: (1) whether the contracting organization is party to a federal contract or subcontract, (2) the dollar amount of the contract, and (3) the type and size of the contractor organization. As to the first element, if a company or local or state government provides goods or workers, leases property or provides services directly to a covered federal government agency, the company is a federal contractor. But in addition, if the company or state or local government instead provides goods or workers, leases property, or provides services directly to a *federal contractor*, if those goods, workers, property or services are necessary to, or part of, the contractor's performance of a federal contract, the company or government body *still* qualifies as a federal subcontractor possibly subject to, and considered also to be a "covered federal contractor" under, affirmative action laws.

The next two factors, contract amount and employer size and type, determine whether a federal contractor meets thresholds giving OFCCP jurisdiction under each set of laws and regulations. This might be most easily approached by referring to an infographic the OFCCP released in October 2015. The infographic outlines the basic thresholds for jurisdiction under the three affirmative action laws. The infographic shows the distinctions in applicable affirmative action requirements based upon: (1) whether the contractor is a supply and service or construction organization (2) cumulative contract dollar amounts vs. single contract values and (3) number of employees. For each law, the infographic shows that supply and service contractors are subject to one or two levels of coverage ("basic coverage" or "AAP coverage") depending upon the dollar amount of the federal contract and the number of employees the contractor has. It also indicates the three types of coverage for construction companies depending upon the applicable law: "basic coverage", "AAP coverage" or "16 Specification" coverage.

Notably, because of its summary nature, the infographic does not identify an important existing distinction in compliance obligations between private contractors and local or State government contractors. Although a State or local government organization contractor meeting the dollar and employee thresholds for basic coverage will have the same "basic coverage" compliance responsibility as a private contractor, it is entirely exempt from the "AAP Coverage" requirement under Executive Order 11246. However, no such exception exists for state and local government contractors under the other two laws – Section 503 or VEVRAA. So covered entities within a state or local unit of government working on a direct federal project must prepare AAPs under VEVRAA and 503 if they met the dollar and employee thresholds, but are expressly exempt by regulations from the requirement to prepare an AAP under the Executive Order. *Note:* State and local government education institutions and medical facilities do not share in the Executive Order exemption from the AAP requirement.

Finally, it should also be mentioned that the infographic does not identify the existing requirement under Executive Order 11236 for any depository of government funds in any amount, or any financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount, to develop and maintain written affirmative action programs. There is no similar requirement in the veteran or disability regulations.

Basic coverage requirements under each law vary but, as illustration, can include the following:

- Post and maintain the most current version of the "EEO is the Law" poster so that it is visible to applicants and employees.
- Prevent discrimination on all bases protected under the laws.
- Include an EEO tag line in all advertisements that includes specific reference to disability or veterans' status if basic coverage thresholds are met under those laws.
- Include a reference to the pertinent law ("EO 11246, Section 503, or VEVRAA) in all covered subcontracts and purchase orders.
- Review mental and physical job requirements.
- Participate in the interactive process regarding provision of accommodations to disabled individuals and veterans.
- List job openings with the relevant state employment service (or, in the language of the veterans regulations, the employment service delivery system).
- Train all personnel involved in recruitment, screening, selection, promotion, and disciplinary action on the contractor's affirmative action obligations.

Generally affirmative action program requirements under each law will require surveying of applicants and employees, data collection, maintenance and analysis related to populations and employment activities for the groups protected under that law, narrative and statistical reports, documentation and analysis of outreach and recruitment efforts, and annual self-evaluation methodologies.

Since jurisdiction determinations are becoming increasingly complex, there is value in contacting affirmative action counsel to assist with questions about jurisdiction.

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