



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

Government contracts are often a critical source of business for many companies. However, companies that conduct business with federal and state governmental agencies must comply with a litany of complex laws and regulations including, but not limited to, equal employment opportunity (EEO) and affirmative action (AA) obligations to obtain and maintain their contractual relationships. Where covered contractors fail to abide by these obligations, they risk a number of potentially devastating consequences up to, and including, having one's contract canceled and/ or being debarred from future contracts. To avoid having the death penalty of government contracting imposed, it is imperative for federal contractors to be familiar, and in compliance, with the myriad of laws and regulations that govern same. This article will address the following topics:

- Which federal laws/regulations require contractors to engage in EEO and AA?
- When is an entity covered by and/or exempt from the EEO/AA obligations?
- What are the EEO/AA requirements?
- What belongs in an AAP?
- How are a contractor's compliance efforts monitored by the government?
- What are the consequences if a covered entity fails to comply with its EEO/AA obligations?

Each of these topics will be addressed<sup>1</sup>.

## I. Which federal laws/regulations require contractors to engage in EEO and AA?

Executive Order 11246 (EO 11246), 29 U.S.C. §793 (Section 503 of the Rehabilitation Act of 1973, as amended, or Section 503) and 38 U.S.C. §4212 (the "Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, or VEVRAA) and their respective implementing regulations are the primary sources of law that establish EEO and AA obligations for federal contractors.

Additionally, the President of the United States and the U.S. Department of Labor Office of Federal Contractor Compliance

Programs (OFCCP) often promulgate additional EEO/AA requirements and guidance through Executive Orders, Agency Directives and FAQ's. As such, contractors must remain vigilant in order to ensure they are up to date on their respective obligations.

## II. When is an entity covered by and/or exempt from the EEO/AA obligations?

EEO/AA obligations are dictated by a number of factors, including the type and amount of the federal contract, as well as the number of employees employed by the contractor.

In general, all federal contractors, regardless of the number of employees they employ, that have revenues from a "government contract" of more than \$10,000 annually are required to promulgate an EEO policy that complies with Section 202 of EO 11246. These EEO requirements are incorporated into every government contract and subcontract whether or not it is in the written contract itself. [41 CFR 60- 1.4\(c and e\)](#).

Additionally, contractors that employ 50 or more employees are required to prepare an Affirmative Action Plan (AAP) where they either:

1. Have a contract for \$50,000<sup>2</sup> or more in revenue during any 12-month period (this is often referred to as the "50/50 test"); or
2. Have a government bill of lading, which in any 12-month period can reasonably be expected to total \$50,000 or more.

Additionally, all financial institutions are covered by the AAP requirements regardless of size if they are:

3. A depository of government funds in any amount; or
4. An issuing and paying agent for U.S. savings bonds and savings notes<sup>3</sup>.

[41 CFR 60-1.40, 60-2.1\(b\), and 60-4-1.](#)

A "government contract" is defined as:

<sup>1</sup>Note, while this article provides a general overview of the EEO/AA requirements, it is not a comprehensive manuscript of all EEO/AA topics. For this reason, it is advisable to seek experienced counsel in the event that a contractor/subcontractor has questions regarding its EEO/AA obligations.

<sup>2</sup> It should be noted that contractors are only required to prepare AAPs under EO 11246 and Section 503 upon meeting the \$50,000 in annual revenues threshold amount and that they are not required to prepare an AAP under VEVRAA until they exceed \$150,000 in revenues annually.

<sup>3</sup> On January 1, 2012, jurisdiction over entities that acted as issuing or paying agents for U.S. savings bonds/notes was effectively eliminated due to the U.S. Treasury Department ending over-the-counter sales of paper U.S. savings bonds at financial institutions.





# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

Any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or non-personal services. The term “personal property,” as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term “non-personal services” as used in this section includes, but is not limited to, the following services: “utilities, construction, transportation, research, insurance, and fund depository. The term “government contract” does not include:

(a) Agreements in which the parties stand in the relationship of employer and employee; and

(b) Federally assisted construction contracts.

41 CFR 60-1.3 (EO 11246); 41 CFR 60-250.2 and 41 CFR 60-300.2 (VEVRAA); and 41 CFR 60-741.2 (Section 503).

Subcontractors are also required to prepare AAPs if they have a covered “subcontract” by virtue of the flow-down provisions contained in the regulations. 41 CFR 60-1.4(c), 60-1.40, 60-2.1(b) and 60-4-1.

The term subcontract is defined as:

Any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

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

(b) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.

41 CFR 60-1.3. Accordingly, the application of this rule results in many businesses having to prepare an annual AAP if they meet the 50/50 test even if they do not have a prime contract with the federal government.

However, not all contracts are covered by the EEO/AAP requirements. For instance, the term “government contract” does not include grants or federal financial assistance, such as Medicaid payments and, thus, these arrangements are exempt from the EEO/AAP requirements. Additionally, 41 CFR 60-1.5 specifically exempts the following contracts from the AAP requirements:

1. Transactions of \$10,000 or less;
2. Contracts/subcontracts for indefinite quantities not exceeding \$10,000;
3. Work performed outside the U.S.;
4. Contracts with state or local governments;
5. Contracts with certain educational institutions; and
6. Work on or near Indian reservations.

Additionally, AAP requirements differ depending on (a) whether the prime contractor/subcontractor is a supply and service contractor or a construction contractor, and (b) whether the prime contractor/subcontractor is subject to EO 11246, Section 503 and/or VEVRAA.

Importantly, covered contractors/subcontractors are required to prepare AAPs for all of their employees for each of their establishments. 41 CFR 60-1.40; 41 CFR 60-2.1(d); 41 CFR 60-741.40 and 41 CFR 60-300.40. Where a contractor/subcontractor is composed of numerous corporate entities, the entire organization will be subject to the EEO/AA requirements even though only one of the entities has the government contract where the “single entity” test is met. This test examines whether:

1. The entities have common ownership;
2. The entities have common directors and/or officers;
3. One entity has de facto day-to-day control over the other through policies, management or supervision of the entity’s operations;
4. The personnel policies of the entities emanate from a common or centralized source; and
5. The operations of the entities are dependent on each other, e.g., services are provided principally for the benefit of one entity by another and/or both entities share management, offices, or other services.

The test focuses primarily on whether the ownership, management and operations of the separate entities are, in fact, sufficiently



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

interrelated to warrant treating them as an integrated enterprise or a single entity. A business or organization need not meet all five factors to be considered a single entity with a covered federal contractor. See, *OFCCP v. Manheim Auctions, Inc.*, ALJ Case No. 2011-OFC-00005 (ALJ June 14, 2011) (holding that subsidiary and parent companies were subject to the AAP requirements even though the subsidiary which held federal contracts only had eight employees because the parent company had in excess of 23,000 employees and the subsidiary's contracts exceeded the dollar thresholds). However, there is growing recognition that centralized control over labor relations and personnel functions is the most important factor. As such, if part of an entity has entered into a federal contract/subcontract, it is prudent for the company to carefully analyze the foregoing factors to determine whether the entire organization is covered by the AAP requirements.

### III. What are the EEO/AA requirements?

As noted, in Section I above, EEO and AAP requirements are distinct. As such, each warrants its own discussion.

#### A. EEO Policy Requirements

All federal contractors/subcontractors with government contracts of more than \$10,000 are required to adopt and include in all of their contracts the EEO clause contained in Section 202 of EO 11246. 41 CFR 60-1.4(a) and 41 CFR 60-4.3. This clause requires contractors and subcontractors to agree to:

1. Prohibit discrimination against any employee or applicant for employment based on race, color, religion, sex, sexual orientation, gender identity, national origin, physical or mental disability, or because an employee or applicant is a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran<sup>4</sup> (Protected Status). EO 11478; 41 CFR 60-1.1; 41 CFR 60-741.5; and 41 CFR 60-300.5.

This clause prohibits discrimination against qualified applicants or employees based on their Protected Status in any and all terms, conditions and privileges of employment including, but not limited to:

Recruitment, advertising, and job application procedures;

- (a) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- (b) Rates of pay or any other forms of compensation and changes in compensation;
- (c) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (d) Leaves of absence, sick leave, or any other leave;
- (e) Fringe benefits available by virtue of employment, whether or not administered by the contractor;
- (f) Selection and support for training, including apprenticeship, on-the-job training, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training; and
- (g) Activities sponsored by the contractor including social or recreational policies. Id.

2. State, in all solicitations or advertisements for employees placed by or on behalf of the contractor, that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin, disability status, or protected veteran status;
3. Send, to each labor union or representative of workers with which it has a collective bargaining agreement, a notice to the union of its commitment to Section 202 of EO 11246 and post said notice where employees and applicants can view same;
4. Comply with all provisions of EO 11246 and the rules and regulations of the Secretary of Labor;
5. Furnish all reports and produce all records required by the Secretary of Labor;
6. In the event of noncompliance with the nondiscrimination clauses of the contract or with any of the rules, regulations or orders of the Secretary of Labor, the cancellation, termination, or suspension, in whole or part, and be deemed ineligible for further government contracts and such other sanctions as may be imposed; and

<sup>4</sup> Disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans are collectively referred to as "Protected Veterans." The individual definition of each category of Protected Veteran can be found at 41 C.F.R. 60-300.2(n-r).



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

7. Include the foregoing provisions in every subcontract or purchase order unless exempted by the Secretary of Labor so that such provisions will be binding upon each subcontractor or vendor.

respective implementing regulations. [41 CFR 60-1.40](#), [41 CFR 60-741.40](#) and [41 CFR 60-300.40](#).

The foregoing requirements not only prohibit discriminatory employment practices but also ensure that all qualified candidates for open job opportunities and employees have equal access to all accoutrements and fringe benefits of employment.

## (a) EO 11246 AAP requirements

In general, an EO 11246 compliant AAP must include the following sections pursuant to Subpart B of [41 CFR 60-2.10\(b\)](#):

## B. AAP Requirements

The AA requirements require covered contractors to measure their EEO efforts and to engage in recruitment and outreach to attract, retain and promote minorities, females, individuals with disabilities and protected veterans where there is evidence of potential discriminatory practices against these groups. However, AA requirements cannot create set asides, quotas, or preference programs and any entity that does so risks engaging in reverse discrimination.

- i. The company's EEO policy;
- ii. The company's identification and acknowledgment of its AAP responsibilities and designation of responsibility for implementation pursuant to [41 CFR 60-2.17](#);
- iii. The company's organizational profile pursuant to [41 CFR 60-2.11](#);
- iv. The company's job group analysis pursuant to [41 CFR 60-2.12](#);
- v. The company's placement of incumbents<sup>7</sup> in job groups pursuant to [41 CFR 60-2.13](#);
- vi. The company's availability<sup>8</sup> analysis pursuant to [41 CFR 60-2.14](#);
- vii. The company's comparison of its incumbents to availability pursuant to [41 CFR 60-2.15](#);
- viii. The company's placement goals pursuant to [41 CFR 60-2.16](#);
- ix. The company's identification of problem areas pursuant to [41 CFR 60-2.17](#), including an analysis of its:
  - a. utilization of women/minorities in each job group;
  - b. personnel activity as to applicant flow, hires, terminations, promotions, and other personnel actions to determine if there are selection disparities as to gender, race, or ethnicity;
  - c. compensation systems to determine whether there are disparities as to gender, race or ethnicity;
  - d. selection, recruitment, referral and other personnel procedures to determine whether

The contents of an AAP depends on whether the government contract is for supplies/services or federally assisted construction work. [41 CFR 60-1.40\(b\)](#).

Covered contractors/subcontractors are required to prepare an AAP within 120 days of the commencement of a contract for each of its establishments and to update same annually. [41 CFR 60-2.1\(c\)](#), [41 CFR 60-741.40](#) and [41 CFR 60-300.40](#).

However, contractors/subcontractors do not have to produce/file their AAPs with the OFCCP. Rather, they merely have to maintain them, along with the supporting documentation for the current and preceding year, unless and until they are selected for a compliance evaluation by the OFCCP<sup>5</sup>. [41 CFR 60-1.20](#).

### 1. Supply/Service Contractors

Covered supply and service federal contractors and subcontractors are required to prepare AAPs that comply with EO 11246, Section 503 and VEVRAA<sup>6</sup>, and their

<sup>5</sup> The only exception to this is where the contractor/subcontractor is bidding on a contract of \$10 million or more. In such circumstances, the awarding agency is required to have the prospective contractor and known first-tier subcontractors submit to a pre-award compliance evaluation unless the OFCCP has conducted an evaluation of the entity and found it in compliance within the preceding 24 months. [41 CFR 60-1.20\(d\)](#).

<sup>6</sup> For contractors with contracts in excess of \$150,000.

<sup>7</sup> To obtain the data to determine incumbency, contractors are required to ask applicants/employees to complete self-identification forms indicating their gender/race/ethnicity.

<sup>8</sup> Availability is based on the U.S. Census Bureau demographic data for the external recruitment area that the contractor hires from and the internal job groups the contractor promotes from



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

- e. any other areas that might impact the success of its AAP.
- x. The company's action-oriented programs to attain established goals and objectives and to ensure good faith efforts to remove identified barriers, expand employment opportunities and produce measurable results pursuant to 41 CFR 60-2.17; and
- x. The company's internal audits to ensure it measures the effectiveness of its total AAP pursuant to 41 CFR 60-2.17.

In addition, the covered contractor is required to maintain documentation of the foregoing for the current and prior plan year and to produce same in the event of an audit by the OFCCP. 41 CFR 60-10(c) and 60-2.32.

## (b) Section 503 AAP requirements

Covered supply and service contractors are also required to have an AAP that is compliant with Section 503 and its implementing regulations. 41 CFR 60-741.40. In general, a compliant Section 503 AAP must have the following sections pursuant to 41 CFR 60-741.44:

- i. An EEO policy statement;
- ii. A system to review its personnel processes to ensure that they do not discriminate against individuals with disabilities and ensure equal access;
- iii. A schedule for the review of all physical and mental job qualification standards to ensure they are job-related and consistent with business necessity;
- iv. A reasonable accommodation policy and procedures;
- v. Procedures to ensure that individuals with disabilities are not harassed;
- vi. An external dissemination policy that provides outreach and positive recruitment activities of individuals with disabilities and an assessment of same;
- vii. An internal dissemination policy that provides

- internal procedures for the company to engage in affirmative action efforts to employ and advance individuals with disabilities;
- viii. An audit and reporting system that:
  - a. measures the effectiveness of the contractor's AAP;
  - b. indicates any need for remedial action;
  - c. determines the degree to which the contractor's obligations have been attained;
  - d. determines whether known individuals with disabilities have had the opportunity to participate in all company-sponsored educational, training, recreational, and social activities;
  - e. measures the contractor's compliance with the AAP's specific obligations; and
  - f. documents the actions taken to comply with the foregoing requirements.
- ix. A section that designates an official to be responsible for the contractor's affirmative action activities; and
- x. A section that requires training of all personnel involved in the recruitment, screening, selection, promotion, discipline, and related processes of employees to ensure the commitments in the contractor's AAP are implemented. Additionally, the covered contractors must document their efforts and maintain records of same for three years:
  - 1. the number of applicants who self-identified as individuals with disabilities pursuant to 60-741.42(a) or who are otherwise known to be individuals with disabilities,
  - 2. the total number of job openings and total number of job openings and total number of jobs filled;
  - 3. the total number of applicants for all jobs;
  - 4. the number of applicants with disabilities hired; and
  - 5. the total number of applicants hired.

Importantly, contractors/subcontractors are required to strive toward reaching a utilization goal of 7% of individuals with disabilities in each job group or for its total workforce where the contractor employs 100 or fewer employees. 41 CFR 60-741.45.



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

## (c) VEVRAA AAP requirements

Finally, covered supply and service contractors that have contracts with revenues of \$150,000 or more are required to have an AAP that is compliant with VEVRAA and its implementing regulations. 41 CFR 60-300.44. Of note, the sections of a VEVRAA AAP are the same as Section 503 requirements except that they require contractors/subcontractors to engage in and measure affirmative action activities based on Protected Veteran status. As such, for brevity's sake, many contractors/subcontractors combine their Section 503 and VEVRAA AAPs into one plan. Thus, contractors/subcontractors should review 41 CFR 60-300.44(a-k) for further guidance on their VEVRAA AAP obligations. In doing so, they should be mindful of one important distinction. That is, they are required to strive towards reaching a hiring benchmark (not goals) for each job group or for its total workforce where the contractor employs 100 or fewer employees. This hiring benchmark is set by the OFCCP annually and currently stands at 5.7%.

## 2. Construction Contractors

Construction contractors are also subject to the above AAP requirements under EO 11246, Section 503 and VEVRAA if they have a direct contract or subcontract for goods and services with a specific government agency. 41 CFR 60-2.

However, if the contractor is working on a federally assisted construction project it will only be subject to the requirements contained in 41 CFR 60-4. This distinction is critical because construction contractors with federally assisted construction contracts only need to develop the following AAP program for trade employees<sup>9</sup> pursuant to 41 C.F.R. 60-4.3. Specifically, these construction contractors are required to:

- (a) Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the company's

employees are assigned to work. The company, where possible, should assign two or more females to each construction project. The company should specifically ensure that all forepersons, superintendents, and other on-site supervisory personnel are aware of, and carry out, the company's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

- (b) Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the company or its unions have employment opportunities available, and maintain a record of the organizations' responses.
- (c) Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the company by the union or, if referred and not employed by the company, this should be documented in the file with the reason therefore, along with whatever additional actions the company took.
- (d) Provide immediate written notification to the Director of the OFCCP when the union(s) with which the company has a collective bargaining agreement has not referred a minority person or woman sent by the company, or when the company has other information that the union referral process has impeded the company's efforts to meet its obligations.
- (e) Develop on-the-job training opportunities and/or participate in training programs for the area, which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the company's employment

<sup>9</sup> Construction contractors with federally assisted construction contracts do not have to develop affirmative action programs covering administrative workers or other job categories outside the trades as long as they are not a prime or first-tier subcontractor for goods or services.



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

- needs, especially those programs funded or approved by the Department of Labor. The company should provide notice of these programs to the sources compiled under paragraph b above.
- (f) Disseminate the company's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the company in meeting its EEO obligations; by including its EEO Policy in any policy manual and collective bargaining agreement; by publicizing the policy in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
  - (g) Review, at least annually, the company's EEO policy and affirmative action obligations with all employees having any responsibility for hiring, assignment, layoff, termination, or other employment decisions, including specific review of these items with onsite supervisory personnel, such as superintendents, general forepersons, etc., prior to the initiation of construction work at any job site. A written record should be maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
  - (h) Disseminate the company's EEO policy externally by including the policy in any advertising in the news media (specifically including minority and female news media) and providing written notification to, and discussing the company's EEO policy with, other contractors and subcontractors with whom the company does or anticipates doing business.
  - (i) Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students, and to minority and female recruitment and training organizations serving the company's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the company should send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
  - (j) Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after-school, summer, and vacation employment to minority and female youth, both on the site and in other areas of a company's work force.
  - (k) Validate all tests and other selection requirements, if any, where there is an obligation to do so under 41 CFR Part 60-3.
  - (l) Conduct, at least annually, an inventory and evaluation of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.
  - (m) Ensure that seniority practices, job classifications, work assignments and other personnel practices do not have a discriminatory effect, by continually monitoring all personnel and employment-related activities to ensure that the EEO policy and the company's obligations under these specifications are being carried out.
  - (n) Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to ensure privacy between the sexes.
  - (o) Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.
  - (p) Conduct a review, at least annually, of all supervisors' adherence to and performance under the Company's EEO policies and affirmative action obligations.
- In addition to the foregoing affirmative action requirements required by 41 C.F.R. 60-4.3, construction contractors with federally assisted construction contracts need to:
1. Place the "Notice of Requirement" set forth in 41 CFR 60-4.2(d) in all solicitations for offers and bids on all



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

federal and federally assisted construction contracts or subcontracts in excess of \$10,000;

2. Include the “Equal Opportunity Clause” in all contracts, subcontracts and purchase orders relating to the work done with other organizations pursuant to [41 CFR 60-4.3\(a\)](#);
3. Use the goals and timetables established by the OFCCP Director for minority and female utilization for such projects/geographic areas, but shall not use the goals and timetables of affirmative action standards to discriminate against any person because of their Protected Status;
4. Not knowingly enter into any subcontract with any person or firm debarred from government contracts pursuant to Executive Order 11246;
5. Carry out such sanctions and penalties for violations of any of the foregoing requirements including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the OFCCP;
6. Designate a responsible official to monitor all employment related activity to ensure that the company’s EEO policy is being carried out, to submit reports relating to the provisions herein as may be required by the government and to maintain records. Records should at least include for each employee the name, address, telephone numbers, construction trade, union affiliation (if any), employee identification number when assigned, Social Security number, race, sex, status (e.g. mechanic, apprentice trainee, helper or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records should be maintained in an easily understandable and retrievable form; and
7. Prepare Section 503 and VEVRAA AAPs as required by [42 CFR 60-741](#) and [41 CFR 60-300](#).

Every construction contractor that is working on a federally assisted construction project, and who is subject to the foregoing requirements, must maintain detailed records of employees, recruiting efforts, recruiting results, applicants produced from these efforts and project-related hiring in order to be able to respond to an audit by the OFCCP.

## IV. How does the government monitor a contractor’s EEO/AA compliance efforts?

As noted above, federal contractors and subcontractors are typically not required to file their AAPs with the OFCCP and are only required to produce it, along with the supporting documentation, upon being selected for a compliance evaluation by the OFCCP. [41 CFR 60-1.20](#).

OFCCP compliance evaluations may be scheduled as a result of: (1) a complaint received by the OFCCP from an employee or governmental agency that the contractor is not complying with its EEO/AA obligations, or (2) a randomly generated compliance review.

Compliance reviews can take several forms pursuant to the regulations.

One option that the OFCCP has is to conduct a comprehensive analysis and evaluation of the hiring and employment practices of the employer, the written AAP and the results of the affirmative action efforts undertaken by the contractor. Where a comprehensive evaluation is conducted, the audit will likely proceed in three stages: (1) a desk audit of the written AAP and supporting documentation, (2) an on-site review of the contractor’s establishment, and (3) an off-site analysis of the information supplied by the contractor.

The OFCCP also has the option of conducting an off-site review of the contractor’s records. This involves examining the contractor’s AAP (or any part thereof) and supporting documentation, and other documents related to the contractor’s personnel policies and employment actions.

Moreover, the OFCCP may perform a compliance check, which seeks to determine whether the contractor has maintained records consistent with [41 CFR 60-1.12](#) which includes its AAP and supporting documents.

Additionally, the OFCCP may conduct a focused review, which is restricted to an on-site review of one or more components of the contractor’s organization or one or more aspects of the contractor’s employment practices. For instance, the OFCCP may simply audit a contractor’s compliance with its Section 503 or VEVRAA obligations.



# Complying With Federal Contractor Equal Employment Opportunity and Affirmative Action Requirements

Kenneth A. Rosenberg, Partner | Fox Rothschild LLP

Finally, the OFCCP may perform a Functional Affirmative Action Review where the contractor has entered into a Functional Affirmative Action Program<sup>10</sup> with the government.

Contractors are notified that they may be subjected to a compliance evaluation audit by a Courtesy Scheduling Announcement List (CSAL) issued by the OFCCP. The CSAL provides contractors with 45-day notice prior to the scheduling letters being issued. After receiving a scheduling letter, a contractor has 30 days to submit their AAPs with a one-time 15-30-day extension for supporting data to be submitted where the AAP has been provided timely.

## V. What are the consequences if a covered entity fails to comply with its EEO/AA obligations?

Violations of EO 11246, Section 503 and VEVRAA, and their implementing regulations may be found based upon any of the following:

1. The results of a complaint investigation;
2. The results of a compliance evaluation;
3. An analysis of an AAP;
4. The results of an on-site review of the contractor's compliance with EO 11246, Section 503 and VEVRAA, and their implementing regulations;
5. A contractor's refusal to submit an AAP;
6. A contractor's refusal to allow an on-site compliance evaluation to be conducted;
7. A contractor's refusal to provide data for off-site review or analysis as required by the regulations;
8. A contractor's refusal to establish, maintain and supply records or other information as required by the regulations;
9. A contractor's alteration or falsification of records and information required to be maintained by the regulations; and/or
10. Any substantial or material violation or the threat of a substantial violation of the contractual provisions of EO 11246, Section 503 and VEVRAA, or the rules and regulations.

Where violations are found, the OFCCP may seek to enter into a Conciliation Agreement with the offending contractor or may initiate administrative and/or judicial proceedings. [41 CFR 60-2.16](#) and [1.33](#). The OFCCP may refer matters to the Solicitor of Labor to initiate administrative or enforcement proceedings, which may be brought to enjoin violations, seek appropriate relief and impose sanctions. [41 CFR 60-2.16](#). These proceedings are conducted before the Office of Administrative Law pursuant to 29 CFR part 18, subpart B. The OFCCP may also refer matters to the Department of Justice to initiate judicial enforcement proceedings and, in such cases, the Attorney General may bring a civil action in the appropriate district court of the U.S. requesting a temporary restraining order, preliminary or permanent injunction, and an order for such additional sanctions or relief, including back pay, deemed necessary.

The OFCCP may seek back pay, interest and other make-whole relief for victims of discrimination identified during a complaint investigation or compliance evaluation. [41 CFR 60-2.16](#).

Where a contractor is found to have refused to comply with its EEO/AA obligations, the OFCCP may seek to rescind a contract and/or debar a contractor from receiving future contracts or modifications or extensions of existing contracts for an indefinite term or for a fixed minimum period of at least six months<sup>11</sup>.

Due to these potential consequences, contractors and subcontractors that do business with the federal government should take care to determine whether they are covered by EO 11246, Section 503 and VEVRAA, and their implementing regulations and, if so, whether they need to prepare an annual AAP. Where they are required to do so, contractors/subcontractors should ensure their AAPs are compliant with the myriad of laws and regulations that govern same. As there are many other components to preparing AAPs that are not covered by this guide, as well as many other laws and regulations that federal contractors/subcontractors are subject to,<sup>12</sup> it is advisable for federal contractors/subcontractors to contact experienced counsel to assist them in preparing their AAPs and to comply with their EEO/AA obligations. ■

<sup>10</sup> A FAAP is an AAP based on functional or business units which has been approved by the OFCCP pursuant to [41 CFR 60-2.1\(d\)\(4\)](#).

<sup>11</sup> Contractors have the ability to seek reinstatement of their status pursuant to [41 CFR 60-1.31](#).

<sup>12</sup> For instance, federal contractors/subcontractors are required to file EEO-1 and VETS 4212 forms annually and to comply with Executive Order 13665, which prohibits pay secrecy policies; Executive Order 11478, which prohibits discrimination based on sexual orientation and gender identity;

Executive Order 12989, which requires federal contractors to use E-Verify; and Executive Order 13496, which requires contractors to provide employees with a notice of their rights under the National Labor Relations Act, among others.