



# Affirmative Action and Compliance

## Summer 2014 Highlights

### Protected Categories Now Include Sexual Orientation/Gender Identity

On July 21, President Obama signed an executive order that added sexual orientation and gender identity to the list of protected classes in Executive Order 11246. E.O 11246 now requires that federal contractors and subcontractors to select and employ individuals without regard to sexual orientation and gender identity. This nondiscrimination provision applies to contractors and subcontractors with over \$10,000 in total government contracts and subcontracts in one year. While sexual orientation and gender identity have been added to the discrimination prohibitions under the Executive Order, they do not include any obligation for affirmative action.

The order takes effect immediately but applies only to government contracts entered into after July 21, 2014. Regulations implementing the Order will be issued within 90 days.

Federal contractors should review their discrimination and harassment policies and modify them to add protections for sexual orientation and gender identity if those protections are not already included.

### OFCCP Zoning in on Federal Contractors with a History of Employee Rights Violations

On July 31, 2014, President Obama signed the [Fair Pay and Safe Workplaces Executive Order](#) (“Executive Order”) that requires contractors to (1) disclose recent violations of various workplace laws before being awarded federal contracts; (2) provide wage notifications to employees and notify independent contractors of their non-employee status; and (3) barring contractors from requiring employees to sign pre-dispute arbitration agreements. This is scheduled to take effect for new contractors in 2016.

This order seeks to increase efficiency and cost savings in the work performed by parties who contract with the Federal Government by ensuring that they understand and comply with labor laws.

This EO will apply to all federal contracts for goods and services, including construction contracts, where the estimated value of the contract exceeds \$500,000. It also requires prime contractors to flow down this requirement to all subcontracts that are not for commercially available off-the-shelf items where the estimated value of the subcontract is over \$500,000.

As part of the solicitation process for covered contracts, contractors will be required to disclose whether they have any violations of certain federal and state discrimination, wage and hour, leave, and safety laws in the three years prior to bidding on the solicitation.



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## Summary Pay Data Collection on the Near Horizon

*A rule to collect summary pay data from federal contractors proposed by US Labor Department to help combat pay discrimination.*

The U.S. Department of Labor announced on August 6, a proposed rule requiring federal contractors and subcontractors to submit an annual Equal Pay Report on employee compensation to the Office of Federal Contract Compliance Programs. Under the terms of the proposal, this requirement would apply to companies that file EEO-1 reports, have more than 100 employees and hold federal contracts or subcontracts worth \$50,000 or more for at least 30 days. Through the Equal Pay Report, OFCCP would be able to collect summary employee pay and demographic data using existing government reporting frameworks.

President Obama signed a presidential memorandum on April 8 instructing the secretary of labor to propose a rule within 120 days to collect summary compensation data from federal contractors and subcontractors. The proposal tabled at the Federal Register today reflects criteria set forth by the president to maximize the efficiency and effectiveness of OFCCP's enforcement programs, minimize the burden placed on federal contractors, and use data to encourage greater voluntary compliance with the law. The proposed Equal Pay Report would also help OFCCP direct its enforcement resources toward contractors whose summary compensation data suggests potential pay violations.

The rule was to be published in the Federal Register on Aug. 8, and all comments must be received by Nov. 6, 2014. To read and comment on the proposed rule, please visit <http://www.dol.gov/ofccp/EPR>.

It is recommended that contractors conduct privileged, proactive pay analyses and appropriately address issues before any data submission.

## The OFCCP's Agenda

In early June, the DOL and OFCCP released their 2014 Spring Regulatory Agenda. Highlights include:

**Non-Retaliation for Disclosure of Compensation Information** – The President amended Executive Order 11246 to prohibit retaliation against applicant and employees who discuss or disclose compensation information. The belief is that employees need to freely discuss compensation in order to discover and address unfair pay disparities. It is expected that this amendment will be implemented by the end of September, 2014.

**Sex Discrimination Guidelines** – The OFCCP is proposing updates to current sex discrimination guidelines to reflect the current state of the law as current regulations have not been updated in over 30 years. These guidelines need to reflect the current state of sex discrimination laws in this area. Employer policies and practices and the nature and extent of women's participation in the labor force have also changed significantly since the guidelines were put in place. The OFCCP is hoping to address these guidelines in September, 2014.

**Construction Contractor Regulations** – The OFCCP is working to update affirmative action goals and timetables for this industry. The updated ruling would “remove outdated goals and provide contractors increased flexibility to assess their workforce and determine whether disparities in the utilization of women or the utilization of a particular racial or ethnic group in an on-site construction job group exist.” These amendments have been pushed back to January, 2015.

### EEO-1 Reports Due September 30, 2014

Don't forget, your EEO-1 reports are due on September 30, 2014. Returning filers: please be aware that for security reasons, passwords have been reset since the 2013 filing period. Please check your notification letter for your new password.

## Content of Your Next AAP Under New Regs

Rate your readiness to complete your next year's AAP under the new regulations with the following checklist. Essentially, your first AAP after the new regulations needs to address:

- Everything you have done to comply with existing regulations
- Everything you have done to comply with new provisions that took effect on 3/24/2014
- The steps you plan to take for those regulations for which you are not yet in full compliance. Remember, the first year after the regulation changes is considered transitional.

The first AAP that begins on or after March 24, 2014 and therefore falls under the new regulations should address, to the extent possible, the following new requirements:

- Evidence that the contractor is complying with the requirements to invite voluntary self-identification per 60-741.42 and 60-300.42;
- The inclusion of an equal opportunity policy statement per 60-741.44(a) and 60-300.44(a);
- A review of the contractor's personnel processes per 60-741.44(b) and 60-300.44(b);
- A schedule for the review of all physical and mental job qualification standards and evidence that it adheres to that schedule per 60-741.44(c) and 60-300.44(c);
- Information relating to the procedures developed and implemented ensuring that employees are not harassed on the basis of disability status per 60-741.44(e) and veteran status per 60-300.44(e);
- A review and assessment of the contractor's outreach and recruitment efforts per 60-741.44(f) and 60-00.44(f);
- Documentation of all activities taken to comply with the obligations of 60-741.44 per 60-741.44(f)(4) and 60-300.44 per 60-300.44(f)(4);
- Documentation that the contractor has implemented and disseminated its commitment to affirmative action to employ and advance in employment qualified individuals with disabilities per 60-741.44(g) and qualified protected veterans per 60-300.44(g);
- Evidence that the contractor has designed and implemented an audit and reporting system per 60-741.44(h) and 60-300.44(h);
- Identification of the individual assigned responsibility for the implementation of the contractor's AAP and evidence of compliance with 60-741.44(i) and 60-300.44(i);
- Data collection pursuant to 60-741.44(k) and 60-300.44(k);
- The snapshot of the disability composition of the workforce, results of the utilization analysis and application of the goal per 60-741.45;
- A discussion of any problem areas identified and the actions planned to address any identified problems per 60-741.45; and
- Documentation that it established and applied an annual hiring benchmark per 60-300.45.
- In addition, this first AAP under the new rules should address what steps the contractor has taken and plans to take to come into full compliance with these new requirements.

## A Lesson in Self-Identification Forms

Here's a quick checklist in when and to whom the new Self-Identification forms should be distributed:

### Pre-Offer Requirements

- Request separate and confidential self-identification of race, gender, and protected veteran status only. You must provide the definitions of the protected veteran categories but not require the applicant to identify the specific category
- Request separate and confidential self-identification of a person with a disability, using the mandatory OFCCP form.

### Post-Offer Requirements

- Request separate and confidential self-identification of race, gender, and specific protected veteran category.
- Request separate and confidential self-identification of a person with a disability, using the mandatory OFCCP form.

### Existing Employees Survey Requirements

- 1st year – we suggest that you do this at your first AAP update after 3/24/14
- Every five years
- In the interim, you must send out a reminder of the employee's ability to change their status to an individual with a disability, as appropriate.
- Although not required, you may survey your employees on a more regular basis.

### Recordkeeping of Self-Identification Forms

All self-identification forms must be kept confidential and separate from the personnel or medical file. Ensure that a procedure is in place to address requests for accommodations. All requests should be handled on a case-by-case basis. The request for reasonable accommodation should include the name of the persons who are responsible for reviewing and determining the response to the request.

Click [here](#) to download the **Voluntary Self-Identification Form** (mandatory form – may not be edited)  
Click [here](#) to download a sample **Invitation to Self-Identify for Veterans**

## Current Focus of OFCCP Audits

OFCCP auditors are increasing focus on current technical obligations, such as:

- Purchase orders
- State job postings
- Mental/physical restrictions in job descriptions and when updated
- Evidence of alternative application process if using online system
- Accommodation examples
- Evidence of good faith outreach efforts

We have also heard of auditors requesting proof of federal contractors enforcing new regulations that are technically not enforceable until the following AAP year, such as count of self-identified disabled employees, proof of new EEO tagline on job advertisements, a copy of your contracts showing the new EEO wording. In that respect, it is important you and your staff are well educated about the current and new regulations so you can provide the necessary information and show compliance. We invite you to call us (716-626-1188) should you have any questions about the new regulations and how to best implement them.

*Disclaimer:* This document is meant only as a guide based on practical recommendations for AAP compliance. The information is not intended to be, nor does it constitute legal advice. It is recommended that your Affirmative Action Plan compliance procedures and all employment policies, procedures and practices be reviewed by your in-house counsel or other legal counsel with qualifications background and experience in AAP compliance.