



Affirmative Action and Compliance

What's New?

Blacklisting Regulations (E.O. 13673)

On July 31, 2014, President Obama signed Executive Order (E.O.) 13673, formally titled the "Fair Pay and Safe Workplaces" E.O., and commonly referred to by business groups as the "Blacklisting" regulations. The effort to tie the award of federal contracting dollars to compliance with labor laws, a high priority of organized labor, is not new. The effort had been introduced during the Clinton Administration.

Under the terms of E.O. 13673:

- Companies bidding on federal contracts valued at more than \$500,000 must disclose various labor law violations from the past three years and, if a contract is awarded, update this information every six months during the performance of the contract;
- Companies bidding subcontracts valued at more than \$500,000 must disclose to the contractor the same type of labor law violations from the past three years and, if a subcontract is awarded, update this information every six months during the performance of the subcontract;
- Federal Contracting Agencies must take into account bidding companies' histories of labor law violations when awarding large contracts, and must monitor covered contractors during the performance of the contract
- Covered contractors must take into account bidding companies' histories of labor law violations when awarding covered subcontracts, and must monitor covered subcontractors during the performance of the subcontract
- Covered contractors and subcontractors are required to disclose to employees working on the contract information regarding hours worked, overtime pay, and additions to and/or deductions from pay, every pay period; and
- For contracts exceeding \$1 million, contractors are barred from using pre-dispute arbitration agreements to resolve disputes regarding claims arising under Title VII of the Civil Rights Act of 1964 or any civil action regarding sexual assault or harassment.

E.O. 13673 requires a company to report "violations" on twelve federal labor and employment laws and two Executive Orders, as well as violations of equivalent state laws. The federal laws and Executive Orders are:

- Fair Labor Standards Act (FLSA)
- Occupational Safety and Health Act of 1970 (OSHA)
- Migrant and Seasonal Agricultural Worker Protection Act (MSPA)
- National Labor Relations Act (NLRA)
- Davis Bacon Act (DBA)
- Service Contract Act (SCA)
- Executive Order 11246
- Section 503 of the Rehabilitation Act of 1973 (Section 503)
- The Vietnam Era Veterans' Readjustment Assistance Act of 1972 and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA)
- Family Medical Leave Act (FMLA)

EEO-1 Reports Due October 30, 2015

Don't forget, EEO-1 reports are due on October 30, 2015. Go to:

<http://www.eeoc.gov/employers/eeo1survey/index.cfm>



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Blacklisting Regulations *(cont'd)*

- Title VII of the Civil Rights Act of 1964 (Title VII)
- Americans with Disabilities Act of 1990 (ADA)
- Age Discrimination in Employment Act of 1967 (ADEA)
- Executive Order 13648 (minimum wage for federal contract employees)

According to the E.O., the types of “violations” that contractors must disclose include administrative merits determinations issued by specific enforcement agencies. The DOL provides a list of documents that will be considered administrative merits determinations. Specifically, for the OFCCP, a show cause notice is considered an administrative merit determination. As a reminder, a show cause notice can be issued when a contractor:

- Fails to submit its AAP and support data for desk audit when requested to do so through a scheduling letter
- Does not submit a “reasonable” AAP for desk audit
- Does not submit the required transactions data for desk audit
- Fails to resolve, through conciliation, deficiencies in its affirmative action programs , or instances of discrimination
- Violates the terms of a letter of commitment

The Executive Order also requires each federal contracting agency to designate a “Labor Compliance Advisor” to, among other things, provide assistance to contracting officers and contractors to assess disclosed violations in a consistent manner and to determine appropriate actions to be taken, if necessary, before or after a contract is awarded.

Now more than ever, federal contractors need to review any past violations, and ensure that compliance programs are robust enough to ensure the ability to win and keep federal government contracts. Click [here](#) for a Fact Sheet published by the White House about E.O.13673.

VETS-4212

The Department of Labor’s Veterans’ Employment and Training Service (DOL-VETS) officially opened the 2015 filing season for the annual report that federal contractors must file with the agency regarding employment of protected veterans.

Beginning with the 2015 reporting cycle, the VETS100 and VETS100A forms have been replaced with the new “VETS -4212” as the form that federal contractors must now use to annually report on their veteran workforce and veteran hiring activity as required under the Vietnam Era Veteran’s Readjustment Assistance Act (VEVRAA).

Covered contractors with multiple establishments must file a report for each establishment (or hiring location) employing 50 or more persons. Establishments with fewer than 50 employees may submit their own separate report or consolidate these locations with other under-50 locations in the same state. If you have less than 50 employees, there is no filing requirement.

The website link to the agency’s “VETS-4212 Federal Contractor Reporting” home page is <http://www.dol.gov/vets/vets4212.htm>. The deadline for submitting completed 2015 VETS-4212 reports to DOL-VETS is September 30, 2015.

OFCCP Section 503 Checklist

The OFCCP has created a [Checklist for Compliance with Section 503 of the Rehabilitation Act of 1973](#) that you may find useful in assessing your organization's compliance with Section 503 by answering a series of "yes/no" questions. There is no requirement to use the checklist and it does not guarantee compliance with Section 503 regulations but it may serve to bring awareness to potential compliance issues that need to be addressed sooner rather than later.

Download the checklist [here](#).

OFCCP Settlements

Since the Obama administration came into power in 2009, the US DOL OFCCP has stepped up formal enforcement activity against federal contractors. Most of the enforcement actions ultimately resulted in settlements. Although history shows that OFCCP typically has focused on most often pursuing cases where contractors failed to maintain accurate records, agency enforcement actions are not always limited to these types of cases.



This summary indicates that OFCCP continues to focus its enforcement effort on entry level hiring cases using statistical evidence and the contractor's lack of documentation to extract monetary settlements. We are also seeing more attention given to failures to properly validate employee selection tests, allegations of steering, and complaint generated investigations that result in a settlement.

Oral Arts Laboratory Inc.

This case involved both testing and entry level hiring issues. OFCCP alleged that Oral Arts Laboratory discriminated against male, female and African American applicants at its corporate headquarters in Huntsville Alabama. Agency officials found the contractor used a dexterity test not supported by a proper validation study that adversely affected 83 females and 19 African American applicants. The agency also alleged that the company stereotyped shipping positions as "female" jobs and discriminated against 57 male applicants who were rejected for these jobs.

Oral Arts ultimately settled for \$115,000 to resolve the allegations of systemic hiring discrimination, and will extend job offers to at least 19 of the original class members as positions become available. In addition, DOL notes that the company has stopped using the offending tests and has revised its selection process.

Lahey Clinic Hospital, Inc

In this compensation discrimination case, OFCCP alleged that Lahey engaged gender-based pay discrimination against 3 female "Housekeeper III" employees by paying women 70 cents less per hour than men in the same position. In support of its claims, OFCCP stated that its multiple regression analyses revealed statistically significant disparities even when accounting for legitimate factors impacting pay.

Under the terms of the conciliation agreement, Lahey will pay just over \$172,000 in back pay and interest to the eligible class, and make salary adjustments just shy of \$18,000 in total to those class members still employed by the company as of the agreement's effective date. In addition, the company will implement an internal audit and reporting system that periodically measures the effectiveness of its affirmative action program and will evaluate compensation systems to identify where impediments exist that result in gender-based pay disparities.

Johns Hopkins University Applied Physics Laboratory LLC (APL)

This was a discrimination complaint case, where OFCCP alleged that APL discriminated against two African American women who were employed at its facility in Laurel, Maryland. The investigation began in June 2010, after an employee filed a complaint alleging that APL created a hostile work environment. During the investigation the agency received another complaint alleging hostile work environment and pay discrimination.

Under the settlement terms, in addition to agreeing to back pay for the two employees, APL has agreed to implement revised policies and procedures aimed at eliminating potential harassment, intimidation, coercion, or retaliation. APL has also agreed to ensure that managers and employees responsible for hiring, transfer, promotion, and discharge decisions are trained on federal equal opportunity laws.

In a statement issued by APL, the company stressed that it disagreed with OFCCP's findings and characterizations, but "concluded that bringing this matter to closure to resolve what has already been a long, drawn-out and costly process is in the Laboratory's best interest. As APL has been, we remain fully committed to diversity and inclusion."

OFCCP Settlements *(cont'd)*

Comcast of Puget Sound, Inc.

This case involved both testing and entry-level “steering” allegations. OFCCP alleged that Comcast discriminated against women and minorities in its selection process for call center positions at its Everett Washington facility. According to the agency, the company used a phone screen to “steer” 96 female applicants into lower paying “CAE-2 Representative” jobs instead of the more lucrative “CAE-3 Representative” jobs.

OFCCP also alleged that Comcast’s use of testing procedures in selecting applicants for CAE-2 and CAE-3 Representative positions resulted in the rejection of 100 African American, Asian, and Hispanic applicants. According to the OFCCP, the hiring tests were not uniformly applied and were not properly validated.

Under the settlement terms, Comcast has agreed to distribute \$54,000 in back pay and interest to all eligible female class members, revise its hiring process, and conduct a wage comparison analysis for the eligible female class and the males hired into CAE-3 positions to identify any pay disparities and make adjustments if necessary. The company has also agreed to pay approximately \$133,000 in back pay and interest, and hire up to 31 members of the affected minority class as call center positions become available.

Millennials

A recent study issued by the Pew Research Center finds that so-called Millennials now constitute the most well-represented generation in the US Labor Force, with one out of every three workers falling within the Pew’s definition. Pew defines the Millennial generation as those individuals born between 1981 and 1997; i.e., adults aged 18 to 34.

Pew reports that during the first quarter of 2015, Millennials surpassed Generation X as the largest generation cohort in the labor force, 53.5 million Millennials working as compared to 52.7 million Gen Xers. With respect to Baby Boomers, 44.6 million currently remain in the labor force. Pew predicts that the Millennials proportional representation in the labor force will likely continue to expand.

According to Pew, 43 percent of all Millennial adults are non-white, making the Millennials the most racially diverse generation in the United States. A third of older Millennials have four year college degrees or above. Pew also reports that Millennials are the first generation to be considered “digital natives”; i.e., a generation which grew up immersed in the new platforms of the digital era (such as the internet, mobile technology, and social media) as opposed to the older generations which have had to adapt to these new technologies later in life.

A recent article in Fortune Magazine indicates that workplace flexibility, ongoing learning, and personal fulfillment are more important to the Millennial generation than a high salary. Whether this is accurate or not, the one thing that is certain is that Millennials now constitute the most well-represented generation in the US labor force, bringing with them a changing and more diverse demographic in a variety of ways.

With Baby Boomers now beginning to retire at a rapid pace, and the younger Millennial labor force expanding, it will be important for employers to keep in mind the evolving nature of the workforce, both from a demographic viewpoint as well as the changes in skills, education, values, and expectations that Millennials are bringing to, and expecting from, their employers.



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.