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Federal Contractor Compliance: Overview and Trends

Employers who are also federal government contractors or in some cases subcontractors are subject to additional obligations with respect to equal employment opportunity recordkeeping and compliance as well as obligations with respect to affirmative action practices. These compliance programs prohibit discrimination on the basis of race, sex, color, religion, national origin, disability or protected veterans' status. Affirmative action programs are required for women, minorities, disabled individuals and protected veterans, all of whom have historically been underrepresented in various employment settings. In the last year these programs have been substantially in flux for federal contractor employers, including those in Idaho. This article overviews the nature of federal contractor obligations as well as the significant trends in this area, but does not address the topic of federal contractor compliance for construction employers, who are subject to special rules.

Who is a Federal Contractor?

Federal law defines a government contract as “any agreement or modification between any contracting agency and any person for the purchase, sale or use of personal property or non-personal services.” Under this broad definition, an employer providing goods or services to the government, other than through a grant, is generally considered a contractor, sometimes referred to as a “prime contractor.”

Many employers fall under the category of a “subcontractor” of the federal government. Subcontracts are defined as agreements between a contractor and any person for the purchase, sale or use of personal property or services that in whole or in part are *necessary to the performance* of one or more contracts, or under which any portion of the contractor’s obligations under one or more contracts is performed, undertaken, or assumed. In other words, as an employer you may provide a part for or perform a service for a federal contractor and, as such, have the same heightened obligations (including affirmative action) in place for that federal contractor. These obligations are routinely communicated in contract language with the prime federal contractor, but such language (or notice) is not required for these obligations to apply. The heightened obligations are in effect the trade off for doing business with the federal government, even remotely through a subcontract. It is estimated there are tens of thousands of such federal subcontractors in the United States, some of whom may very well be unaware that they are a subcontractor or that they are responsible for meeting these additional obligations.

Agency Oversight for Idaho Employers

The agency with oversight of federal contractor equal employment and affirmative action compliance is the Office of Federal Contract Compliance Programs (“OFCCP”), which is

under the umbrella of the federal Office of the Secretary of Labor. The OFCCP is a contracting agency with both affirmative action and anti-discrimination authority. According to the OFCCP website (www.dol.gov/ofccp/), the agency's mission is to enforce the contractual promises of affirmative action and equal employment opportunity for those doing business with the federal government. The agency is divided into six (6) regional offices and Idaho employers work with the Portland Area Office under the guidance of the San Francisco Regional Office of the OFCCP. The agency's website has multiple helpful links, including required posters, required reports, a sample Affirmative Action Plan, the agency's compliance manual, as well as links to outreach efforts including informational webinars.

Employers may have limited or full compliance obligations depending on the threshold dollar value of the contract. While comprehensive review of these various threshold limits and obligations is beyond the scope of this overview, the basic application of the anti-discrimination obligation attaches at certain minimum contract levels. By way of example, a single contract or subcontract exceeding \$10,000 would subject an employer to the anti-discrimination and affirmative action practices associated with the disabled. Employers with at least 50 employees and contracts at higher threshold numbers are additionally required to prepare and maintain a written Affirmative Action Plan ("AAP") and must file certain federal annual reports.

The OFCCP has long been the agency focused on systemic practices and discrimination, as well as affirmative action obligations. Affirmative action, as defined by the regulation, is a management tool designed to ensure equal employment opportunities. Contrary to perception, affirmative action is not a hiring preference program. Instead, affirmative action programs evaluate the number of women and minorities (as well as protected veterans and disabled individuals) in the relevant labor pool and compare them to the employer's workforce. Goals are then set to address differences in those numbers.

Additionally, there are federal and state agencies that enforce anti-discrimination laws based on an applicant or employee's race, color, religion, sex, national origin, age, disability, or genetic information. The federal Equal Employment Opportunity Commission (www.eeoc.gov/) is the agency that enforces federal laws applicable to these protected statuses and focuses on both individual and systemic enforcement. Generally employers with at least 15 (in some cases 20) employees are subject to these federal laws. Correspondingly, the Idaho Human Rights Commission enforces state equivalent anti-discrimination laws (<http://humanrights.idaho.gov/>). Normally discrimination charges dual filed with the state and federal agencies are deferred to and investigated by the Idaho Human Rights Commission. Idaho anti-discrimination laws apply to employers with at least five (5) employees.

As such, employers are subject, based on their size, to both state and federal anti-discrimination laws. Employers who are also federal contractors or subcontractors are additionally subject to overlapping and enhanced OFCCP regulation, compliance and oversight.

Affirmative Action and the Affirmative Action Plan

Affirmative action includes the outreach, recruitment, and other efforts that an employer takes to extend employment opportunities to women, minorities, the disabled, and those with protected veterans' status. An Affirmative Action Plan is a document that must be created with 120 days of federal contractor status. It is an individualized review, both narrative and statistical, that answers the question what number or percentage of those covered by a plan, such as women and minorities, are available to an employer in the employer's labor market. The Affirmative Action Plan is then updated annually. Employers with multiple locations or operations may be required to develop more than one (1) plan. Employers with over 100 employees and a number of small locations may obtain approval for a plan covering all its locations, known as a Functional Affirmative Action Plan.

The OFCCP's website contains a helpful model proposed plan that can be modified and adopted for use by a new contractor or subcontractor. Private consultants are routinely used to assist in development of a plan and its annual review.

Additional Obligations for Federal Contractors

Federal contractor obligations beyond the development of an Affirmative Action Plan and its annual review are numerous. This begins at the application stage, where applicants are invited to self-identify certain protected statuses in order for the employer to monitor its efforts at recruitment of women, minorities, the disabled and protected veterans. Applicant flows and hiring practices are then kept and periodically reviewed. Records must be kept of various advertising and recruitment efforts. The OFCCP has developed special regulations associated with Internet Applicants, which many federal contractors have turned to as a consistent method of individuals to proceed with an application for employment.

Beyond these initial requirements, enhanced record keeping and statistical review of promotions and terminations are kept. Certain postings in the workplace are required. Affirmative action and equal opportunity clauses are required for contracts put into place by the federal contractor. Certain other federal reports are also required for federal contractors.

While by no means a complete list, this gives an overview of the enhanced obligations for record keeping and reporting for federal contractors.

OFCCP Compliance Audits and Remedies

One of the most onerous obligations associated with these programs is the prospect of an audit by the OFCCP. While such audits take place each year to only a small percentage of federal contractors, the process is extensive and can last months and in some cases years. Traditionally the agency's approach to an audit was in steps: 1) a desk audit that

by way of a “scheduling letter” requests the employer to submit within 30 days a series of documents including the Affirmative Action Plan, 2) an on-site review for employers whose statistical review demonstrated some form of non-compliance from the desk audit, and 3) an off-site analysis of additional data.

Notable changes are proposed in this area, which would result in the three (3) potential steps of an audit condensing to two (2) steps. Proposed changes to the amount of information initially collected are already in process.

Non-compliance prompts in some cases, normally in the case of major violations, a proposed conciliation or settlement agreement. Failure of the employer to enter the agreement can then prompt litigation. A contractor or subcontractor with serious violations risks various sanctions including the cancellation of its federal contract.

Individual applicants and employees can file a complaint with the OFCCP. Similarly, the OFCCP may seek individual relief on behalf of an applicant or employee, although traditionally the agency has focused on group or systemic discrimination violations. Remedies for the individual include back pay and benefits as well as other relief. However, unlike other federal non-discrimination statutes, compensatory and punitive damages are not available under these types of violations pursued by the OFCCP.

Audit and Agency Trends

Under the current administration, the OFCCP has seen its staff and budget grow by 25 percent. Veterans and the disabled have been focus areas and priorities, with proposed regulations that shift the burden to employers to gather additional information with respect to these groups and their availability in the labor market. The current unemployment rate for veterans is estimated to be between 10-20 percent, with the number of veterans transitioning to the private sector each year growing. With the expanded scope of the ADAAA, compliance programs for the disabled are also expected to change significantly. Consistent with other compliance focus concerns of the Department of Labor, a federal contractor’s use of independent contractors, temporary and seasonal workers is expected to be audited and reviewed.

One of the most anticipated trends for the OFCCP, again consistent with legislation and other initiatives promoted by the current administration, will be a focus on pay equity and pay discrimination. It is anticipated the agency will propose new regulations in 2012 to develop new data collection opportunities, again shifting the burden to the employer to collect such data. These enhanced obligations appear to be a significant increase over the already enhanced record keeping and data collection required of federal contractors. One step employers are taking in anticipation of such a focus is an internal and proactive compensation analysis in order to determine any pay disparity questions in advance of such an audit. It is recommended that counsel guide such an audit in order to assert attorney-client protections on the data and information collected.

In September, the OFCCP announced a \$2.25 million dollar settlement against Tyson Fresh Meats for systemic and repeated discrimination against women applicants at four (4) of their plants. According to the press release from the agency, this was one of the largest settlements in the history of the OFCCP. The \$2.25 million in back wages, benefits and interest will be distributed among 1650 qualified female applicants who were rejected for positions. Additionally, 220 women will be offered employment as positions become available and the company will take other corrective measures to prevent such discrimination in the future. This type of case and its publicity highlight the agency's focus on enforcement of its anti-discrimination laws.

Summary

With increased budgets and staffing, the OFCCP has taken on a number of initiatives that could have a far-ranging impact on federal contractors and subcontractors. With a particular focus on compensation programs, federal contractor and subcontractor employers should consider proactive steps to analyze and address, or at a minimum be prepared to explain, pay variances. Federal contractor status is both a benefit and in many respects a burden. For employers choosing to benefit from this contractor status, they should be well of those burdens and risks in light of this considerable period of change.