

## Government Contracts & International Trade Blog

The Latest Updates on Developments Affecting Government Contracts

Presented By **SheppardMullin**

# Government Contracts, Investigations & International Trade Blog

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## **OFCCP's Proposed Equal Employment Opportunity Rules: More On-Site Investigations, More Data Collected From Contractors, Closer Scrutiny of Contractor Affirmative Action**

*By W. Bruce Shirk and Nick Schnermann*

The Office of Federal Contract Compliance Programs (“OFCCP”) recently proposed two rules that would, among other things, enhance the agency's investigative and enforcement capabilities and substantially increase the amount of EEO-related data it will collect from contractors. These proposals should come as no surprise – OFCCP's publicly available budget submissions to Congress for FYs 2011 and 2012 set out detailed explanations of the agency's long-term enforcement strategy.

The first proposed rule, published under the heading “*Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans*,” would create significant new contractor obligations with respect to data collection and implementation of affirmative action plans under the Vietnam Era Veterans Readjustment Assistance Act (“VEVRAA”). 76 Fed. Reg. 23,358 (proposed Apr. 26, 2011). The second proposed rule, which appears under the misleadingly innocuous heading “*Proposed Extension of the Approval of Information Collection Requirements Comment Request*,” would require prime contractors and subcontractors to collect and provide much more—and much more specific—information regarding implementation of their affirmative action plans for EEO than is presently the case. 76 Fed. Reg. 27,670 (proposed May 12, 2011).

Congress has given the OFCCP more enforcement “muscle,” increasing its budget from \$82.44M in FY 2007 to \$105.38M in FY 2010. The agency anticipates funding of \$109M in FYs 2011 and 2012, and an increase in FTEs from 625 in 2007 to some 786 by the end of FY 2011. U.S. Commission on Civil Rights, *Funding Federal Civil Rights Enforcement: 2000 and Beyond* (2001); OFCCP, *FY 2011 Congressional Budget Justification* (“FY 2011 Justification”), at 3; OFCCP, *FY 2012 Congressional Budget Justification* (“FY 2012 Justification”), at 6.

“Building on the gains reflected in the FY 2010 and FY 2011 budgets,” the agency is committed to forcing “an overall improvement in the compliance rate of federal contractors and a reduction in [their] discrimination rate.” To that end, OFCCP’s new leadership is making a number of expenditures intended to enhance its ability to investigate contractors and subcontractors and to collect, maintain and analyze contractor and subcontractor data, including:

- Hiring over 200 compliance officers to “build the agency’s capacity to conduct more comprehensive compliance evaluations and increase enforcement efforts.”
- Acquiring a new IT system designed to enable federal contractors and subcontractors to provide the agency employment data, including EEO, hiring, promotion and compensation information, “in a much more timely and efficient manner” and aimed, ultimately, at automation of the Affirmative Action Plan process.
- Developing a Compensation Data Collection Tool to assist the agency in identifying compensation discrimination.

FY 2012 Justification at 13, 18, 22; FY 2011 Justification at 22.

Once in place, these functional capabilities are intended to enable the agency to implement the policy and operational changes planned by the new agency leadership, including:

- Replacement of the Bush-Cheney era Active Case Management process, which, it is asserted, for a decade restricted the agency’s enforcement activities to investigation of “systematic hiring discrimination,” with an approach that instead entails full reviews of “all discriminatory practices, not just systemic cases, and enforcement of affirmative action plans . . . .” FY 2011 Justification at 15-16.
- Replacement of the Bush-era enforcement strategy that “prioritized” enforcement of equal employment rules under Executive Order 11246, asserted to have caused a significant decline of enforcement activities under VEVRAA, Section 503 of the Rehabilitation Act of 1973, as amended (38 U.S.C. §4212), and the Americans with Disabilities Act, as amended (“ADA”) (42 U.S.C. §12101 *et seq.*), with a broadened enforcement effort intended both to maintain the agency’s focus on equal employment and to enhance employment opportunities for veterans and the disabled. FY 2011 Justification at 16, 22; FY 2012 Justification at 20. The likely increase in OFCCP investigations was previously discussed on the blog [here](#).

- Conduct more on-site reviews to ensure “that more contractors abide by technical requirements, including maintaining appropriate and accurate records.”
- Expanded use of existing agency authority to investigate subcontractors, authority provided by the mandatory flow-down provisions from prime contractors to subcontractors pursuant to the Federal Acquisition Regulation, for compliance with Executive Order 11246, VEVRAA, the Rehabilitation Act and the ADA.
- Use of litigation to force entities who deny their subcontractor status to comply with Equal Employment and affirmative action requirements of the above Executive Order and statutes. The Department of Labor’s attempts to extend the “Christian Doctrine” to subcontractors was previously discussed on the blog [here](#).

Finally, the OFCCP has recently identified two issues as to which the agency believes its prior enforcement efforts have fallen short and which will be the subject of the its aggressive attention going forward, as follows:

- The pay gap between men and women which, according to the agency, persists to the extent that there is currently a 23% pay disparity between men and women, with an even greater disparity between African-American and Hispanic women and men. FY 2012 Justification at 20.
- Misclassification of employees as independent contractors who, as a result, "do not receive the protections and benefits to which they are entitled" and who may be misclassified to mask discriminatory employment practices. FY 2012 Justification at 20; U.S. Gov’t Accountability Office, GAO-09-717, *Employee Misclassification: Improved Coordination, Outreach, and Targeting Could Better Ensure Detection and Prevention* (2009).

These proposed rules are at the first stage of the rule-making process and subject to comment and revision. However, given the agency's announced commitment to the strategies underlying these rules, the proposals may well not undergo significant substantive change before becoming final. Contractors should therefore review the proposed rules with care to ascertain how their operations may be impacted if the rules become final and whether they may wish to submit comments. In this regard, there are certain aspects of the proposed rules which are, we think, highly likely to become final, because their implementation is asserted to be critical either to the achievement of key administration goals, e.g., elimination of misclassification and gender discrimination, or because they are viewed as critical to OFCCP's successful implementation of its overall strategy. That said, contractors may wish to prepare for these probable changes in the following ways:

- Review their records to determine the level of "technical compliance," e.g., the accuracy and completeness of their records.
- Review their affirmative action plans to determine whether those plans are adequate and are in fact being implemented.
- Assess changes which may be necessary to their IT systems to comply with OFCCP's likely new data submission requirements.
- Determine whether their worker classification methodology has resulted in misclassification of employees as independent contractors.
- Assess their compensation system to determine the extent to which, if any, it appears to discriminate on the basis of gender.

The comment deadlines for the proposed rules are, respectively, June 27 and July 11, 2011.

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