

# Affirmative Action

## Overview and Key Updates

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# Introduction

During today's program, we will address:

- Federal contractor affirmative action obligations
- FAR provisions relating to affirmative action and related issues
- OFCCP enforcement procedures and guidance for minimizing related liabilities
- New developments with the OFCCP and anticipated priorities going forward

DOES THIS APPLY TO ME?

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# Affirmative Action – EO 11246, Rehabilitation Act, VEVRAA

- Executive Order 11246
  - affirmative action for *minorities and females*
- Rehabilitation Act
  - affirmative action for *individuals with disabilities*
- Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA)
  - affirmative action for *veterans*
- The Office of Federal Contract Compliance Programs (an agency within the U.S. Department of Labor) enforces these contractor obligations

# Coverage Under EO 11246, Rehabilitation Act, VEVRAA

EO 11246: AAP required if:

- (1) the contractor has 50 or more employees (generally includes all workers – full-time, part-time, regular, temporary – except independent contractors); and
- (2) the contractor
  - (a) serves as a depository of federal funds in any amount; or
  - (b) is a financial institution that is an issuing and paying agent for U.S. savings bonds and saving notes; or
  - (c) has a federal contract or subcontract of \$50,000 or more

Rehabilitation Act: AAP required if 50 or more employees and federal contract or subcontract of \$50,000 or more.

VEVRAA: AAP required if 50 or more employees and federal contract or subcontract of \$150,000 or more.

*Note*: If contract is less than threshold amounts above, the company may have other affirmative action obligations even if there is no obligation to develop a written affirmative action program.

# WHAT IF I DON'T CONTRACT DIRECTLY WITH THE FEDERAL GOVERNMENT?

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# Subcontractor Coverage

“Subcontract” means:

“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):

- (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, *is necessary to the performance of any one or more contracts*; or
- (2) Under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken or assumed.”

41 C.F.R. § 60-1.3

# WHAT ARE A FEDERAL CONTRACTOR'S AFFIRMATIVE ACTION OBLIGATIONS?

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# The Basics of an AAP under EO 11246

- a written plan
- updated annually
- potential broad scope
  - a contractor’s AAP obligations may flow to subsidiaries or affiliate companies (OFCCP has developed a 5 factor test and a 27 point questionnaire to use to determine if entities constitute a “single entity”)
  - each physical “establishment” must have its own AAP or otherwise be included in the AAP of another “establishment” as permitted by regulations
  - *all* of the contractor’s employees must be covered in an AAP
- requires detailed data collection, including applicant flow log that details information concerning race and sex of applicants (collected through voluntary self-identification)

# The Basics of an AAP under EO 11246

- requires outreach and recruitment to attract qualified female and minority candidates
  - OFCCP has developed an Employment Referral Reference Directory
    - [www.dol.gov/agencies/ofccp/compliance-assistance/outreach/errd](http://www.dol.gov/agencies/ofccp/compliance-assistance/outreach/errd)
- maintained as a confidential document disclosed to senior-level executives on a need-to-know basis
- the AAP is not regularly filed with OFCCP or any other agency – it is provided to OFCCP only in response to audit letter
- include EO clause in subcontracts and purchase order forms
- the AAP and support data must be maintained for two years (one year if contractor has fewer than 150 employees or does not have a contract of at least \$150,000)

# The Basics of an AAP under EO 11246

- an EO 11246 AAP requires detailed statistical analyses:
  - job group analysis and assessment of “utilization” (job groups jobs that are similar in content, wage rates, and opportunities)
  - workforce analysis listing employees by organizational unit
  - analyses concerning job group “utilization” (comparison between contractor’s workforce and the expected race/female composition of the workforce given the contractor’s recruitment practices and relevant census data)
  - establishing placement goals where workforce composition for minorities or females is less than the expected race/female composition
  - evaluating progress against placement goals in job groups where employer is underutilized
  - impact ratio analyses concerning applicants/hires, promotions, and terminations (by sex and race)

# Compensation and EO 11246

- OFCCP regulations require a contractor to conduct self-audit of compensation system to ensure non-discrimination in compensation
- Item 19 in Scheduling Letter (for OFCCP audits):  
“Employee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, and temporary employees) . . . . Provide gender and race/ethnicity information and hire date for each employee as well as job title, EEO-1 Category and job group in a single file. . . .

For all employees, compensation includes base salary and or wage rate, and hours worked in a typical workweek. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee.

You may provide any additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.

Documentation and policies related to compensation practices of the contractor should also be included in the submission, particularly those that explain the factors and reasoning used to determine compensation.”

# The Basics of an AAP -- VEVRAA and Rehabilitation Act

- written plans, updated annually (with far fewer statistical analyses than EO 11246 plans)
- “hiring benchmark” for veterans and “workplace utilization goals” for individuals with disabilities
  - Benchmarks and goals are *not* “quotas”
- voluntary self-identification for veterans (for all applicants before and after offer of employment has been made) and for individuals with disabilities (applicants before and after offer of employment; invitation for all employees to self-identify periodically; remind employees that they may self-identify)
  - OFCCP has provided self-identification forms for this purpose
- data collection (including applicant data)
- Equal Opportunity clause in contracts
- job listings and outreach (e.g., post with state employment services; state in ads that employer is federal contractor; assess effectiveness)
  - OFCCP has posted on website list of potential outreach services

# WHAT ARE THE RELEVANT AFFIRMATIVE ACTION FAR CLAUSES?

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# Affirmative Action FAR Provisions

- FAR 22.8 Equal Employment Opportunity
  - Affirmative Action Programs (FAR 22.804)
    - Non-construction contracts
      - Affirms eligibility requirements for development of written AAP within 120 days from commencement of contract
    - Construction contracts
      - Construction contractors required to meet contract terms and conditions citing affirmative action requirements that specify goals for women and minorities in covered construction trades, as applicable to covered geographical areas or projects
- FAR 22.12 Employment of Workers with Disabilities
  - Prescribes policies and procedures for implementing Section 503
- Far 22.13 Equal Opportunity for Veterans
  - Prescribes policies and procedures for implementing VEVRAA

# Additional EEO Requirements under EO 11246

FAR 22.802: Affirms the EEO requirements of EO 11246 Sec. 202

- Sec. 202(1): Prohibits contractor discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin
  - Requires affirmative actions with respect to employment, promotion, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.
  - Requires contractor to post notice setting forth provisions on non-discrimination clause
- Sec. 202(2): Requires contractors to state in all job solicitations and advertisements that all qualified applicants will receive consideration for employment without regard protected categories



# Additional EEO Requirements under EO 11246

- Sec. 202 (3): Pay Transparency
  - Prohibits covered contractors from discharging, or in any other manner discriminating against, any employee or applicant for employment because the employee or applicant inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant.
    - Does not apply when an employee has access to compensation information of other employees as part of their job, discloses the compensation of such other employees to individuals who do not otherwise have access to such information
      - Unless such disclosure is in response to a formal complaint or charge, investigation (including the employer's internal investigation) or other proceeding, or is consistent with the contractor's legal duty to furnish information.
  - *Sample Employee Policy:*

*Employer will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by Employer, or (c) consistent with the Employer's legal duty to furnish information.*

# Additional EEO Requirements under EO 11246

- Sec. 202 (4): Notice to labor unions
- Sec. 202 (5): Compliance with related rules and regulations
- Sec. 202 (6): Provision of information and access to records
- Sec. 202 (7): Penalties for non-compliance
- Sec. 202 (8): Flow down requirements
  - Contractor must include provisions of Sec 202 (1)- (8) in every non-exempt subcontract and purchase order
  - Non-discrimination obligations are binding on subcontractors and vendors even if they do not contract directly with the government
  - Contractor must cooperate with government's enforcement efforts against subcontractors and vendors, including with respect to sanctions for non-compliance

# Ethics Obligations

- FAR 52.203-13 Contractor Code of Business Ethics and Conduct
- Applies to government contracts that exceed \$5M with a period of performance greater than 120 days
- Within 30 day after covered contract award, employees on contract must be provided a written code of business ethics and conduct
  - Procurement integrity
  - Hiring of government and former government employees
  - Business gifts and gratuities
  - Conflicts of interest, including outside employment
  - Protection of confidential information
  - Avoiding anti-competitive practices and restrictions on trade
  - Timekeeping, recordkeeping and expense reporting
  - Record retention
  - Workplace safety
  - Non-discrimination
  - Complaint and reporting procedure
  - Non-retaliation and whistleblower protection
  - Training and compliance

# Ethics Obligations

- Additional Obligations under FAR 52.203-13
  - Timely disclosure of legal violations, conflicts of interest and other contract violations to government customer in accordance with their established processes
  - Implementation of awareness and compliance program within 90 days of award to provide related training to principals, employees, agents and subcontractors (as appropriate)
  - Establishment of internal control systems that clearly define standards and procedures for the timely disclosure of violations
    - Including regular evaluation of controls and effectiveness of ethics program
  - Establishment of anonymous and/or confidential internal reporting mechanism for employees
- Requirements flow down to subcontractors with subcontracts that exceed \$5.5M with a period of performance greater than 120 days

# WHAT ARE MY ENFORCEMENT RISKS?

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# Office of Federal Contract Compliance Programs (OFCCP)

- OFCCP enforces affirmative action obligations
- Based in Washington D.C., with 6 regional offices and various district/area offices
- Conducts compliance evaluations (desk audit, on-site review)
- More information about OFCCP:
  - <https://www.dol.gov/ofccp/>

# Remedies, Sanctions, and Publicity

- Conciliation agreement: a negotiated settlement between contract and OFCCP that might include monetary payments, job offers, promotions, special recruitment efforts
- Remedies: remedies include back pay and injunctive relief
- Sanctions: debarment and interrupting progress payments on existing contracts (only after a hearing and ruling by an Administrative Law Judge)
- Adverse publicity (OFCCP press releases)

# Examples of Conciliation Agreements – Hiring

- \$7.8M in connection with allegations of discrimination against more than 34,193 African American applicants and 308 female applicants
- \$3.8M to more than 5,000 employees and applicants for alleged systemic hiring and compensation discrimination
- \$3.5M to 4,428 affected African American applicants not hired for 10 different job positions
- \$3M to resolve alleged hiring discrimination affecting 1,229 applicants
- \$700,000 to resolve allegations of hiring discrimination to 616 Asian, African American and Hispanic applicants, with agreement to hire 34 of the affected applicants
- \$395,000 to 1,624 applicants to resolve alleged systemic hiring discrimination against Black, Asian, Native Hawaiian, and Pacific Islander applicants



# Examples of Conciliation Agreements – Pay Discrimination

- \$9.8M – comprised of \$800,000 in back pay and \$9M in pay equity adjustments for female and minority employees over 5 years – to resolve alleged systemic compensation discrimination
- \$1.45M in back pay to 391 female employees in connection with systemic pay discrimination
- \$500,000 in back wages for alleged pay discrimination to 42 affected employees, and company to allocate \$500,000 for salary adjustments
- \$450,000 in back pay to 214 female employees in connection with alleged systemic compensation discrimination
- \$275,000 in back pay to 34 female employees in connection with alleged pay discrimination

# Systemic Discrimination – Identify and Address Issues

- review the impact ratio analyses (hiring, promotions, terminations)
- review organizational profiles and job groups to identify potential problem areas of minority or female under-representation
- review possible problem areas specific to a hiring manager or a department
- review and validate employment tests used for hiring or promotions
- review compensation system regularly to identify disparities
- provide training to employees regarding hiring and equal employment opportunity

WHAT ARE THE CHANCES WE'LL BE  
AUDITED?

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# WHAT ARE THE MOST COMMON PROBLEMS?

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# Common Pitfalls of AAPs

- poor recordkeeping
- failing to collect accurate and complete applicant data (including voluntary self-identification information concerning gender, race, disability, veteran status)
- failing to take good faith efforts (including recruitment) and document those efforts
- mistaking affirmative action for quotas or otherwise not understanding non-discrimination and affirmative action obligations
- failing to articulate and disseminate affirmative action principles *throughout the company* – *everyone* involved in hiring process should be aware of the company's affirmative action obligations, including recordkeeping obligations

# Affirmative Action – Practical Tips

- implement recordkeeping and applicant tracking systems
- analyze compensation system and address pay disparities
- focus on good faith efforts to recruit minority and female applicants and documents these steps
- conduct critical self-analyses in connection with developing AAP, with a focus on systemic discrimination issues
- defend OFCCP compliance evaluations vigorously and engage counsel early in the process

WHAT NEW DEVELOPMENTS SHOULD I BE  
AWARE OF?

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# What's new at OFCCP?

- New Leadership
  - Director Jenny Yang
  - Deputy Director May Raghu
- Plan for increased staffing over next year to boost enforcement capabilities
- Enforcement priorities
  - Pay equity and compensation discrimination
  - Systemic bias in hiring
  - Compound intersectional discrimination
- Affirmative Action Verification Initiative “Coming Soon”
  - Will require federal contractors to provide annual verification that they are fully compliant with affirmative action obligation
  - Contractor that fails to prepare an AAP but verifies their compliance will be making a material misrepresentation to the government
  - Failing to complete verification will likely increase audit risk



# OFCCP v. Oracle

- OFCCP sued Oracle in January 2017, alleging that Oracle engaged in a pattern and practice of pay discrimination on the basis of gender and race.
- Last year, the DOL Administrative Law Judge held that no pattern and practice of discrimination could be determined
  - Due to the OFCCP's inability to explain the difference in specific jobs at issue
  - Due to the OFCCP's inability to make comparisons between relevant groups of employees
  - Due to Oracle's explanation of nondiscriminatory factors that influenced employee pay and positions

# OFCCP v. Oracle

- Anticipated impact going forward
  - Increase in OFCCP analysis of wage and hour data, leading to more findings of pay equity issues
  - More stringent OFCCP investigation and discovery procedures
  - Increased focus on information gathering with respect to employer job categories
- Recommended action items:
  - Consider compensation audit if not recently undertaken
  - Ensure pay decisions are based on legitimate non-discriminatory business factors

# Executive Orders

- Revocation of EO 13950
  - In January 2021, Biden revoked the Trump EO restricting government contractor workplace DEI training
  - Contractors should renew their DEI efforts
    - Employee training
    - Mentorship and sponsorship programs
    - Including DEI responsibility and accountability metrics in job descriptions
    - Establishing procedures to measure progress towards DEI goals
  - Review contracts and subcontracts to identify remnants of the order including limitations on workplace training
- Minimum wage increase
  - In April 2021, Biden issued an executive order requiring federal contractors and subcontractors to pay employees minimum wage of \$15/hour by January 2022

# Annual CSAL

- The OFCCP's annual Corporate Scheduling Announcement List issued on July 1, 2021
  - <https://content.govdelivery.com/accounts/USDOLOFCCP/bulletins/2e63534>
- Contractors should determine whether any of their establishments are included on this year's list and take steps now to prepare for upcoming audit

# About Us

## David Santeusanio



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**David J. Santeusanio** is a member of the firm's Litigation Section, the National Labor, Employment and Benefits Practice Group and co-chair of the Trade Secrets and Restrictive Covenants Team. Mr. Santeusanio is an experienced litigator and advisor representing and counseling clients in all facets of labor and employment law. His areas of concentration include employment discrimination litigation, non-competition and trade secret matters, union-management relations, education and government investigations.

Mr. Santeusanio counsels clients on federal contractor affirmative action obligations. He has successfully represented clients in affirmative action audits by DOL's Office of Federal Contract Compliance Programs. In addition, he counsels businesses and higher education institutions on voluntary affirmative action efforts and diversity programs

### Practice

- Civil Rights, Discrimination and Retaliation
- Trade Secrets and Restrictive Covenants
- Labor Relations for Management
- Labor and Employment Class Actions
- Labor, Employment and Benefits
- Education
- Litigation and Dispute Resolution

### Education

- Connecticut College, B.A.
- Suffolk University Law School, J.D., *magna cum laude*

### Bar Admission

- Massachusetts

# About Us

## Kara M. Ariail



**Kara M. Ariail** is an attorney in Holland & Knight's Tysons office in northern Virginia. She practices in the area of employment law counseling and litigation. Ms. Ariail works closely with employers in a range of industries to provide ongoing counseling, training and investigations designed to minimize the risk of litigation and maximize employee retention and productivity. Ms. Ariail recognizes that legal compliance is one of many competing business considerations when advising clients on employment law matters.

Clients rely on Ms. Ariail because she carefully evaluates the priorities and underlying circumstances at issue for each client to ensure the advice and recommendations she provides are both comprehensive and practical. She regularly advises clients on a wide range of employment issues, including successful hiring, employee performance management and termination strategies; development and implementation of anti-harassment and other personnel policies; evaluating and resolving employee complaints and workplace conflicts; evaluating reasonable accommodation obligations under the Americans with Disabilities Act (ADA) and state disability laws; achieving compliance with the Family and Medical Leave Act (FMLA); and wage and hour compliance. Ms. Ariail also advises clients on the employment law aspects of corporate transactions at all stages of the acquisition and sale process.

When litigation cannot be avoided, Ms. Ariail represents employers before the U.S. Equal Employment Opportunity Commission (EEOC), the U.S. Department of Labor (DOL), and both federal and state courts and agencies. Ms. Ariail has defended claims of discrimination and harassment, wage and hour violations, breach of contract, defamation, negligence and wrongful termination, as well as claimed violations of both the ADA and FMLA.

Ms. Ariail also works with clients to prepare, interpret and enforce employment, retention and termination agreements, including confidentiality and restrictive covenant agreements.

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### Practice

- Litigation and Dispute Resolution
- Labor, Employment and Benefits
- Civil Rights, Discrimination and Retaliation
- Trade Secrets and Restrictive Covenants
- Wage and Hour

### Education

- American University, B.A., Political Science, *cum laude*
- William & Mary Law School, J.D.

### Bar Admission

- District of Columbia
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# About Us

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**Chris Nagel** is a government contracts attorney based in Holland & Knight's Tysons office whose practice is focused on litigation and compliance matters. Mr. Nagel advises businesses on a broad range of legal issues involving their relationship with the government. His work includes a particular focus on companies that contract with the U.S. Department of Defense (DoD) and U.S. Intelligence Community (IC), as well as other aspects and matters that involve national security.

Mr. Nagel represents clients in bid protests, contract claims, suspension/debarment, False Claims Act (FCA) matters and disputes between contractors. He regularly guides corporations through compliance issues, including internal investigations and employee training.

In addition, Mr. Nagel's litigation and compliance practice includes matters related to faith-based and other non-profit entities.

Mr. Nagel served for 12 years on active duty and as a reservist in the U.S. Marine Corps (USMC). While on active duty, he was deployed to Afghanistan, where he adjudicated claims against the North Atlantic Treaty Organization (NATO) and the U.S. government. His previous tours include stints as a special assistant U.S. attorney for the U.S. District Court for the Eastern District of Virginia, officer-in-charge of the Quantico Legal Assistance Office and as a military prosecutor.

Prior to his service in the Marines, Mr. Nagel worked as a staffer to a member of Congress and as a writer at the White House.

### Practice

- Litigation and Dispute Resolution
- Government Contracts
- Anti-Corruption and FCPA
- National Security, Defense and Intelligence
- Clean Technology

### Education

- William & Mary Law School, J.D.
- Miami University, B.A.

### Bar Admission

- Virginia
- Maryland
- Colorado

**Thank You**