AFFIRMATIVE ACTION: The New Rules

New affirmative action regulations are simpler and offer contractors more flexibility. Unfortunately, the lack of specific guidance also means greater uncertainty and risk.

BY PETER CHATILOVICZ AND STUART NIBLEY

President William J. Clinton's administration issued a number of regulations in its waning days that will impact business for years to come. One of its more significant changes amended the regulations governing affirmative employment action programs of government contractors. Issued November 13, 2000, the amendments aim to refocus affirmative action efforts from programs with highly prescriptive standards to programs with performance-based standards.[1] The amendments are the first major revision to the affirmative action requirements in 30 years.

While refocusing from prescriptive to performance-based standards is a laudatory goal, it is not without risk. Prescriptive standards provide clear guidance, and that clarity is lost when using performance-based standards. In some cases, the amendments streamline or relax requirements. In other cases, the amendments add new requirements. In all cases, contractors need fully to understand the changes so that they can bring their programs into compliance and avoid the severe non-compliance penalties. Less clarity also makes it that much more important to have legal counsel that understands the new affirmative action requirements.

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The Basic Rules

Affirmative action programs in government contracting originated in Executive Order 11246, issued by President Johnson in 1965. The order prohibits companies contracting with the federal government from "discriminat[ing] against any employee or applicant for employment because of race, color, religion, sex, or national origin."[2] The order further requires companies to "take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, creed, color, or national origin."[3]

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) administers the order's requirements. Regulations governing its administration are set forth in Parts 60-1 and 2 of the *Code of Federal Regulations*. Although the order requires companies to "take affirmative action" to ensure that persons are employed without regard to the established criteria, the order provides only scant guidance concerning the actions companies must take. The regulations are more instructive: companies with 50 or more employees holding federal government contracts of $50,000 or more must "develop a written affirmative action compliance program for each of its establishments."[4]

Key to such programs is the company's employment of racial and religious minorities and women. Companies are required to conduct "an analysis of areas within which the contractor is deficient in the utilization of minority groups and women" and if the company is under-using such persons, it must establish goals and timetables for addressing the problem.[5] These

analyses, goals, and related items are documented in the companies' affirmative action plans.

Non-compliance can result in significant penalties. The government can terminate the contracts of non-compliant companies and declare them ineligible for award of future government contracts.[6] This latter penalty is particularly important in light of the *Federal Acquisition Regulation's* recent amendments emphasizing compliance with labor and employment laws as a condition of "responsibility." Contractors without a history of compliance with labor and employment laws can be found to be non-responsible and ineligible for government contract award.[7]

And of course, affirmative action programs are a means to an end: the end being that companies employ persons without discrimination with regard to race, color, religion, sex, or national origin. Such discrimination is illegal and companies not complying with affirmative action requirements may find themselves in violation of these other anti-discrimination laws and subject to their penalties.

Along New Lines

The November 2000 amendments revise the requirements governing affirmative action programs in several ways. One of the most significant revisions addresses the basis on which affirmative action programs are developed. The prior regulations required companies to establish affirmative action programs for "each of its establishments."[8] Some companies have in the past complained that developing a plan per establishment distorts their true use of minorities and women and hinders their efforts to identify and increase their use of these persons. These companies have noted that they are organized along functional lines or business units that cross geographic establishments. Requiring such companies to develop programs based on each establishment may distort, positively or negatively, their use of minorities and women.

Responding to such concerns, the new amendments allow companies, with the approval of the OFCCP, to develop affirmative action programs based on functional lines or business units.[9] Thus, companies can now comply with regulations by demonstrating that program development along these lines more accurately represents their use of minorities and women. Such companies must, however, annotate their programs to identify the employees' actual geographic location.[10]

In keeping with their theme of simplicity, the amendments provide scant guidance about how companies should develop programs based on functional lines or business units. Over time, firms will undoubtedly develop guidelines through practice, if they are not formally codified in regulations first. In the meantime, companies' only guidance in developing programs along these lines is the OFCCP's history of compliance actions.

It is also important to note that notwithstanding its acceptance of a company program based on functional lines or business units, the OFCCP retains the right to conduct compliance reviews on an establishment-by-establishment basis.[11] This may significantly discourage companies from developing other programs. This concern may abate over time if the OFCCP routinely monitors compliance on the bases on which the affirmative action program was developed. In the meantime, companies developing programs based on functional lines or business units should develop their programs to allow easy tracking to their establishments. Such tracking may assist them in responding to any under-utilization the OFCCP discerns in monitoring their compliance on an establishment-by-establishment basis.

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New Analyses

Another significant change introduced by the November amendments addresses the basis on which the OFCCP determines a company's use of minorities and women. The prior regulations required companies to determine use based on a workforce analysis, listing each job title as it appeared in the companies' collective bargaining agreements or payroll records. For each job title, the company was required to identify the number of employees, the number of male and female employees, and the number of minority employees.[12]

To simplify the analysis and provide flexibility, the new amendments allow companies to conduct their analyses using either a workforce analysis or an organizational display.[13] An organizational display must show the company's organizational structure in detail. The regulations are unconcerned, however, with the way the structure is shown; companies may use graphs, texts, spreadsheets, or other means.[14]

For each of the display's organizational units, the company must identify the unit's name and the job title, as well as the unit supervisor's gender, race, and ethnicity. The

company must also identify the number of employees, the number of male and female employees, and the number of minority employees within each business unit.[15] The information gathered under the workforce and organizational display analyses is the same. The difference is that under the workforce analysis, the information is arranged by job title, whereas information in the organizational display is arranged by business unit.

The organizational display is generally viewed as a shorter and simpler format than the workforce analysis. Just as with the establishment versus functional lines/business units, however, companies adopting an organizational display analysis need be careful that they do not unintentionally structure their analysis to mask real deficiencies the company faces in using minorities and women. If so, a company that looks good on paper may find itself facing compliance inquiries.

Determining Availability

One of the more troubling aspects of affirmative action programs has been determining the availability of minority and female workers. Determining availability is critical to assessing whether a company is under-using such persons. If minority and female workers are not available, a company cannot be faulted for not employing more of them.

The November amendments made significant changes in how availability is determined. The prior regulations required companies to individually determine minority and female worker availability considering eight different factors.[16] This was the so-called "eight factor analysis," which included the

- minority population;
- size of the minority unemployment force;
- percentage of the minority work force;
- availability of minority workers having the requisite skills within the establishment's surrounding area;
- availability of minority workers having the requisite skills in the area in which the company can reasonably recruit;
- availability of minorities that can be promoted and transferred within the company's organization;
- existence of institutions capable of training persons in the requisite skills; and
- degree of training that the contractor can reasonably undertake.[17]

The eight factor analysis was frequently criticized for being overly complex and administratively burdensome. Consequently, the new amendments now call for only two factors when determining availability: 1) the percentage of minorities or women with requisite skills in the reasonable recruitment area and 2) the percentage of a company's minorities or women that can be promoted, transferred, or trained.[18] However, companies must still separately assess the availability of minorities and women.[19]

Yet, moving from eight factors to two still brings some uncertainty and risk. The uncertainty is expressly reflected in the revision language. While the regulations call for contractors to consider the "reasonable recruitment area," they offer scant guidance for determining what area is "reasonable." The regulations state only that the area cannot be drawn to specifically exclude minorities and women.[20] No doubt there will be disputes about what constitutes a reasonable area.

Moreover, as with the organizational display analysis, companies need to be careful that their two-factor assessment does not unintentionally mask real deficiencies.

Compliance Evaluations

While most of the new amendments revise existing requirements, the administration also established several new requirements, such as the one regarding corporate management compliance evaluations. Arising out of the OFCCP's previously informal glass-ceiling reviews, these required evaluations (initiated and conducted by OFCCP) are designed to ascertain whether individuals are encountering artificial barriers to advancement into mid-level and senior corporate management positions.[21]

Again, the new amendments do not identify any parameters or standards by which the OFCCP will conduct such evaluations. Failing formally to cite standards may serve only to confuse companies about how the OFCCP might conduct the evaluations. Since the evaluations arose from the OFCCP's informal glass ceiling reviews, the OFCCP will likely conduct the evaluations according to the same standards. The OFCCP never formally published such standards, however. So even here, companies must rely on informal information to determine the OFCCP's review standards.

Equal Opportunity Survey

Another new requirement calls for companies to complete an equal opportunity survey. The regulations provide that "[e]ach year OFCCP will designate a substantial portion of all nonconstruction contractor establishments to prepare and file an Equal Opportunity Survey."[22] Although the regulations do not identify what constitutes a substantial portion of contractor establishments, the OFCCP has stated that it intends to require approximately one-half of all applicable contractors to file the survey each year.[23]

In a trial run in 2000, the OFCCP required 7,000 companies to complete the survey. Reaction has varied. The companies generally complained that the survey took much longer to complete than OFCCP anticipated. The companies also expressed concern that 1) the survey inaccurately portrays companies' use of

minorities and women and might inappropriately be used as evidence of discrimination, and 2) a company's survey results might be released improperly to competitors or the general public (via a request under the Freedom of Information Act, for example). Despite these concerns, the OFCCP did not modify its proposed regulations. Instead, it stated that 1) the survey results were not to be used as evidence of discrimination but only as indicators of potential problem areas, and that 2) the OFCCP would attempt to safeguard company proprietary information. Whether these safeguards offer adequate protection in practice remains to be seen.

The amendments also

- addressed how companies should combine job titles to organize their workforces into manageable groups to facilitate analysis;[24]
- provided special rules for companies with fewer than 150 employees, which are intended to reduce the administrative burden of developing affirmative action programs;[25]
- formalized OFCCP's demand for records, requiring that companies must make available to the OFCCP records pertaining to their affirmative action programs upon request;[26] and
- deleted the requirements that companies reaffirm their equal employment opportunity (EEO) policy in all personnel matters and disseminate their EEO policy.[27]

Seek Counsel

As the first significant revision of the affirmative action regulations in 30 years, the November 2000 amendments are noteworthy. They are especially significant for their attempt to simplify requirements and to move from prescriptive to performance-based standards.

While laudatory, this attempt is not without risk. Much of the clarity provided by the old, prescriptive standards is now lost. The new performance-based standards offer simplicity and flexibility, but considerable uncertainty. Undoubtedly, history will prove relevant to the present and the new regulations will be interpreted and applied with a view to past practices and a sense of the affirmative action requirements' purpose.

Companies are well advised to seek informed counsel concerning not only the current but the preceding regulations, and how we got from there to here. It is only through such counsel that firms can fully understand the changes and bring their affirmative action programs into compliance. **CM**

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Endnotes

1. 65 *Federal Register* 68022 (2000).
2. Exec. Order No. 11246, § 202(1), as amended by Exec. Order No. 11375.
3. Exec. Order No. 11246, § 202(1), as amended by Exec. Order No. 11375.
4. 41 C.F.R. §60-1.40(a) (2000).
5. 41 C.F.R. §60-2.10 (2000).
6. 41 C.F.R. §60-1.4(a)(6) (2000).
7. 65 *Federal Register* 80257 (2000)
8. 41 C.F.R. §60-1.40(a) (2000); See also 41 C.F.R. §60-2.1(a) (2000).
9. *Federal Register* 68043 (2000) (to be codified at 41 C.F.R. §60-2.1(d)(4)).
10. 65 *Federal Register* 68043 (2000) (to be codified at 41 C.F.R.§60-2.1(e)).
11. 65 *Federal Register* 68043 (2000) (to be codified at 41 C.F.R. §60-2.1(d)(4)).
12. 4 C.F.R. §60-2.11(a) (2000).
13. 65 *Federal Register* 68044 (2000) (to be codified at 41 C.F.R. §60-2.11(a)).
14. 65 *Federal Register* 68044 (2000) (to be codified at 41 C.F.R. §60-2.11(b)(1)).
15. 65 *Federal Register* 68044 (2000) (to be codified at 41 C.F.R. §60-2.11(b)(3)).
16. 41 C.F.R. §60-2.11(b)(1) and (2) (2000).
17. 41 C.F.R. §60-2.11(b)(1) (2000).
18. 65 *Federal Register* 68045 (2000) (to be codified at 41 C.F.R. §60-2.14(c).
19. 65 *Federal Register* 68045 (2000) (to be codified at 41 C.F.R. §60-2.14(b)).
20. 65 *Federal Register* 68045 (2000) (to be codified at 41 C.F.R. §60-2.14(e)).
21. 65 *Federal Register* 68047 (2000) (to be codified at 4 C.F.R. §60-2.30(a)).
22. 65 *Federal Register* 68946 (2000) (to be codified at 41. C.F.R. §60-2.18(a)).
23. 65 *Federal Register* 68038 (2000).
24. 65 *Federal Register* 68045 (2000) (to be codified at 41 C.F.R. §60-2.12).
25. 65 *Federal Register* 68045 (2000) (to be codified at 41 C.F.R. §60-2.12(e)).
26. 65 *Federal Register* 68047 (2000) (to be codified at 41. C.F.R. §60-2.32).
27. 65 *Federal Register* 68045 (2000) (to be codified at 41 C.F.R. §60-2.13(a) and (b)).