

# Summary of Federal Affirmative Action Requirements

Affirmative Action | Applicant Tracking | Pay Equity

## Are You a “Covered” Federal Contractor?

When you become a federal contractor or subcontractor, or a qualifying bank or higher educational institution, you may be subject to the nondiscrimination and affirmative provisions of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA), among other laws. Your first step should be to review the regulations and determine whether the federal contract(s) or subcontract(s) you hold are subject to these provisions. The regulations can be found on the Department of Labor’s Office of Federal Contract Compliance Programs’ (OFCCP) [website](#). OFCCP is the government agency responsible for the enforcement of these laws. You may also visit the OFCCP’s [eLaws advisor](#) for a step-by-step guide to determining your status as a federal contractor.

Executive Order 11246 prohibits federal contractors, subcontractors, and federally-assisted construction contractors and subcontractors with contracts that exceed \$10,000, from discriminating in employment decisions on the basis of sex, sexual orientation, gender identity, race, color, religion, or national origin. It also requires covered contractors to take affirmative action to ensure equal opportunity is provided in all aspects of their employment. Covered supply & service contractors holding a contract of \$50,000 or more must prepare a written annual affirmative action plan under EO 11246.

The Rehabilitation Act of 1973, Section 503, requires employers with federal contracts or subcontracts that exceed \$15,000, including construction contractors, to ensure nondiscrimination in employment on the basis of disability and take affirmative action to hire, retain, and promote Individuals with Disabilities (IWDs). Covered contractors holding a contract of \$50,000 or more must prepare a written annual affirmative action plan for individuals with disabilities.

VEVRAA requires federal contractors and subcontractors with contracts or subcontracts of \$150,000 or more, including construction contractors, to ensure nondiscrimination in employment on the basis of Protected Veteran (PV) status and take affirmative action to employ and advance in employment Disabled Veterans, Active Duty or Wartime Campaign Badge Veterans, Armed Forces Service Medal Veterans, and Recently Separated Veterans (those discharged from the Service in the past three years). Covered contractors holding a contract of \$150,000 or more must prepare a written annual affirmative action plan for protected veterans.

## Now that you have determined your status, what does this mean for your organization and your HR department?

### **Preparing Your Organization for Compliance**

Once you determine you are a federal contractor or subcontractor, your next step is to ensure your organization's compliance with the requirements for each law. This document is designed to give you an overview of federal affirmative action requirements and provide you with our compliance recommendations. More detailed information regarding each of the requirements can be found at the links below, or on OFCCP's website.

As you can see from the compliance checklist below, covered federal contractors have detailed recordkeeping obligations and must perform annual analyses of their personnel activity, including hiring, promotions, terminations, and compensation systems. Companies have the option of conducting the necessary analyses and reports internally, or with outside assistance. If you have limited resources or knowledge of affirmative action and related regulations, our recommendation is to obtain guidance. Since these laws can be complex, expert interpretation is often needed.

### **Affirmative Action Compliance Checklist**

- **Appoint an Affirmative Action Officer**  
Your first step should be to appoint an Affirmative Action Officer. This person will have primary responsibility for managing and implementing the affirmative action program (AAP).
  
- **Assign overall responsibility**  
While typically the AA Officer is responsible for management and implementation of your AAP, overall responsibility should be assigned to a higher-level executive, such as the President/CEO of your organization.
  
- **Solicit voluntary self-identification information of applicants and employees**
  - Applicants—Pre-offer: As soon as the job seeker meets the definition of an applicant
    - Invite applicants to self-identify race/ethnicity, gender, Protected Veteran (PV) and Individual with Disability (IWD) status.
  - Applicants—Post-offer: After a job offer has been made, but before an individual begins working
    - Invite these applicants to self-identify as a PV and as an IWD.

- All Employees:
  - You must maintain race/ethnicity and gender information for each employee in your workforce in order to complete required EEO reporting. If employees refuse to voluntarily self-identify their race/ethnicity or gender, contractors are to use visual identification or other employment records.
  - Within the first year of coverage under the 503 regulations—offer all employees the opportunity to voluntarily self-identify as an IWD.
  - Every five years thereafter, offer employees the opportunity to voluntarily self-identify as an IWD.
  - At least once between each five-year solicitation, remind employees they may voluntarily self-identify as an IWD at any time during their employment.
  - When resurveying your workforce for IWD information, consider providing employees with the opportunity to update their race/ethnicity, gender, and PV status.

## Compliance Tip

### Collecting Voluntary Self-Identification Information

During an OFCCP compliance review, you may be asked to provide a copy of your self-identification form(s) and to explain the process you use to solicit voluntary self-identification from applicants and employees.

- All self-identification forms must be maintained separately from other applicant or employee information.
- Any self-identification forms should indicate that submission of the requested information is voluntary, that failure to provide such information will not subject an individual to adverse treatment, and that any information provided will be maintained confidentially and used only in ways that are consistent with applicable law.
- An OMB-approved form must be used to solicit disability status information. OFCCP has developed sample forms to collect race/ethnicity, gender, and PV status information.
- Contractors should collect race/ethnicity information using the same categories on the EEO-1 report.
- Contractors may, but are not required to, collect the specific PV category to which an individual belongs.

### □ **Maintain accurate personnel transaction records**

- Accurate data is an integral part of preparing a compliant program. Poor data can cause erroneous calculations and results that could have a negative impact on your compliance efforts. Therefore, before you conduct any analysis of your personnel activity for your written AAP, review your HRIS or other recordkeeping systems to ensure the following:
  - All required data fields, such as job titles, grades, department codes, termination codes, applicant disposition codes, promotion codes, etc. are complete and reviewed for accuracy
  - Job titles have been classified using proper EEO categories
  - Race/ethnicity, gender, PV, and IWD codes are being captured for all applicants and employees
  - Effective dates of personnel actions are maintained accurately
  - Compensation data for all employees is maintained accurately
  - Appropriate records of job changes or actions (hire, rehire, competitive promotion, non-competitive promotion, competitive transfer, non-competitive transfer, voluntary termination, involuntary termination, etc.) are maintained
- Data is the foundation of your AA program. If your data is not organized, and you do not have the time or resources to prepare your data, inquire about data preparation assistance.

## **Compliance Tip**

### **Tracking Applicant Information**

Ensure your organization can define who is an applicant. OFCCP uses the Uniform Guidelines on Employee Selection Procedures to define a “traditional” applicant, an individual who applies in person using a paper application. Additionally, OFCCP has adopted a definition for an Internet Applicant, which applies whenever an employer uses the Internet or related technologies, such as email or fax, to recruit for a position. Under this definition, an individual is considered an applicant when four specific criteria have been satisfied:

1. The individual submits an expression of interest in employment through the Internet or related electronic data technologies.
2. The contractor considers the individual for employment for a particular position.
3. The individual’s expression of interest indicates the individual possesses the basic qualifications for the position.
4. The individual, at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, removes themselves from further consideration or otherwise indicates they are no longer interested in the position.

## Compliance Tip

### Tracking Applicant Information (continued)

Detailed disposition codes should be used to identify which applicants should be included in the required analyses of hiring activity. Disposition codes should identify the reason each candidate was not selected (i.e. did not meet basic qualifications, not considered, withdrew from process, etc.) and the step of the hiring process where this decision was made (i.e. recruiter review, phone screen, interview, etc.)

Make sure you:

- Review your recruitment process to ensure race/ethnicity, gender, PV, and IWD status are being solicited from all applicants who meet the definition of an applicant.
- Train staffing representatives and hiring managers on proper use of disposition codes and related recordkeeping.
- Notify third-party recruitment agencies and search firms of their obligations to track and maintain applicant data on your behalf. Review contracts with these agencies to require recordkeeping.
- Consider investing in a software program or Internet based application to automate your applicant processes. If you do, provide an email or phone number as an alternative to the online application system to allow access to the application process for individuals who are unable to use an online process.

#### **Ensure the Uniform Guidelines on Employee Selection Procedures are followed**

The [Uniform Guidelines on Employee Selection Procedures \(UGESP\)](#) were designed to provide a framework for employers to use in determining the proper use of employment tests and other selection procedures. Consistent selection practices are a critical component to ensuring that your practices are nondiscriminatory. If you do not have a standardized selection process in place, develop procedures with the UGESP guidelines in mind—and establish them as policy. All selection procedures should be reviewed to ensure compliance with these guidelines.

#### **Complete a written Executive Order 11246 AAP**

If you have at least 50 employees and a contract or subcontract of \$50,000 or more, a written AAP must be created annually for each establishment that has more than 50 employees.

As part of the written program you will need to take the following steps, among other requirements:

- Designate responsibility for the program
- Develop and disseminate an EEO/AA Policy
- Construct an organizational profile or workforce analysis
- Perform a job group analysis
- Determine availability of women and minorities for jobs in each job group
- Perform a utilization analysis by comparing the percentage of employees in each job group to their estimated availability
- Identify problem areas
  - Detailed evaluation of the workforce by organizational unit or job group
  - Review of personnel activity for the prior one-year period to identify any selection disparities
  - Review of progress towards prior year placement goals
  - Evaluation of compensation systems
- Develop and implement action-oriented programs
- Develop and implement internal audit and reporting systems

□ **Complete written AAPs for covered PV and IWDs**

If you have at least 50 employees and a covered contract (\$50,000 under Section 503 and \$150,000 under VEVRAA), you are required to develop and implement a written AAP for IWDs and PV on an annual basis. For both of these written AAPs you will need to take the following steps, among other requirements:

- Assign responsibility for implementation
- Develop an EEO/AA Policy for PV and IWD and disseminate internally and externally
- Train personnel involved in the recruitment, selection, promotion, evaluation, and discipline systems about the organization's EEO/AA policy
- Establish a schedule to review personnel practices to ensure that your processes allow for equal employment opportunity without regard to any protected basis
- Establish a schedule to review all job qualifications to determine if physical and mental job qualification standards are job related and do not screen out individuals with disabilities
- Provide reasonable accommodations to the physical and mental limitations of otherwise qualified individuals with disabilities, unless doing so poses an undue hardship on your business
- Develop procedures to ensure that individuals are not harassed because of their disability or protected Veteran status
- Set an annual PV hiring benchmark to establish a quantifiable method to measure progress towards equal employment opportunity
- Compare the representation of IWD in your workforce to an OFCCP established utilization goal for IWDs by each job group in your workforce, or for your entire workforce if you have fewer than 100 employees, and use the results of this analysis to evaluate the effectiveness of the AAP

- Collect, retain, and analyze the following metrics for applicants and hires:
    - The number of applicants who self-identified as PV and/or IWD
    - The total number of job openings and the total number of jobs filled
    - The total number of applicants for all jobs
    - The number of PV and IWD hired
    - The total number of applicants hired
  - Conduct outreach and positive recruitment efforts for IWDs and PVs and prepare a written analysis of the effectiveness of those efforts on an annual basis
  - Develop and implement an audit and reporting system
- **List jobs with the state or local employment service delivery system (ESDS) office**  
 Under VEVRAA, positions that will continue for more than three days, excluding executive and senior level manager positions and ones being filled from within, must be listed with the state or local ESDS office covering the location where the job will be located. Contractors must maintain documentation to show that they have satisfied their listing obligation for each covered position filled during a plan year.



## Compliance Tip

### Listing Jobs with the ESDS

- Ensure listings meet the format requirements and submission process for each ESDS office
- If you are using a third-party to list your openings, ensure their compliance with this requirement
- Keep records showing you listed each employment opening in case of an OFCCP audit
- Identify the following in the listing submission:
  - Status as a federal contractor
  - Desire for priority referrals of PV
  - Contact information for the hiring official at each location to verify information in the listing

- **Develop and implement action-oriented programs**  
 Develop and execute action-oriented programs designed to eliminate problems and accomplish stated goals and objectives. Be sure to make your AAP goals and related programs part of your human resources strategic objectives, and if possible, part of your corporate goals. Included in the narrative section of your written AAPs should be a discussion of the action-oriented programs you have put in place to address any problem areas. These programs need to be results oriented and should be evaluated for effectiveness on an annual basis.

□ **Document all outreach communication and activities**

Throughout the year, you should maintain a log of all communications sent to colleges, universities, and other targeted recruitment sources. Document your organization's outreach programs, recruitment activities, and other community volunteer programs that demonstrate good faith efforts towards meeting your affirmative action obligations for women, minorities, PVs, and IWDs.

- Maintain documentation of every job listed or advertised
- Establish contact with agencies and organizations focused on placement for PVs, IWDs, women, and minorities
- Regularly assess the effectiveness of your outreach and recruitment activities—if they are not producing measurable results or qualified candidates, make adjustments or find alternative sources
- A written assessment of the effectiveness of your activities for PV and IWDs is required on an annual basis

□ **Review job descriptions and job requirements**

Maintaining accurate job descriptions is an integral part of recruitment and hiring. Accurate job descriptions can assist you with listing basic requirements, describing the physical and mental requirements of the job, and providing a method for evaluating applicants. They can also be used in an assessment of reasonable accommodation. OFCCP may ask about the physical and mental requirements or medical restrictions for a position and if an employment medical exam or physical is required.

□ **Review policy statements and processes**

Review your EEO Policy statement annually to ensure it is current and has the appropriate top-level executive support. If you have an employee handbook, verify it has the most recent policy updates and procedures. Annually review other policy statements and associated processes that cover non-discrimination, anti-harassment, family medical leave, maternity/paternity or caregiver leave, and reasonable accommodation for disability and religious observance.

□ **Review reasonable accommodation process**

Establish or review your organization's process for considering reasonable accommodations for IWDs who request an accommodation. Provide a notice to applicants on your career page or other prominent location with information on how applicants may request an accommodation during the application process. The notice must contain contact information, such as a valid email address or phone number, and the name of the contact person. Provide methods and a process for employees to request accommodation at any time during their employment. Train staffing representatives and managers on actions to be taken when an accommodation request is made.

□ **Develop and implement an internal audit and reporting system**

In order to measure the effectiveness of your AAP, you must monitor progress to goals and assess adverse impact for employment decisions. The update program is used to evaluate progress made towards reaching placement goals set at the beginning of the program year. You are also required to report the results of your AAP to management and those involved in your selection processes. It is recommended you maintain a copy of the meeting agendas and place them in the exhibits section of the written AAP.

□ **Incorporate EEO Clause into purchase orders and subcontracts**

Federal contractors must incorporate the EEO clauses in every subcontract or purchase order distributed to business partners working on government contracts. Contractors may incorporate this language by reference, but specific, bolded language must be used.

 **Compliance Tip**

**Required Language for Subcontracts and Purchase Orders**

Specific, bolded language must be used when incorporating the EEO Clause into subcontracts, such as:

**Our organization is an equal opportunity employer and federal contractor or subcontractor. As applicable, the parties agree that they shall abide by the requirements of 41 CFR Section 60-1.4(a); 41 CFR Section 60-300.5(a); 41 CFR Section 60-741.5(a); and 29 CFR Part 471, Appendix A to Subpart A with respect to affirmative action program and posting requirements, and that these requirements are incorporated herein. Section 60-300.5 and 60-741.5 require that covered prime contractors and subcontractors ensure nondiscrimination and take affirmative action in employment to employ and advance qualified individuals without regard to their physical or mental disability and protected Veteran status.**

□ **Include EEO clause in solicitations and advertisements—EEO tagline**

As a covered employer, you are required to include the EEO clause in all solicitations and advertisements for employees.

## Compliance Tip

### Creating an EEO Tagline

OFCCP has specific rules for creating an EEO tagline. You must specifically reference Vets and Disabled in any tagline. It is not acceptable to use abbreviations such as: M/F/D/V, however, you may shorten Protected Veterans to Vet and individuals with disabilities to disability in your tagline. If your tagline references other protected traits, such as minorities or females, you must reference all of the protected traits. For online use, you should include this tagline on the 'home' recruitment screen, as well as on each individual job listing.

Acceptable EEO taglines include:

- Equal Opportunity Employer including Disability/Vets
- OR**
- [Organization name] is an Equal Opportunity/Affirmative Action employer. All qualified applicants will receive consideration for employment without regard to sex, gender identity, sexual orientation, race, color, religion, national origin, disability, protected Veteran status, age, or any other characteristic protected by law.

You should maintain copies of employment ads or listings and recruitment materials with your written AAP as the OFCCP often asks for this material during a compliance review.

#### **Notify labor unions, worker representatives, and referral sources**

Once a year, you must notify each labor union with which you have a collective bargaining agreement, or other worker representatives (including temporary staffing firms) with whom you have a contract, of your organization's commitment to EEO and affirmative action. You also should notify referral sources of your EEO and affirmative action policy and ask that they refer qualified applicants of diverse backgrounds to you. Contractors also are required to provide written notification of their EEO/AA policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

□ **Comply with record retention requirements**

If you have more than 150 employees or have a contract of \$150,000 or more, the minimum record retention period under Executive Order 11246 is two years from the date the record was created or the date of the personnel action involved; otherwise the record retention requirement is one year. Under VEVRAA and Section 503, the record retention period is three years for assessments of external outreach and recruitment, the PV hiring benchmark, and the specific hiring data that must be maintained under these regulations. The Section 503 and VEVRAA regulations require that all other records be maintained for two years if you have more than 150 employees or have a contract of \$150,000 or more, and one year if you do not meet these requirements. Also, if an existing AAP comes under an audit, then related records must be maintained until a final decision is provided in the audit.

□ **Display EEO poster**

The “EEO is the Law” poster must be posted in conspicuous places used by employees and applicants—such as on bulletin boards in lunchrooms and on any online application system. The latest version of the poster, and any supplements, is available at no cost from a link on OFCCP’s website.

□ **Post Executive Order 13665 Pay Transparency Nondiscrimination Statement**

Covered contracts entered into or modified after January 11, 2016 include a requirement to post a required nondiscrimination statement regarding pay transparency. The statement, including certain required language summarized [here](#), must be conspicuously posted for employees and applicants. In addition, the statement must be incorporated into employee handbooks and manuals.

### **Other Obligations for Federal Contractors**

There are other employment-related rules that may apply to covered federal contractors and subcontractors. Some of those requirements are included here for your reference.

□ **Display Executive Order 13496 Poster**

Under Executive Order 13496, enforced by the OFCCP and the Department of Labor’s Office of Labor-Management Standards, federal contractors are required to post a notice discussing employees’ rights to form, join, and assist a union, to bargain collectively with their employer, and to engage in or refrain from concerted activity regardless of current union or non-union status. The notice must be posted in conspicuous places in plants and offices where covered employees engage in activities relating to the performance of covered contracts, including all places where notices to employees are customarily posted both physically and electronically. More information, including a free, downloadable version of the required notice, is available [here](#).

□ **Display Executive Order 13658 Notice**

Executive Order 13658 sets a minimum wage for workers supporting certain federal contracts and subcontracts entered into or modified after January 1, 2015. The Secretary of Labor is required to determine the Executive Order minimum wage rate yearly, and publish this wage rate at least 90 days before the wage is to take effect. Contractors should review new bids and government contracts carefully to determine whether the minimum wage requirement will apply, and develop procedures for including the required language in any subcontracts. Covered employers must notify all workers of the applicable minimum wage rate. A copy of the notice may be obtained [here](#).

□ **Complete and submit the appropriate EEO-1, EEO-4 or EEO-5 Report annually**

- Private employers with 100 or more employees must complete and file EEO-1 reports each year. Federal contractors with covered government contracts are required to file this annual report if they have 50 or more employees. More detailed information is available [here](#).
- The EEO-4 applies to covered state and local governments and is filed on odd numbered years. The EEO-5 applies to covered elementary/secondary school districts and is filed on even numbered years. More detailed information is available on the EEOC website [here](#).

□ **Complete and submit the VETS-4212 Report annually**

Covered federal contractors must file a VETS-4212 report each year. More information about the VETS-4212 report is available [here](#).

□ **Use E-Verify to confirm employment eligibility**

E-Verify is a federal program that allows employers to electronically confirm a person's employment eligibility to work in the United States. As a result of Executive Order 13465, the Federal Acquisition Regulations (FAR) were amended to require federal contractors with contracts issued after September 2009 to use E-Verify. In addition to using E-Verify, additional posters and subcontractor notifications are required. Use this link to find out more about [E-Verify](#).

□ **Comply with Executive Order 13627 requirements**

Contractors who are awarded a procurement contract of any value solicited after March 1, 2015 must develop and disseminate a policy against human trafficking, to include a complaint process and subcontractor notification. Certain contractors also must develop a detailed compliance plan and certification process. More information about the compliance requirements regarding human trafficking applicable to federal contractors can be found on the DOL website [here](#).

□ **Report subcontract awards and executive compensation**

The Federal Funding Accountability and Transparency Act (FFATA) was signed on September 26, 2006 and requires information on federal contract awards be made available to the public in a searchable website, [www.USASpending.gov](http://www.USASpending.gov). As a result of this Act, contractors are required to report subcontract award data and total compensation of the five most highly compensated executives of the contractor and subcontractors. The required clause appears in applicable contracts of \$25,000 or more awarded after October 2010. Guidance on this reporting requirement can be found [here](#).

□ **Comply with The Fair Chance Act**

The Fair Chance Act, enacted as part of the National Defense Authorization Act for Fiscal Year 2020, prohibits, with limited exceptions, federal contractors from inquiring about the criminal history of an applicant for a position related to work under a federal contract until after a conditional job offer is extended. This new requirement goes into effect December 20, 2021 and will apply to federal contracts awarded pursuant to solicitations issued after that date.

### **What should you do next?**

This guide was designed to provide an overview of AAP requirements for federal contractors. As you can see from the various requirements outlined in this guide, becoming a federal contractor or subcontractor brings numerous, unique compliance obligations. Compliance with these nondiscrimination and affirmative action obligations warrants a healthy investment in the right resources.

Berkshire can help you with all your OFCCP compliance needs, and we'll help you get the most out of the time and resources invested. Our experts will take advantage of the information, data, and analyses conducted during your AAP process, and use it to help you create your ideal, balanced workforce. Please feel free to contact us should you need further assistance or have questions about the information in this guide.

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