



IN THE BUSINESS OF YOUR SUCCESS®

ADP TOTALSOURCE®

So You're A Federal Contractor, Now What?

Take the first step to help ensure your business is in compliance. This report provides an in-depth look at the myriad and complex laws and regulations impacting your business.



HR. Payroll. Benefits.

Produced in partnership with
ADP TotalSource® and Jackson Lewis

jackson lewis
Preventive Strategies and
Positive Solutions for the Workplace®

Contents

INTRODUCTION	1
ARE YOU A COVERED FEDERAL CONTRACTOR OR SUBCONTRACTOR?	2
OBLIGATIONS OF A COVERED EMPLOYER	3
A. Implement an Affirmative Action Plan	3
1. What Is Affirmative Action?	
a. Proactive EEO	
b. Your AAP as a Strategic Tool	
2. What Does Creating an Affirmative Action Plan Require?	
a. Statistical Trends Analyses of Personnel Selections and Compensation Practices	
b. Establishing Statistical Placement Goals for Minorities, Women, Individuals With Disabilities, and Protected Veterans	
c. Designing Recruitment and Outreach Programs	
d. EEO Policies and Other Notifications	
B. Maintain Applicant Information	8
1. Applicant Tracking	
2. Who Is an “Applicant”?	
C. Record-Keeping Obligations	9
D. Government Reporting (EEO-1 and VETS-100/100A)	9
WHY IS IT IMPORTANT TO COMPLY WITH YOUR AFFIRMATIVE ACTION OBLIGATIONS?	10
A. Enforcement by the OFCCP	10
1. Audits	
2. Aggressive OFCCP Enforcement	
B. Consequences of Not Being in Compliance	11
OTHER OBLIGATIONS OF GOVERNMENT CONTRACTORS	12
A. E-Verify	12
B. Davis-Bacon and Related Acts	12
1. Prevailing Wage Requirement	
2. Record-Keeping Requirement	
3. Certified Payroll-Reporting Requirement	
4. Notice Requirements	
5. Consequences of Noncompliance	
C. Service Contract Act	13
D. False Claims Act	13
E. Drug-Free Workplace Act of 1988	13
F. The Government Funding Transparency Act of 2008	14
G. Defense Contract Audit Agency Requirements	14
H. Executive Orders	14
1. Executive Order 13494: Economy in Government Contracting	
2. Executive Order 13495: Nondisplacement of Qualified Workers	
3. Executive Order 13496: Notification of Employee Rights Under Federal Labor Law	
4. Executive Order 13502: Use of Project Labor Agreements for Federal Construction Projects	
I. Ethics Requirements	15
J. Security Clearance	15
CONCLUSION: WHAT YOU SHOULD DO NOW	16
ABOUT ADP TOTALSOURCE®	17
ABOUT JACKSON LEWIS	17

Introduction

Each year, the federal government gives out trillions of dollars in the form of payments for goods and services to companies with a private-sector workforce. Doing business with the government can be lucrative, but it requires compliance with a litany of complex laws and regulations impacting your day-to-day business operations. Among other things, the federal government expects federal contractors to hold themselves to the highest standard of equal employment opportunity (“EEO”).

The EEO obligations of those who do business with the federal government arise primarily from three laws and corresponding regulations. Executive Order 11246, also referred to as the “Executive Order,” applies to minorities and women. Section 503 of the Vocational Rehabilitation Act of 1973 (“Rehabilitation Act”), applies to individuals with disabilities. The Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRAA”), applies to certain groups of protected veterans, including veterans with disabilities and recently separated veterans. These EEO obligations are enforced by the Department of Labor’s (“DOL”) Office of Federal Contract Compliance Programs (“OFCCP”).

In addition to these three EEO laws, there are other requirements specific to contractors. Because an effective understanding of the entire federal regulatory scheme that applies to federal contractors is essential to maintaining compliance and avoiding liability, the article also gives a brief overview of several other obligations your company may be required to fulfill as a government contractor.



Among other things, the federal government expects federal contractors to hold themselves to the highest standard of equal employment opportunity (“EEO”).

From timekeeping and labor management systems, E-Verify processing, EEO-1 filing, certified payroll, human resource policies, training and access to preferred vendor relationships for Affirmative Action Plan development and administration, *ADP TotalSource® provides its government contractor clients with solutions to help them comply with the myriad of federal contractor laws, as described in this article.*

Are You A Covered Federal Contractor Or Subcontractor?

Before getting into the details of what you need to do if you are a federal contractor, you must first assess whether your business is a *covered* federal contractor or subcontractor. There are several ways your company can be a contractor subject to federal affirmative action and equal employment opportunity obligations.

Your company will be covered if it has a contract to supply goods or services directly to an agency of the federal government. Your company may also be covered if it has a subcontract to supply goods or services necessary to fulfill another company's federal contract or subcontract. Coverage can also arise through an intra-company relationship with a parent, subsidiary, division, or affiliate company that has a federal contract or subcontract. This obligation flows both "upstream" and "downstream" between entities. So, even if your company does not have a government contract, it still might be covered if your company is part of a larger corporate entity and another company in your corporate family has a government contract.

When an employer has at least fifty (50) employees and enters into a contract for at least \$50,000 annually to supply goods or services to the federal government or to supply goods or services to a government contractor and such goods or services are necessary, in whole or in part, to fulfill a government contract, the contractor must implement and maintain a written affirmative action plan.

Even if the contract is less than the \$50,000 threshold, obligations still arise. If it is at least \$10,000 (or \$25,000 under VEVRAA), contractors must certify compliance with federal reporting and equal employment opportunity requirements regarding minorities, females, veterans, and individuals with disabilities. At these lower monetary thresholds, there is no requirement to implement a written affirmative action plan.

... you must first assess whether your business is a covered federal contractor or subcontractor.

Obligations Of A Covered Employer

A. Implement an Affirmative Action Plan

1. What Is Affirmative Action?

As a federal employer with a covered contract or subcontract, your company is required to implement a written affirmative action plan (“AAP”). An AAP includes trend analyses regarding applicants, new hires, promotions, terminations, and compensation – really all of the stages of the employee life cycle. But before we get into the details about what affirmative action is, let’s take a couple of minutes and talk about what affirmative action is not.

a. Proactive EEO

The phrase “affirmative action” can be confusing. The phrase means different things to different people and can be used in different situations. However, in the federal contractor world, affirmative action does not mean employers have quotas or are required to give preferential treatment to certain groups of individuals. Nor does it mean employers are expected to guarantee the results of employment decisions. The best way to think about affirmative action is to view it as a proactive tool you can use to identify and address areas of inequity or unfairness before they turn into litigation.

The traditional view of EEO is a “reactive EEO” view. In a reactive situation, employers wait until they have received a lawsuit, an agency charge of discrimination or an internal complaint before investigating employment practices and the effects those practices may have on employees. But that is often too late as issues may have been hidden for years, bubbling under the surface, which can lead to a great degree of liability for the employer. The intention behind developing an AAP is to uncover “hidden barriers” to EEO so you can proactively identify and address areas of potential unfairness.

b. Your AAP as a Strategic Tool

An AAP, if properly designed, should be a “strategic tool” to assist employers to identify, address and resolve EEO issues. AAPs include statistical trend analyses designed to identify “hidden barriers” at

each stage of the employment process. Every AAP contains statistical data analyses on the utilization of minorities and females in the workforce, compensation analyses, and adverse impact (disparate impact) analyses of how minorities and females (and vice versa) are doing in the company’s hiring, promotion, and termination processes. The “three pillars” of AAP statistics are:

- *Utilization Analyses* which analyze the company’s representation of minorities and females in the workforce compared to what is truly available in the population, as reflected by census data.
- *Impact Ratio Analyses* which determine if minorities, females (or vice versa), or particular sub-minority groups are not doing as well comparatively in the company’s hiring, promotion, or termination processes.
- *Compensation Analyses* which identify and correct, when needed, pay differences that are not legitimate and job-related.

Employers should review these analyses and investigate any “red flags” to make proactive changes to address the issues. A “red flag” can be underutilization of a segment of the available population – a disparate impact in hiring, promotions, or terminations that is more than two standard deviations or job titles where there are significant pay differences. Red flags only mean further investigation is needed.

2. What Does Creating an Affirmative Action Plan Require?

Covered federal contractors and subcontractors must develop, implement, and annually update an AAP for each U.S. establishment of 50 or more employees, even if those facilities do not contribute to the performance of any government contracts. A facility of less than 50 employees may have its own small plan or “roll up” into the plan of the facility to which its workforce reports or from where its personnel functions are handled.

Preparing and implementing an AAP requires four distinct projects:

- Analyzing personnel-selection decisions (applicant flow, hires, promotions, terminations) and compensation practices to ensure the company's personnel procedures are fair and consistent, and do not have a discriminatory impact against applicants and employees due to differences in race, gender, the presence of a disability, or veteran(s) status;
- Establishing statistical placement targets for hiring veterans and placement goals for minorities, women, and individuals with disabilities in areas of underutilization (typically by job group);¹
- Designing equal employment opportunity policies and outreach/recruitment programs that focus and document the company's specific good faith efforts to recruit females, minorities, veterans, and individuals with disabilities; and
- Implementing processes and procedures to document and comply with notification, posting, record-keeping and reporting obligations.

We will discuss each one of these areas in turn, below.

a. Statistical Trends Analyses of Personnel Selections and Compensation Practices

The statistical analyses in an AAP are traditionally designed to assess how women and minorities fare in all of a covered contractor's personnel decisions, from recruitment and hiring through termination. Where statistical trends uncover hidden barriers to EEO, the contractor has an obligation to address and remedy these statistical "red flags."

i. Impact Ratio Analyses

Covered federal contractors and subcontractors must analyze their hiring, promotion, and termination rates for women and minorities compared to males and non-minorities, respectively. This analysis reviews a full year's

The statistical analyses in an AAP are traditionally designed to assess how women and minorities fare in all of a covered contractor's personnel decisions, from recruitment and hiring through termination.

worth of personnel activity data and identifies any job groups where women, men, or minorities are disadvantaged to a statistically significant degree – two or more standard deviations – in hiring, promotion, or termination decisions.

Job Group	Hire Rate for Minorities	Hire Rate for Non-Minorities	IRA	Standard Deviation
6	5/100 .05	20/100 .20	0.25	3.207

In the above example, non-minorities are hired at a higher rate than minorities (20 non-minorities hired out of 100 non-minority applicants for a total of 20 percent versus five minorities hired out of 100 minority applicants for 5 percent), which results in a statistically significant hiring difference that is above two standard deviations. In order to conduct an accurate impact ratio analysis, contractors must carefully track all applicants for open positions, including asking applicants to voluntarily provide their race and gender information. Contractors must track personnel movements within the company (promotions and transfers), as well.

ii. Compensation Analyses

Covered federal contractors and subcontractors are required to analyze their compensation systems annually, although the regulations do not require a specific type of analysis. The OFCCP has recently made pay discrimination a primary focus of its audits and is aggressively investigating

¹ Job groups are the units of statistical analysis in an AAP. They are generally subdivisions of EEO-1 reporting categories (officials and managers, professionals, etc.) and are groupings of employees with similar job responsibilities and opportunities for advancement. Creation of job groups is one of the first steps in developing an AAP.

perceived differences in employee pay. Accordingly, you should review your hiring practices to ensure women, men, and minorities in the workforce are paid equitably, accounting for relevant factors such as tenure and performance.

	Average Salary	Average Difference in Pay	Average Tenure
Females	\$48,000	\$6,000 or 7%	1.5
Males	\$54,000		4.5

Differences in pay are not always an issue, but you need to be able to point to job-related factors, such as average tenure in the above example, to explain why the differences exist.

As part of annual compensation analyses of your company’s pay practices, you should conduct larger regression analyses that take into consideration factors, such as tenure and performance that could be affecting pay for a group of individuals as well as smaller cohort analyses, which will allow discovery and understanding of the reasons for pay disparities between individuals. It is imperative to understand how and why your employees are being paid what they are, and if there is not a legitimate business reason for a disparity in pay between a male or a female, or a minority or non-minority or even between minorities who belong to different sub-minority groups, consider, with the advice of counsel, conducting pay equity adjustments.

Covered federal contractors and subcontractors are required to analyze their compensation system annually, although the regulations do not require a specific type of analysis.

These self-critical analyses can be quite revealing, exposing employers’ potential “trouble areas.” As a result, it is recommended these compensation analyses be conducted at the direction and under

the review of counsel. This will allow the analyses to be privileged and protected from production to other parties during any ensuing legal or regulatory investigations.

b. Establishing Statistical Placement Goals for Minorities, Women, Individuals With Disabilities, and Protected Veterans

Covered federal contractors and subcontractors have traditionally been required to compare the representation of women and minorities in their workforce to their availability in the geographic areas where the company recruits and the job groups from which the company promotes within its workforce. These are referred to as **Availability and Utilization Analyses**. Availability is based on the number of individuals with the required skills available both internally and externally. External availability is calculated based on census occupational codes (job titles) for the contractor’s recruitment area.

Job Group 2	Current Workforce	Current “Availability”	Underutilized?
Females	15/100 15%	45%	Yes
Minorities	25/100 25%	22%	No

In job groups, where the contractor is statistically underutilizing females and/or minorities, it must set placement goals and make good faith efforts (discussed below) to meet those goals. In the above example, the employer would need to establish a placement goal for females, because the representation in the current workforce is less than the current “availability.” The company would not need to set a placement goal for minorities, because it currently employs as many or more minorities than statistically “available.”

Under new regulations regarding Section 503 of the Rehabilitation Act, covered federal contractors and subcontractors must conduct similar analyses to determine if their workforce is “underutilizing” individuals with disabilities. Here, however, employers must use a presumed “availability” percentage provided by the OFCCP – currently

7 percent. As with the analyses for minorities and females, if an employer's utilization of individuals with disabilities falls below the required goal set by OFCCP, the employer must set placement goals.

New regulations regarding VEVRAA also require employers to set hiring "benchmarks" for protected veterans. Unlike the new Section 503 regulations, employers have options regarding what goal to set: they may either implement a standard hiring benchmark set by the OFCCP for protected veterans – currently 8 percent – or evaluate a set of predetermined factors to determine whether a different benchmark is more appropriate under their specific circumstances. (The employer will have to justify any custom benchmark during an OFCCP audit.)

Contractors should alert management about any placement goals established for a current plan year and have a narrative discussion with the proper individuals (management, recruitment, human resources, etc.) about the efforts made to achieve the goals established in the previous years. The efforts would include reaching out to recruitment sources to increase the diversity of applicant pools as opposed to any hiring "quota" system, which is prohibited under Title VII of the Civil Rights Act of 1964. As a matter of course, it is recommended that discussions take place verbally to help maintain the confidentiality of the discussions and reduce any potential exposure to liability that may arise from the acknowledgment of and discussions surrounding underutilization of groups of protected individuals.

c. Designing Recruitment and Outreach Programs

Covered employers are expected to engage in recruiting practices that ensure equal access for women, minorities, veterans, and individuals with disabilities to hiring and advancement opportunities. An employer's AAP is expected to demonstrate:

i. Listing With State Job Services

With limited exception, covered employers must list with state job services all employment openings. For example, if the employer externally advertises for a position in the State of California, the position

must be posted with California's Employment Development Department (EDD). Suitable employment openings for posting with the state include any positions except top management or positions lasting less than three days or those for which the contractor seeks no external candidates.

With limited exception, covered employers must list with state job services all employment openings.

ii. Making and Documenting "Good Faith Efforts"

To satisfy the government that it is fulfilling its EEO obligations, a contractor or subcontractor must be able to demonstrate it has taken steps to address the underutilization everywhere a goal or hiring benchmark has been set. As such, covered employers must retain copies of documents substantiating good faith efforts to attract qualified minorities, females, veterans, and individuals with disabilities where goals or benchmarks were set and placement opportunities existed. This includes, but is not limited to, retaining copies of internal job postings, newspaper and online advertisements, letters to diversity recruitment sources, and documentation or recruitment efforts at diversity job fairs and colleges.

iii. Documenting Good Faith Efforts for Veterans and Individuals With Disabilities

Covered contractors and subcontractors are also required to take affirmative action to employ and advance in employment veterans and individuals with disabilities. In compliance reviews, the government has increasingly focused on this area and required covered employers to demonstrate the good faith efforts they have made with respect to veterans and the disabled, through submission of documentation of the company's good faith efforts.

Recently, employers who have demonstrated they may not be engaged in adequate outreach have been required to demonstrate they have taken additional steps to recruit protected individuals, including inviting representatives of organizations to tour the facility, arranging in-person meetings and other personalized activities.

Additionally, the new revisions to the VEVRAA and Section 503 regulations require that contractors and subcontractors monitor and evaluate the effectiveness of their outreach efforts, abandon efforts that are not effective, and continue to identify potential effective recruitment sources.

d. EEO Policies and Other Notifications

In addition to the statistical aspects of affirmative action compliance, covered employers are required to maintain a host of written policies and implement a number of procedures intended to help ensure equal employment opportunity, including the following:

i. Vendor Notification

Covered contractors and subcontractors are required to notify their vendors/suppliers of their obligation to comply with the affirmative action regulations. Although no particular form or method is required, using a vendor notification letter is a best practice. While you may choose to notify all of your vendors/suppliers, you may want to consider notifying just those vendors/suppliers with which you do a significant level of business (i.e., \$50,000.00 per year or more).

ii. Contracts and Purchase Orders

The covered contractor or subcontractor's purchase orders and contracts must contain specific references to and information concerning EEO obligations. Moreover, certain employers must also include additional language regarding notice of employee rights under federal labor laws in their contracts and purchase orders. (See discussion of Executive Order 13496 below.)

iii. EEO Language in Advertisements

Contractors and subcontractors must include EEO language (i.e., "We are an Equal Opportunity

Employer," "MFDV," "EOE Employer," "EEO Employer") in all newspaper and online advertisements and job postings.

iv. Affirmative Action and Equal Employment Opportunity Policy Statement

This is a statement of the covered employer's commitment to EEO and affirmative action compliance. Although not required under the regulations, it is strongly recommended that employers draft this statement. A copy should be included in the contractor's AAP. In addition, it is recommended that the statement is posted on employee bulletin boards and where it can be seen by employees as well as applicants for employment.

Covered contractors and subcontractors are required to notify their vendors/suppliers of their obligation to comply with the affirmative action regulations.

v. Online Application Systems

Covered employers that use online application systems are required to include on their careers Web site a notice about how applicants can request a disability accommodation to allow them to use the system (for instance, if the system is incompatible with a visually impaired person's adaptive software).

vi. Invitation for Individuals With Disabilities and Covered Veterans to Self-Identify

Under the new VEVRAA and Section 503 regulations, covered contractors and subcontractors are required to invite all applicants, hires, and employees to voluntarily identify themselves as individuals with disabilities and protected veterans for inclusion in the employer's AAP. The invitations to applicants may be conducted at the same point that applicants are invited to voluntarily self-identify their race and gender.

vii. Additional Required Policies

Among the policies required and expected to be part of an employer's affirmative action program are: an EEO/anti-discrimination policy, an anti-harassment policy, a complaint procedure through which employees can report equal opportunity issues, a family/medical leave policy, if applicable, internal posting of job or advancement opportunities, blank performance reviews, and an exit interview process.

B. Maintain Applicant Information

The most important – and potentially burdensome – additional obligation of federal contractors and subcontractors is the requirement to track and maintain detailed information regarding all applicants for employment with your company. This includes carefully tracking all applicants for open positions, including asking applicants to voluntarily provide race, gender, veterans' status, and disability information, and recording the reasons applicants were not selected for the position. As described above, covered contractors and subcontractors have an obligation to analyze this data yearly.

The implementation and utilization of an Applicant Tracking System (“ATS”) is highly recommended for employers who do, or will do, a consistent amount of business with the federal government.

1. Applicant Tracking

The implementation and utilization of an Applicant Tracking System (“ATS”) is highly recommended for employers who do, or will do, a consistent amount of business with the federal government. An ATS will allow you to collect the information needed to comply with your obligations to track the race and gender of applicants. An ATS will also allow

for the collection of detailed information needed to be able to evaluate the individual stages of the selection process to identify where adverse impact may be occurring.

For example, using detailed disposition codes will allow you to identify at precisely what point in the process a certain applicant was removed for further consideration for an open position. Why is this important? Because “big numbers are bad numbers” and the fewer applicants you have to include in your analyses, the better.

The current state of technology allows for hundreds of individuals around the country (and even further) to learn about and apply for your job openings. However, increased numbers of applicants not only increase your obligations to track and retain documents, but also can unfavorably affect adverse impact analyses and increase liability in discrimination claims.

As a result, you want to limit your number of applicants.

2. Who Is an “Applicant”?

The current regulations allow employers to legitimately limit the number of “applicants.” Under the “Internet Applicant Rule” a job seeker falls within the definition of an “applicant” if:

- The job seeker submits an expression of interest in employment through the **Internet or related electronic data technologies**;
- The employer **considers** the job seeker for employment in a particular position;
- The job seeker's expression of interest indicates the individual possesses the **basic qualifications** for the position; and
- The job seeker at no point **removes himself or herself from further consideration** or otherwise indicates he or she is no longer interested in the position.

Only those job seekers who meet all of these elements will be considered “applicants” whom employers must track on their applicant flow log, maintain documents for, and include in adverse impact analyses.

C. Record-Keeping Obligations

Covered contractors subject to affirmative action regulations must retain documents and data regarding applicants and employees for two years. These records include, but are not limited to, resumes, employment applications, employee self-identification information, applicant flow data, interview notes, performance reviews/evaluations, EEO or affirmative action training, letters of resignation, exit interview forms, and documentation substantiating an involuntary termination.

The new VEVRAA and Section 503 regulations require employers to maintain certain records relating to veterans and disability status for three years. Accordingly, although the regulatory retention requirement for documents regarding traditional race and gender analyses is two years, it is strongly recommended that you retain these documents for a minimum of three years.

Employers must maintain certain records relating to veterans and disability status for three years.

In addition, there may be longer retention requirements under federal, state, or even your company's personnel policies. If selected for an audit (or notified of an EEOC investigation), you should refrain from discarding or destroying any documents related to your current affirmative action plan.

D. Government Reporting (EEO-1 and VETS-100/100A)

In addition to those primary aspects of affirmative action compliance described above, covered contractors and subcontractors must annually prepare and submit both EEO-1 and VETS-100/100A reports to the government by September 30 of each year. Although all private employers with 100 employees or more must prepare annual EEO-1 reports, covered contractors and subcontractors must identify themselves as such on those reports. The EEO-1 report collects data about gender and race/ethnicity by type of position. Contractors are required to maintain three years of EEO-1 reports as part of their AAPs.

Likewise, employers who fall under the coverage of VEVRAA are required to submit VETS-100 and/or VETS-100A reports (for contracts dated 12/31/03 or later). This report similarly collects data about the number and type of protected veterans in an employer's workforce. Visit <http://www.dol.gov/vets/programs/fcp/main.htm> for additional information.

Why Is It Important To Comply With Your Affirmative Action Obligations?

A. Enforcement by the OFCCP

The OFCCP is part of the DOL's Employment Standards Administration with enforcement authority for Executive Order 11246, the Rehabilitation Act, and VEVRAA. It has the authority to enforce technical affirmative action compliance – that is, to determine whether a company has a plan in place, has identified minority and female underutilization and has set goals, is using various recruitment sources, is maintaining all of the correct reports, and so forth – as well as to seek relief for any “class-wide” or individual discrimination identified during the auditing process.

1. Audits

The OFCCP audits AAP compliance by using its annual audit selection data system, the Federal Contractor Selection System (“FCSS”) to randomly select contractors for compliance evaluations. The OFCCP conducts four types of compliance evaluations:

- **Compliance Review** – a comprehensive review of all components of a contractor’s affirmative action plan. In addition to a desk audit, the review may include an on-site review and off-site analysis;
- **Focused Review** – an on-site review that focuses on one or more components of a contractor’s affirmative action compliance;
- **Off-Site Review of Records** – the receipt and review by the OFCCP of documentation related to a contractor’s employment processes to ensure compliance with affirmative action rules and regulations;
- **Compliance Check** – an abbreviated review of a contractor’s record-keeping practices to ensure compliance with the affirmative action rules and regulations. A compliance check may be

followed by a more expansive evaluation, as appropriate.

The OFCCP will send a scheduling notice informing your company it has been selected for a compliance review. Attached to the scheduling notice will be an itemized list of information your company must submit within 30 days, including current Executive Order 11246, Rehabilitation Act, VEVRAA affirmative action plans, and supporting documentation reflecting the analyses and documentation discussed above.

The OFCCP will review your submission primarily for indications of statistically significant adverse impact in your selection procedures – hires, promotions, and terminations (for which it will use the personnel activity data summaries) or disparities in your compensation practices. If the OFCCP finds adverse impact or salary disparities, you can expect either a focused, or full-blown on-site review, and inquiries into pay or personnel selection practices.

If the OFCCP finds adverse impact or salary disparities, you can expect either a focused, or full-blown on-site review, and inquiries into pay or personnel selection practices.

2. Aggressive OFCCP Enforcement

The OFCCP recently instituted a new enforcement methodology called Active Case Enforcement or ACE. ACE is consistent with, and in furtherance of, the OFCCP’s commitment to aggressively enforce the equal employment obligations of federal

contractors. ACE allows the OFCCP to expand the focus of compliance reviews while affording them the flexibility to obtain an assortment of information, in various forms, from a contractor. ACE is a significant departure from the way the OFCCP conducted audits in the past and will greatly alter how the OFCCP assesses your company's compliance with its affirmative action-related equal employment obligations.

For starters, the OFCCP is no longer focusing just on class or systemic issues of discrimination. The agency is now operating under the assumption that indicators of discrimination may be of an individual and/or systemic nature. This expanded focus on individual discrimination will likely result in more in-depth audits of your company's employment processes, even where there are no indicators of systemic discrimination.

In addition, the OFCCP is currently utilizing a compensation threshold test that looks for differences in pay of \$2,000 or two percent between individuals that share the same job title. If your company fails this test (and you will fail because virtually every employer fails this test) the OFCCP will request exceptionally detailed compensation information for your workforce so they can look into the nitty-gritty details of your compensation practices.

Under this new philosophy, there is a greater likelihood your company will receive an on-site visit from the OFCCP. In addition to review of your data triggering an on-site review, under ACE, your company can also be automatically and randomly selected for a focused review by the FCSS. A focused review requires an on-site review by the agency, even in the absence of any indicators of discrimination.

Additionally, if your company is the 25th company selected for compliance evaluation, it will be slated for an automatic full compliance review, including an on-site visit, regardless of whether any problematic employment processes are identified.

This is an internal quality check measure implemented by the OFCCP, as a way to monitor its auditing process.

B. Consequences of Not Being in Compliance

The OFCCP has a number of penalties and deterrence mechanisms for use at its discretion in situations of contractor noncompliance. In the event of an OFCCP allegation/finding of discrimination during an audit, either through a conciliation (settlement) process or after an administrative hearing (or court proceeding), the following remedies may be required by the agency:

- Back pay awards or other "make whole" remedies (e.g., job offers, reinstatement, benefits, lost overtime, front pay, bonuses, seniority, etc.) for "victims" of discrimination identified by the OFCCP. Each year the agency obtains millions in back pay through settlement or litigation.
- Compensation adjustments (proactive and/or retroactive) to address pay equity issues.
- Other diversity- and EEO-related measures mandated by the OFCCP under a Conciliation Agreement (e.g., management training, outreach efforts, etc.).
- Required submission of progress reports to the OFCCP regarding the corrective action ordered by the agency.

A noncompliant company may also be subject to the following:

- Withholding of contract progress payments,
- Suspension or cancellation of a contract in whole or in part, and
- Debarment from future federal contracts.

In addition, noncompliant employers are unable to certify or substantiate compliance with federal affirmative action obligations on RFPs, which increasingly include this requirement.

Other Obligations Of Government Contractors

In addition to affirmative action and equal employment opportunity obligations, companies that do business with the federal government have a plethora of additional obligations to which they are required to adhere. Below is a brief discussion of some of the obligations that may apply to your company. As the federal regulatory landscape is always changing, you should check with legal counsel or other advisor(s) at the time you enter into a contract with the federal government to make sure you fully understand the extent of your obligations, to avoid any surprises.

A. E-Verify

E-Verify is an Internet-based system operated by the Department of Homeland Security (“DHS”) and U.S. Citizenship and Immigration Services (“USCIS”) for use by employers to verify the eligibility of an employee to work in the United States. As a federal contractor, if you have a contract with a term of performance of 120 days or longer valued at \$100,000 (\$3,000 for sub-contractors) or more, you are required to agree to use E-Verify to verify the employment eligibility of (1) all employees you hire during the contract term that will be performing work within the United States, and (2) all individuals you assign to perform work in the United States on the federal contract. Verification of employment must be completed within three business days after a newly hired employee’s start date, with a couple of exceptions.

Regardless of whether you are a contractor or subcontractor, it is important to note pre-screening of candidates is not permitted. The E-Verify system is to be used for checking the eligibility of individuals only after the employee has been offered the job and has accepted.

If you are awarded a contract or subcontract, which requires you to utilize E-Verify, you will have 30 calendar days to enroll in the E-Verify

program after the contract award date. USCIS has published an E-Verify users’ manual which can be found at http://www.uscis.gov/files/natedocuments/E-Verify_Manual.pdf.

B. Davis-Bacon and Related Acts

1. Prevailing Wage Requirement

The Davis-Bacon Act (“DBA”) is a federal law, which establishes the requirement for paying prevailing wages on projects involving the construction, alteration, or repair (including painting and decorating) of public buildings or public works. DBA states all government construction contracts over \$2,000, to which a federal agency or the District of Columbia is a party, must include provisions for paying workers on-site no less than the local prevailing wages and benefits as set by the DOL.

The Davis-Bacon Related Acts (“DBRA”) extended DBA prevailing wage requirements to federally assisted construction activities.

2. Record-Keeping Requirement

As evidence of their compliance with the requirement to pay workers the prevailing wage, covered contractors must maintain records during the course of the work and for three years after job completion reflecting the following:

- Name, address, and Social Security Number of each employee
- Each employee’s work classification(s)
- Hourly rates of pay and contributions for fringe benefits or their cash equivalents
- Daily and weekly numbers of hours worked
- Actual wages paid and deductions made
- If applicable, detailed information re: fringe benefits and approved apprenticeship or trainee programs

3. Certified Payroll-Reporting Requirement

Covered employers must provide the contracting

agency, on a weekly basis, a certified copy of all payrolls providing the information listed above for the previous week's payroll period. The Wage and Hour division of the Department of Labor has created a standard form contractors can utilize to submit the information (<http://www.dol.gov/whd/forms/wh347.pdf>). Each payroll submitted must include a "Statement of Compliance." The language required for the Statement of Compliance is included in the standard WH-347 form provided by the Agency.

4. Notice Requirements

Every contractor or subcontractor who performs work covered by the DBA/DBRA must post an "Employee Rights Under the Davis-Bacon Act" poster at the work site. The poster must be displayed in a prominent and accessible place where it can be easily seen by employees. The contractor must also post the applicable wage scale. A copy of the poster can be downloaded from the following link: <http://www.dol.gov/whd/programs/dbra/wh1321.htm>.

5. Consequences of Noncompliance

If a contractor or subcontractor disregards its obligations under the DBA/DBRA, in addition to back pay that may be owed, it may be subject to contract termination and debarment from awards of future contracts for up to three years. In addition, payments to a contractor or subcontractor may be withheld to cover unpaid wages and/or liquidated damages that result from overtime payment violations.

C. Service Contract Act

The Service Contract Act (SCA), like the DBA, requires that area prevailing wage determinations and minimum fringe benefit payment requirements be paid by covered contractors. While the DBA applies to construction contracts, the SCA applies to certain contracts entered into with a federal agency or the District of Columbia, which provide services through "service employees." A "service employee" is a worker that performs services but is not an executive, administrative, or professional employee under the Fair Labor Standards Act. The SCA requires

contractors and subcontractors performing services through federal contracts in excess of \$2,500 to pay service workers no less than the prevailing wage rates and fringe benefits found in the area where the services are being provided, based on each worker's job classification. These rules and benefits are determined by the DOL.

The SCA has record-keeping and notice requirements as well as consequences for non-compliance similar to the DBRA. Unlike the DBA, however, there is no certified payroll requirement under the SCA.

D. False Claims Act

The False Claims Act ("FCA") protects against fraud in federally funded contracts or programs. The FCA prohibits a person or entity from knowingly presenting, or causing to be presented, a fraudulent claim for payment or approval to the federal government and from knowingly making, using or causing to be made a false record or statement to get a false or fraudulent claim paid or approved. The type of conduct that can be prosecuted as a crime, or the subject of civil litigation, under the FCA ranges from billing for goods and services that were never delivered or rendered to charging more than once for the same goods or services, also known as "double billing," and can even include participating in kickbacks. Recently, there has been a rise in FCH cases concerning alleged violations of the DBA/DBRA and the SCA.

The FCA encourages individuals to report misconduct involving false claims. The Act allows an individual with actual knowledge of allegedly false claims to file a lawsuit on behalf of the U.S. Government. This is known as a "qui tam" suit. As an incentive, these "whistle-blowers" get to keep 15-30 percent of the government's recovery. As a result, if you are a contractor, it is imperative you put measures in place to educate your employees about corporate ethics and proper record keeping and reporting on your federal contracts.

E. Drug-Free Workplace Act of 1988

The Drug-Free Workplace Act of 1988 ("DFWA") requires certain federal contractors to agree

to provide drug-free workplaces as a condition of receiving a contract from a federal agency. Contractors are subject to the requirements of the DFWA of 1988 if the contract with the government is valued at \$100,000 or more, will be performed in the United States, and the primary purpose of the contract is something other than the acquisition of commercial items. Visit <http://www.dol.gov/elaws/asp/drugfree/screenfq.htm> for the DFWA's requirements.

F. The Government Funding Transparency Act of 2008

The Government Funding Transparency Act of 2008 ("GFTA") requires the Office of Management and Budget ("OMB") to establish a free, public Web site containing full disclosure of all federal contract award information. As a part of the rule requirements, federal contractors are required to report the names and total compensation for the contractor's five most highly compensated officials and first-tier subcontractor awards on contracts expected to reach \$25,000 or more. These reports are submitted to the Federal Funding Accountability Transparency Act Sub-award Reporting System at <http://www.fsr.gov>.

G. Defense Contract Audit Agency Requirements

If you have a contract with the United States Department of Defense, your records are subject to audit by the Defense Contract Audit Agency ("DCAA"). In addition to providing auditing services for Department of Defense contracts, the DCAA performs audits for some other government agencies. The DCAA is concerned with identifying and evaluating all contractor activities that contribute to or have an impact on the costs of government contracts. To do this, the DCAA evaluates contractors' internal cost-control systems, management policies, accuracy of cost representations, adequacy and reliability of records, and accounting systems.

The DCAA has stated "timekeeping procedures and controls on labor charges are areas of utmost concern." One of the areas the DCAA will pay particular attention to is whether you have a

timekeeping system to track an employee's time spent on each work activity. In connection with this, the DCAA evaluates whether costs are allocated to coincide appropriately with each employee's division of time.

As mentioned before, under the False Claims Act, there is also risk of civil and criminal exposure, if a contractor knowingly allows employees to make false charges in connection with a federal contract. It is critical, therefore, that you have labor-charging internal control systems in place and your management educates employees on their responsibility to accurately record their time charges on federal contract work. Thus, if you have not already done so, you should strongly consider implementing a timekeeping system, like ADP's timekeeping solution system, to allow for accurate and efficient tracking of employee time.

H. Executive Orders

Upon coming into office, President Obama issued several Executive Orders implementing various rules and expectations for government contractors. The following discussions touch briefly on four Executive Orders that have significant implications for federal contractors.

1. Executive Order 13494: Economy in Government Contracting

Based on the premise of promoting economy and efficiency in government contracting, President Obama declared certain labor relations costs, not directly related to a contractor's provision of goods or services to the government, should not be allowed for reimbursement or payment by the contracting agency. Specifically, only those costs incurred in maintaining a satisfactory relationship between the contractor and its employees, including costs of union stewards and labor management committees, are allowable for payment.

2. Executive Order 13495: Nondisplacement of Qualified Workers

Based again on the notion of government efficiency and economy, the President set forth a policy that government service contracts shall contain a clause requiring that successor contractors and subcontractors give employees employed on

a predecessor contract for the performance of a similar service at the same location a “right of first refusal” of employment under the successor contract in positions for which they are qualified. The President reasoned that the government will benefit from the efficiency provided by continuity of service from a carryover workforce. The President’s Executive Order also requires contractors to include a written commitment to the nondisplacement of qualified workers in their solicitations for service contracts that succeed contracts for similar work at the same location. As of November 2012, the final regulations putting this Executive Order into effect have not been issued.

3. Executive Order 13496: Notification of Employee Rights Under Federal Labor Law

In an effort to promote an environment in which federal contracts for goods or services will be performed by contractors whose work will not be interrupted by labor unrest, President Obama signed into law an Executive Order mandating that federal contractors inform employees of their rights under the National Labor Relations Act (“NLRA”).

The Executive Order states federal contractors and subcontractors, subject to the NLRA, must post a notice containing information proscribed by the DOL, informing employees of their rights under the NLRA, in all plants and offices where employees are performing work on the federal contract. Contractors are also required to include this language in their contracts and purchase orders.

4. Executive Order 13502: Use of Project Labor Agreements for Federal Construction Projects

A project labor agreement (“PLA”) is a prehire collective-bargaining agreement designed to systemize labor relations at a construction site. The President’s Executive Order gives federal agencies the authority to require contractors to enter into PLAs for “large-scale” construction projects, each of which is a project with a total cost exceeding \$25 million.

Although the Executive Order and the corresponding regulations apply only to large-scale construction projects, the wording of both the Executive Order and the implementing rules reiterate federal

contracting agencies are “not prohibited” from requiring PLAs on projects that do not fall within the \$25 million threshold. Given this, and the effect PLAs can have on labor and other project costs, it is advisable that contractors submitting bids on construction projects diligently review each contract solicitation to determine if a PLA will be required. This will allow the contractor to understand the extent to which the PLA will affect the costs of your work and you can adjust your bid accordingly.

I. Ethics Requirements

Contractors with federal contract awards of \$5 million or more (entered into on or after December 12, 2008) are subject to Federal Acquisition Regulation ethics rules and must implement written codes of business ethics and conduct, an employee awareness and compliance program, and an internal control system. In addition, covered contractors must self-disclose credible evidence of violations of certain criminal laws or the civil False Claims Act and “significant over-payment.”

J. Security Clearance

Some federal contracts require contractors to have the ability to access classified information. To have access to U.S. classified information and/or facilities there must be a bona fide procurement requirement. When this need has been established, a procuring agency of the government, or cleared contractor in the case of subcontracting, may request the clearance for the bidding contractor. The request for clearance must come from the contracting agency; the contractor cannot apply for security clearance on its own accord.

Once the contractor has obtained facility clearance, it can then request the applicable security clearance for its employees. The process of obtaining both a Facility Security Clearance and Personnel Security Clearance are established by the Defense Security Service (“DSS”), which is the interface between the government and contractors who are in need of obtaining clearance, and set out on the DSS’s Web page at http://www.dss.mil/isp/fac_clear/per_sec_clear_proc_faqs.html{facility}; http://www.dss.mil/disco/indus_disco_process_applicant.html{personnel}.

Conclusion: What You Should Do Now

As you can tell, doing business with the federal government brings with it a lot of compliance obligations. Understanding and taking a proactive approach to your affirmative action and EEO responsibilities, as well as compliance with other applicable laws and regulations, can allow you to have a beneficial and rewarding experience as a federal contractor and minimize claims that you are not in compliance with the law. In addition to taking the steps necessary to comply with the laws touched upon above, engaging in the following practices now will put you ahead of the game and allow you to submit a compliant AAP when your company is selected for an audit.

- If required, develop and implement an AAP
- Post jobs with the appropriate state agency
- Engage in meaningful outreach regarding females, minorities, veterans, and individuals with disabilities – with at least two sources for each group
- Institute an Applicant Tracking System
- Analyze pay equity annually
- Request race, gender, and veteran status of current employees and new hires

About ADP TotalSource®

ADP TotalSource provides employers with a comprehensive human resource outsourcing solution that can help reduce the costs and complexities related to employment and human resource management. For companies and HR departments that seek to return their focus to their core processes, ADP TotalSource can help remove administrative and regulatory burdens, allowing more effort to be expended on strategic initiatives. Our affordable outsourcing opportunities have the ability to significantly help reduce operating costs and streamline business operations, paving the way for growth and competitive gains. To learn more about how ADP TotalSource can help your business, call **1-800-HIRE-ADP (800-447-3237)** or visit us online at **www.adptotalsource.com**.

About Jackson Lewis

Jackson Lewis is a strategic alliance partner with ADP TotalSource. For more than 50 years, Jackson Lewis has placed a high premium on preventive strategies and positive solutions in the practice of workplace law. With nearly 700 attorneys practicing in 48 offices nationwide, Jackson Lewis has a national perspective and sensitivity to the nuances of regional business environments. **www.jacksonlewis.com**.



IN THE BUSINESS OF YOUR SUCCESS®



HR. Payroll. Benefits.

This material is subject to change and is provided for informational purposes only and nothing contained herein should be taken as legal opinion, legal advice, or a comprehensive compliance review.

The ADP logo, ADP, ADP TotalSource and In the Business of Your Success are registered trademarks of ADP, Inc. All other trademarks and service marks are the property of their respective owners.

MKT195 1113 Printed in the USA Copyright ©2013 ADP, Inc.