Understanding Affirmative Action Plan
And
Government Reporting Obligations Applicable To
Federal Government Contractors And Sub-
Contractors

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EXECUTIVE SUMMARY

This memorandum overviews the following issues relating to the obligations of employers who are federal contractors:

A. The employer’s obligation to establish and implement affirmative action plans with respect to employment of minorities, women, the disabled, and veterans (Parts I to VII).

B. Compliance reviews and audits by the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) (Part VIII).

C. The OFCCP’s aggressive use of “disparate impact” analyses to uncover systemic discriminatory conduct (Part IX. A.)

D. The definition of who is an “applicant”, especially with respect to job seekers over the Internet (Part IX. B.)

E. The employer’s obligation to submit annual reports to the federal government that break down the workforce by job category (EEO-1); race, ethnicity, and gender (EEO-1); and veteran status, including disabled veterans (VETS 100 or 100A) (Part X).

This memorandum is provided for purposes of conveying general information about new regulatory developments; it is not a substitute for legal advice addressing an organization’s particular circumstances. Federal contractors are advised to seek out the advice of industry professionals and/or legal counsel in making decisions about the nature of their organizations’ affirmative action and EEO reporting obligations.
I. FEDERAL CONTRACTOR STATUS

Direct Federal Contractors – companies providing goods or services directly to a federal government agency. For example, in the manufacturing industry, a company that provides medical equipment/supplies to the federal government or, in the banking industry, an issuer or redeemer of U.S. Savings Bonds or notes or acting as a depository of federal funds. Generally, employers who receive federal money through grants need not comply with the affirmative action regulations.

Federal Sub-Contractors – companies providing goods or services to other companies with direct federal contracts. The goods or services provided by the sub-contractor must be necessary to the performance of the direct government contracts.

II. FEDERAL CONTRACTOR AFFIRMATIVE ACTION REGULATIONS

Executive Order 11246 (color, gender, national origin, race, and religion)¹

Section 503 of the Rehabilitation Act of 1973 (disability)²

Vietnam Era Veterans Readjustment Assistance Act of 1974³

¹ To read Executive Order 11246 and the regulations issued thereunder, go to http://www.dol.gov/esa/ofccp/regs/compliance/ca_11246.htm.

² To read Section 503 of the Rehabilitation Act of 1973 and the regulations issued thereunder, go to http://www.dol.gov/esa/ofccp/regs/compliance/ca_503.htm. For purposes of Section 503 of the Rehabilitation Act of 1973, the definition of a “disability” is the same as under the Americans with Disabilities Act. The text of the ADA is available at http://www.eeoc.gov/policy/ada.html.

³ To read the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 and the regulations issued thereunder, go to http://www.dol.gov/esa/ofccp/regs/compliance/ca_vevraa.htm. The definition of “veteran” is the same for both the Vietnam Era Veterans Readjustment Assistance Act of 1974 and VETS 100 or 100A reporting purposes (see Part X. B.).

III. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

The Office of Federal Contract Compliance Programs (OFCCP), within the U.S. Department of Labor, is the federal agency that enforces the federal contractor affirmative action requirements through compliance audits and complaint investigations. Its website is www.dol.gov/esa/ofccp.

IV. WHEN IS AN AFFIRMATIVE ACTION PLAN REQUIRED?

An employer is required to have an affirmative action plan (AAP) if they have (1) fifty (50) or more employees and (2) $50,000 or more in federal contracts. It should be noted that these requirements apply to federal sub-contractors as well as contractors. Contracts in excess of $10,000 are subject to regulatory requirements (i.e., equal employment opportunity clause in contracts).

As noted in Part II above, there are three different regulations that control the AAP requirements: for minorities and women (Executive Order 11246), for the disabled (Section 503 of the Rehabilitation Act of 1973), and for veterans (Vietnam Era Veterans Readjustment Assistance Act of 1974). Therefore, there are three different plans required – one to satisfy each set of regulations. The AAP requirements under Executive Order 11246 are discussed in Part V below. The AAP requirements under Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974 are discussed in Part VI below.

4 With respect to federal contracts entered into on or after December 1, 2003, the dollar threshold for AAPs required for veterans under the Vietnam Era Veterans Readjustment Assistance Act of 1974 is $100,000. See http://www.dol.gov/esa/ofccp/regs/compliance/ca_vevraa.htm.
V. WHAT IS REQUIRED IN AN AFFIRMATIVE ACTION PLAN UNDER EXECUTIVE ORDER 11246

Preparing and implementing an affirmative action plan under Executive Order 11246 requires three distinct projects: 1) establishing statistical placement goals for minorities and women in all underutilized job groups; 2) designing outreach/recruitment programs that focus and document the company’s specific good faith efforts to achieve the established placement goals; and, 3) analyzing personnel selections decisions (applicant flow, hires, promotions, terminations) and compensation practices to ensure the company’s personnel procedures are fair and consistent.

A. The Goal-Setting Process

1. When Must Affirmative Action Goals Be Established?

The company must conduct a separate "Utilization Analysis" for each establishment with fifty or more employees (or in the case of contractors that prepare functional affirmative action plans, each functional business unit). A utilization analysis compares the representation of minorities and women by job group with their statistical “availability” in both the surrounding labor area as well as from internal feeder groups (i.e., promotable and trainable incumbent staff) within the company’s own workforce.

2. What Is the Job Group Analysis?

Preparation of the Job Group Analysis requires dividing the workforce into groupings of “similar” job titles, based upon similarity of function, responsibilities,

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5 The Federal Contracts Compliance Manual (FCCM) defines “minorities” as: “Men and women of those minority groups for whom EEO-1 reporting is required; i.e., Black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native. As used in this Manual, the term may mean these groups in the aggregate or an individual group. See EEO-1 for further explanation.” FCCM, Section 1B, available at http://www.dol.gov/esa/ofccp/regs/compliance/fccm/ofcpch1.htm#1B.

6 More detailed information regarding each of these elements can be found in the implementing regulations for Executive Order 11246: 41 CFR Part 60-2, available at http://www.dol.gov/dol/allcfr/ESA/Title_41/Part_60-2/toc.htm. See also footnote 1 above.
opportunity for advancement and salary. Job groups generally are subdivisions of EEO-1 Categories. Thus, rather than having a single “Officials & Managers” job group encompassing managers with widely-differing responsibilities, the company often distinguishes among the different levels and, sometimes, types of management. For example, job groups based upon levels could be Senior Managers, Mid-level Managers and Junior Managers. On the other hand, job groups based on type could be Production Managers versus Sales Managers.

3. **How to Prepare an Availability Analysis**

Once job groups are established, a statistical Availability Analysis must be prepared. This analysis is used to determine the hypothetical “availability” of qualified minorities and females to fill employment openings in each job group in the company’s workforce. To determine this hypothetical availability, the company identifies the approximate percentage of time that job openings in a particular job group are filled either internally (from promotion or transfer from other job groups in the workforce) or externally (from the outside labor force).

For the internal percentage, the company identifies the specific job group(s) within the workforce that are “feeder” groups for the job group being analyzed. For the external percentage, the company identifies the geographic area (e.g., county, multi-county, state, multi-state or national) within which it recruits when it has job openings in the job group. The company next must utilize specific external labor force occupational data that correspond to the job titles in the job group to determine who in the outside labor force may have the skills/experience necessary to fill the job openings. The internal and external data is aggregated and then broken down into the percentage of minorities and non-minorities, males and females. The results are hypothetical “availability” percentages.
4. **Conducting the Utilization Analysis and Goal Setting**

The Utilization Analysis compares the percentage of incumbent minority and female employees in each job group with their “availability” percentage, as determined by the Availability Analysis, described above. Where job group representation of minorities or females is less than availability, that job group is said to be “underutilized” and the company may need to establish a “goal.” However, a goal only will be established in those job groups where the underutilization is “statistically significant.” In order to determine if the underutilization is significant, several recognized tests of statistical significance may be used, including:

a. the Whole Person rule;

b. the 80% rule; and

c. the Two Standard Deviation rule.

5. **Good Faith Efforts: What Efforts Must the Company Undertake in Job Groups Where Goals Have Been Established?**

a. **Making and Documenting Good Faith Efforts**

In each job group where a goal has been established, the company has an obligation to make and document “good faith efforts” when there are job openings during the affirmative action plan year. These efforts may include external recruitment efforts, such as: 1) placing employment advertisements -- with an EEO “tag-line” -- in newspapers and minority or female journals/periodicals; 2) sending job opening announcements to minority and female community organizations (e.g., Urban League, NAACP, etc.); 3) sending job opening announcements to educational institutions; and, 4) participating in local career fairs. In addition, these efforts may include internal actions as posting job openings within the property or company-wide and developing mentoring and training programs for junior employees.
All good faith efforts to achieve the company’s goals must be documented and copies should be maintained in a good faith efforts binder or folder. Whether the company actually achieves each of its goals is not as important as its ability to demonstrate that it has made good faith efforts. In the event of a government audit, the company must be able to show that it has either achieved each of its goals or produce documentation demonstrating that it has taken steps to address the underutilization in each job group where a goal has been established.

VI. WHAT IS REQUIRED IN AN AFFIRMATIVE ACTION PLAN UNDER SECTION 503 OF THE REHABILITATION ACT OF 1973 AND THE VIETNAM ERA VETERANS READJUSTMENT ASSISTANCE ACT OF 1974

The disabled and veteran affirmative action plan (AAP) requirements pursuant to Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) are less onerous than the requirements under Executive Order 11246. For the disabled and veteran AAPs, there are no required statistical analyses. Rather, good faith outreach efforts to the disabled and veteran communities is stressed. Compliant AAPs for purposes of the Rehabilitation Act and VEVRAA should include the following elements:

1. Policy statement;
2. Review of personnel processes;
3. Physical and mental qualifications;
4. Reasonable accommodation to physical and mental limitations;
5. Harassment prevention;
6. External dissemination of policy, outreach and positive recruitment;
7. Internal dissemination of policy;
8. Audit and reporting system;
9. Responsibility for implementation; and
10. Training.  

VII. **ANALYZING PERSONNEL SELECTION DECISIONS – ADVERSE IMPACT ANALYSIS**

The company is required to record and analyze personnel activity data, including applicant flow, hires, promotions, and terminations, to determine whether the company's selection procedures have an “adverse impact” on women or minorities. The Impact Ratio Analysis ("IRA") is the OFCCP’s standard method of identifying adverse impact. An IRA first determines whether there is a disproportionately negative impact upon protected group members resulting from the company's selection procedures. For example, if the company hired 50 of 100 male applicants (50% selection rate), but only 12 of 48 female applicants (25% selection rate), there is adverse impact. There is adverse impact because the selection rate of females (25%) is less than the selection rate of males (50%).

Where adverse impact is detected, the company must ascertain whether the adverse impact is “statistically significant” by determining, initially, whether the protected group selection rate is at least 80% of the non-protected group selection rate. Furthermore, whenever there is at least a two standard deviation difference between the selection rates of the protected group and the non-protected group, the OFCCP will seek an explanation for such “significant” adverse impact. If the explanation is not

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7 More detailed information regarding each of these elements can be found in the implementing regulations:

Section 503 of the Rehabilitation Act of 1973: 41 CFR 60-741.44, available at [http://www.dol.gov/dol/allcfr/Title_41/Part_60-741/41CFR60-741.44.htm](http://www.dol.gov/dol/allcfr/Title_41/Part_60-741/41CFR60-741.44.htm); and

VEVRAA, for federal contracts entered into on or after December 1, 2003: 41 CFR 60-300.44, available at [http://www.dol.gov/dol/allcfr/Title_41/Part_60-300/41CFR60-300.44.htm](http://www.dol.gov/dol/allcfr/Title_41/Part_60-300/41CFR60-300.44.htm).


See also footnotes 2 and 3 above.
satisfactory, then the OFCCP may seek a “make-whole” remedy. The OFCCP considers any difference of two or more standard deviations between the selection rates of protected and non-protected group members to be statistically significant. Simply put, two standard deviations or greater means there is a less than 5% chance that the difference could occur by chance alone. In other words, any difference of two or more standard deviations is statistically unlikely to be a result of chance. If deemed not statistically significant, the company must continue the analysis by ascertaining the “overall selection rate” for the group and applying that rate to the number of protected group members in the selection pool. Multiplying the overall selection rate by the number of protected group applicants results in the “expected” number of protected group selections. The expected number of selections is compared with the actual number of selections.

Applying this approach to the example used above, the overall selection rate would be 42% (62 total hires -- 12 female and 50 male -- divided by 148 total applicants -- 48 female and 100 male). When the overall selection rate (42%) is applied to the number of female applicants (48), this results in 20 expected female hires. The difference between the expected number of female hires (20) and the actual (12) is 8. Since the difference between the expected and actual number of female selections is greater than a whole person, there is statistically significant adverse impact. Statistically significant adverse impact is an indication of potential discrimination.

The OFCCP has implemented an aggressive approach to investigating adverse impact. According to the Uniform Guidelines on Employee Selection Procedures, “[i]f [the applicant and hire data] show that the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact.” After the OFCCP has made certain it understands the overall selection process in detail, it will conduct a selection stage analysis. To

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8 In the case of hiring, the selection pool is all applicants for the position(s). In the case of promotions, the selection pool is either all incumbents eligible for the promotion or those employees who actually bid for the position. In the case of terminations, the selection pool is all similarly situated incumbents who could have been terminated from employment.
determine the stage at which each non-selected applicant “fell out” of the selection process, the OFCCP will demand production of all applications, resumes, pre-employment test results, interviews notes, drug screen results, background checks, etc. Moreover, the OFCCP will demand the contractor identify the stage at which each applicant fell out. If the contractor is unable to do so, the OFCCP will glean that information from the personnel documents it has obtained from the employer and often supplement that information by contacting non-selected applicants to determine their recollection regarding when they fell out of the selection process. Based upon all these data, the OFCCP will conduct adverse impact analyses for each selection stage.

In each area where adverse impact is identified, the company must confirm that the selection decisions are supported by legitimate, non-discriminatory business reasons. In the event the OFCCP identifies statistically significant adverse impact, and the company is unable to justify its selection decisions, the Agency will seek monetary damages on behalf of the “affected class” of protected group members. The OFCCP often is very successful in extracting huge back-pay awards in such circumstances.

VIII. OFCCP COMPLIANCE EVALUATIONS

A. Submission Stage

The routine compliance review most often begins with a telephone or written inquiry from the OFCCP about the company’s status as a federal contractor. If the inquiry is made by telephone, the company should ask the OFCCP to submit its requests in writing. By doing so, the contractor can be certain that the inquiry is valid. In addition, the company can obtain additional time to prepare its plan for submission. After the company submits the response to the information request, it will receive a scheduling notice.

The scheduling notice informs the company that it has been selected for a compliance review and as a consequence, must submit certain information within thirty
days. It also alerts the company to the fact that its I-9 forms will be reviewed during the on-site portion of the audit (if necessary). The information that must be submitted within thirty days is set forth in an itemized listing attached to the notice. Briefly stated, the itemized listing requires the submission of the contractor’s current affirmative action plan as well as certain portions of the prior year’s plan, including placement goals, personnel activity data and a report on achievement of the prior year’s goals.

**B. Desk Audit Stage and Request for Compensation Data**

In order to facilitate the identification and resolution of cases of systemic discrimination, the OFCCP uses a process known as Active Case Management (ACM). ACM begins with an abbreviated desk audit where the OFCCP analyzes contractor personnel activity and compensation data to identify indicators of potential systemic discrimination. If systemic discrimination indicators are discovered, then the OFCCP conducts a full desk audit. If issues cannot be resolved during the desk audit, then the OFCCP may conduct a focused on-site inspection.

During the desk audit stage, the OFCCP reviews the contractor’s document submission and identifies areas of inquiry for the on-site stage of the compliance review. Generally, the Compliance Officer reviews the contractor’s affirmative action plan and the supporting documentation to determine whether the affirmative action plan is current, complete, reasonable and acceptable.

On December 3, 1999 the Office of Management and Budget, cleared the way for the OFCCP to include in its initial scheduling letter a requirement that contractors submit summary compensation data during the desk audit stage. Thus, within thirty days of receiving a scheduling notice contractors must now comply with the following:

Please provide annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade or level showing total number of employees* by race and gender and total compensation by race and
gender. Present these data in a manner that is most consistent with your current compensation system. If the information is maintained in electronic format, please submit in that format. . . . You may also include any other information you have already prepared that would assist us in understanding your compensation system(s).

*For this purpose, the method used to determine employee totals by the contractor should be the same as that used to determined employee totals in the workforce analysis for the AAP.

The OFCCP uses such compensation data to conduct an aggressive form of compensation analysis.

After the desk audit phase is complete, the compliance officer will contact the contractor about arranging a date for the on-site review. The company should ensure the OFCCP provides advance written notice of the information that will be demanded on-site.

C. **On-site Review**

The three main purposes of the on-site review are to (1) investigate potential problem areas which were identified during the desk audit stage, (2) verify the contractor’s implementation of its affirmative action plan, and (3) address potential violations. At the beginning of the on-site review, the OFCCP holds an entrance conference, during which it describes what will occur during the on-site phase of the compliance review. The types of activities conducted during the on-site review include:

- Confirming that the required EEO posters, policy statements, invitations for self-identification, and notices of the location and hours of availability of AAPs are posted;
- Interviewing employees and/or management personnel;
- Investigating a contractor’s compliance with the terms of prior conciliation agreements or letters of commitment;
• Inspecting the facility to evaluate the working conditions, the kind of work performed in different job titles, and the accessibility of the personnel process to disabled employees and applicants;

• Conducting a visual inspection of the I-9 forms;

• Analyzing the contractor’s implementation of its AAP requirements;

• Analyzing the contractor’s compliance with the Guidelines on Discrimination because of Religion or National Origin; and

• Analyzing the contractor’s compliance with the Rehabilitation Act and Vietnam-Era Veterans’ Readjustment Assistance Act.

As described more fully above, the OFCCP will also review a contractor’s personnel selection and compensation practices to ascertain their effect on minorities and females.

D. Exit Conference and Off-Site Analysis

At the close of an on-site review, the OFCCP typically asks to meet with the senior officer at the company. At this meeting, the compliance officer will discuss the findings of the review. The compliance officer may also advise the officer of the agency’s need to perform additional off-site analysis. At the conclusion of the compliance review, The OFCCP will issue a letter of closure listing identified violations (if any) and any need for remedial action.

IX. RECENT OFCCP ENFORCEMENT TRENDS

A. The OFCCP’s New, Aggressive Approach to Investigating Applicant Adverse Impact and Systemic Discrimination

While government contractors have spent most of their time and energy during the past few years focused on the Internet Applicant Rule and the proposed pay analysis guidelines, the OFCCP has – with little fanfare – substantially changed the way it investigates applicant adverse impact. This new, aggressive approach can be significantly more burdensome for contractors when defending audits and often
produces much stronger “cases” which the OFCCP either uses as leverage to demand large monetary settlements or, increasingly, takes to litigation.

Pursuant to the Uniform Guidelines on Employee Selection Procedures and the OFCCP’s regulations, government contractors always have been required to monitor personnel selection trends to ensure that employees and applicants are treated fairly and in a non-discriminatory manner in the employee selection process. Thus, when preparing affirmative action plans, personnel activity (applicants, hires, promotions and terminations) must be recorded and monitored and regular (at least annually, but preferably more frequent) analyses prepared. While a number of reputable statistical methods are acceptable, the most widely-used by the OFCCP and government contractors for reviewing personnel selection trends for “fairness” is an adverse impact analysis.

While contractors always have been obligated to conduct adverse impact analyses, until the past few years, the OFCCP tended to focus on other, more programmatic aspects of affirmative action compliance during audits, such as affirmative action goal achievement, good faith efforts and community outreach and support.

However, the OFCCP has transformed itself during the past few years from an agency concentrating on affirmative action and diversity to an agency focused on systemic discrimination. Specifically, the OFCCP spends the majority of its time and resources investigating indicators of potential systemic discrimination in contractors’ personnel selection processes and compensation systems.

While the OFCCP has worked hard to develop and implement new methods for investigating compensation systems during the past few years, they have had difficulty for many reasons, including the complexities and wide-ranging differences in contractors pay systems. In addition, the OFCCP encountered strong resistance from many in the contractor community to the complicated and burdensome methodologies the OFCCP proposed in its pay analysis guidelines issued in November,
2004 (which were issued as final guidelines on June 16, 2006). As a result of these difficulties, despite all the time and energy invested in discussing the topic of systemic pay discrimination, the OFCCP has spent relatively little time and resources during audits over the past few years actually conducting in-depth investigations of potential pay discrimination. Thus, while systemic pay analyses has been a very “hot topic” between the OFCCP and the contractor community, relatively few audits have resulted in detailed investigations of contractors’ pay systems and still far fewer have resulted in significant monetary settlements.

In contrast, the OFCCP has quickly and quietly developed new, rigorous methods for investigating adverse impact in employee selection processes and has used those new methods with increasing effectiveness in many audits throughout the country during the past few years. The vast majority of that money, in each of the three years, came from settlements resulting from OFCCP claims of systemic discrimination in contractors’ hiring processes due to indicators of statistically significant adverse impact. Furthermore, district-level OFCCP personnel have only now begun to become comfortable with these new methods, which will likely result in still more effective use of these methods and, most likely, more in-depth investigations of adverse impact and potential findings of systemic discrimination. We describe below the traditional methods the OFCCP has used to investigate adverse impact and the new methods which have produced increasing numbers of high-dollar systemic discrimination settlements.
1. **The OFCCP’s New, More Rigorous Method for Analyzing Adverse Impact**

   a. **The Conceptual Problem with the OFCCP’s Traditional Approach to Investigating Adverse Impact**

      While the OFCCP’s traditional method often was effective at uncovering possible discrimination in individual selection decisions – and at times resulted in findings of discrimination and back-pay settlements – during the past few years, the OFCCP realized that this approach was inconsistent with its increasing focus on systemic discrimination. Rather than investigating “systemic” aspects of a contractor’s overall selection process, the traditional approach focused on individual selection decisions, akin to a series of distinct EEOC charges against the same employer in which individual non-selected minority applicants filed charges separately alleging in each instance that particular a non-minority applicant who was less qualified was hired instead of them. In fact, the traditional method contradicted the OFCCP’s stated goal of no longer focusing on “onezees” and “twozees” (leaving those claims to the EEOC) and instead targeting potential discrimination at a systemic level.

   b. **The New “Systemic” Method for Analyzing Adverse Impact**

      In seeking a new approach for analyzing adverse impact, the OFCCP turned to its lawyers in the U.S. DOL’s Solicitors Office and to the Uniform Guidelines on Employee Selection Procedures. These resources provided a new method for investigating adverse impact consistent with the OFCCP’s developing focus on systemic discrimination. Specifically, the Guidelines provide that when an employer identifies statistically significant adverse impact in the overall selection process, the employer should isolate the specific “component” – or components – of the selection process that is causing the adverse impact. Once the employer has isolated the specific component of the selection process that is causing the adverse impact, it must investigate why that
component is producing adverse impact and either be able to defend the component (or components) as being job-related and consistent with business necessity or, if not, eliminate or modify the component so that it no longer causes adverse impact.

This approach requires that the employer continue at the “systemic” level, investigating the selection process at distinct stages across all the selections that occurred throughout the year. Thus, it permitted the OFCCP to claim it was focusing on systemic discrimination while still “drilling down” into the selection process to determine if discrimination had occurred.

c. The OFCCP’s Developing Investigatory Techniques in Support of New Method for Analyzing Adverse Impact

In order for the OFCCP to isolate the specific “components” of the selection process that cause adverse impact, the OFCCP first must gain a clear and detailed understanding of the specifics involved in the selection process in order to identify the specific components of the process. The OFCCP has interpreted “component” of the selection process to mean a distinct stage in the process at which a selection decision is made. For example, if Human Resources conducts a screening of applications at the outset of the process which leads to decisions regarding which applicants to refer on to Operations for further consideration and which to reject, that is a distinct stage, or “component”, of the selection process. Consequently, the OFCCP can conduct a separate adverse impact analysis to determine whether the HR screening decisions in the aggregate throughout the year produce adverse impact against minority or female applicants.

In order to gain a clear and detailed understanding of each stage in the selection process, the OFCCP first conducts an often extensive series of interviews with all company personnel who participated in the selection process in any way. For example, OFCCP now will typically interview all HR personnel and all managers who participated in screening applications, the interview process and made selection decisions at each point on the overall selection process. OFCCP also will typically seek
to interview all employees in the Job Group under review who were hired during the relevant period, which often results in dozens of interviews, at times more than one hundred. Furthermore, the OFCCP contacts and interviews as many non-selected applicants as possible (often contacting hundreds of applicants).

Through these series of extensive interviews, the OFCCP will develop a detailed written description of the overall selection process and each distinct stage within the selection process. The OFCCP will typically ask the contractor to review the written selection process description and acknowledge in writing that the description is accurate.

B. The OFCCP Internet Applicant Rule

On Friday, October 7, 2005, the OFCCP issued its long awaited final rule regarding the definition of Internet Applicant entitled “Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes.” The final rule went into effect on February 6, 2006 and the 90 day grace period expired on May 7, 2006.9

Under the final rule, an individual is considered an “Internet Applicant” if the following four criteria are met:

- The individual submits an expression of interest in employment through the Internet or related electronic data technologies;
- The contractor considers the individual for employment in a particular position;
- The individual’s expression of interest indicates the individual possesses the basic qualifications for the position; and
- The individual at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, removes himself

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9 During the 90 day grace period, a contractor was not cited for failure to comply with the rule’s provisions provided it: (1) demonstrated that it was taking reasonable steps to update its systems to comply with the rule, including a projected date of compliance, and (2) collected and maintained records according to the established procedures consistent with OFCCP recordkeeping requirements that existed prior to the new Internet Applicant rule.
or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.

1. **Background**

   For years, the contractor community and the OFCCP were divided on the definition of applicant. Since the definition of applicant determines the size of the pools used for adverse impact analysis, the stage at which a contractor identifies an applicant is significant. Identify early and the size of the pools (and thus potential liability) are greater. Identify later and the size of the pools (and potential liability) decrease. Many contractors insisted on counting applicants at the interview stage, which was the first point they could observe the race and gender of the applicant. This also was consistent with the belief of many contractors that “true” applicants were only those who were “minimally qualified.” The OFCCP, on the other hand, insisted this was too late in the process because too many individuals already had been screened out. The “pre-minimally qualified” were applicants too, the OFCCP argued; just not as qualified. Instead, it maintained the definition had to start earlier and that anyone who expressed an interest in employment was an applicant. This broad definition, the OFCCP asserted, could include all unsolicited resumes or everyone in an electronic applicant database. Not only did this exponentially increase the size of the applicant pool (and therefore, the potential for adverse impact), but it made collection of race and sex information very difficult. Adding to the confusion, the definition of applicant was not uniformly applied among the OFCCP’s various offices.

   With that as a backdrop, shortly after the 2000 presidential election, a governmental inter-agency task force, (consisting of the OFCCP, EEOC, the Civil Rights Division of the Department of Justice and Office of Personnel Management), was created to examine the thorny issue of defining “applicant.” After a wait of over three years, on March 2, 2004, the EEOC published in the Federal Register a proposed inter-agency guidance on the definition of applicant entitled “Adoption of Additional Questions and Answers to Clarify and Provide a Common Interpretation of the Uniform Guidelines
of Employee Selection Procedures as They Relate to the Internet and Related Technologies."

Shortly thereafter, in March, 2004, the OFCCP published in the Federal Register a "Notice of Proposed Rulemaking; Request for Comments" containing its own definition of "Internet Applicant." The OFCCP’s proposed definition, unlike the EEOC’s, included an element of "minimum qualifications." During the public comment period, the OFCCP received a total of 46 comments. On Friday, October 7, 2005, despite the fact that the March, 2004 proposed joint guidance issued by the EEOC had yet to be finalized, the OFCCP issued its final rule. The OFCCP’s final rule, largely adopts its rule as it was originally proposed, with some important modifications.

2. **Explanation of the Final Definition**

While the final rule establishes minimum standards for applicant recordkeeping for Internet and related electronic technologies, the OFCCP states that contractors may “voluntarily adopt recordkeeping practices that are broader than those mandated by the final rule.”

3. **The Final Rule Addresses Contractor Concerns over the Separate Definitions for Paper and Electronic Applicants.**

A number of public comments expressed concern over having two different standards for defining applicant; one for internet and one for paper applicants. The OFCCP addressed this issue in the final rule.

Under the final rule, " submits an expression of interest in employment through the Internet or related technologies" includes:

all expressions of interest, regardless of the means or manner in which the expression of interest is made, if the contractor considers expressions of interest made through the Internet or related electronic technologies in the recruiting or selection processes for that particular position. (emphasis added).
Thus, the OFCCP eliminates the dual standard for those positions for which the contractor considers expressions of interest through both the Internet and traditional means. In other words, if the contractor accepts only hard copy resumes/applications for a position, then the final rule does not apply to that position. However, if the contractor solicits and accepts applications or resumes for the position via the Internet or other related electronic technologies, as well as in hard copy, the new rule applies. Therefore, if an employer advertises a job opening and states in the advertisement that it will accept resumes/applications electronically or in hard copy, the new rule applies to both the electronic and hard copy applications.

4. Under the New Rule, It Is up to the Contractor Whether It Considers the Individual for Employment in a Particular Position

Under the final rule, carrying over a concept from the proposed rule, the phrase “the contractor considers the individual for employment in a particular position” means that the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position. Thus, an employer is not required to consider expressions of interest that either are not submitted in accordance with the contractor’s standard procedures for applying for a job or that are not submitted with respect to a particular position. For example, if the contractor has consistently applied a practice of not accepting unsolicited resumes, it is under no obligation to start doing so following issuance of this final rule.

In addition, the new rule allows employers to draw the line at too many applicants. The rule provides that if there are a large number of expressions of interest, the employer has not “considered the individual for employment in a particular position” if it uses data management techniques that do not depend on an assessment of qualifications, such as random sampling or absolute numerical limits to reduce the number of expressions of interest to be considered, provided that the sample is appropriate in terms of the pool of those submitting expressions of interest. In this
regard, an employer is free to apply a data management process (to limit the number of expressions of interest that must be considered) that is facially neutral and does not produce disparate impact based on race, gender or ethnicity in the expressions of interest to be considered. For example, an employer could decide it will only look at the first one hundred applicants or 10% of the applicants. Any above one hundred or the remaining 90% would not be considered applicants.

5. **The Final Rule Makes It Clear That an “Applicant” Must Meet All of the Position’s Basic Qualifications in Order to Satisfy the Element That “the Individual’s Expression of Interest Indicates the Individual Possesses the Basic Qualifications for the Position”**

Pursuant to the final rule, “Basic Qualifications” refers to qualifications:

- That the contractor advertises to potential applicants that they must possess in order to be considered for the position, or
- For which the contractor establishes criteria in advance by making and maintaining a record of such qualifications for the position prior to considering any expression of interest for that particular position if the contractor does not advertise for the position but instead uses an alternative device to find individuals for consideration (e.g., use of an external resume database).

In addition to the foregoing, “basic qualifications” must also meet each of the following three (3) conditions:

- The qualifications must be noncomparative features of a job seeker (e.g., two year experience requirement would be acceptable; a requirement that the individual be one of the top five individuals in terms of experience would not be acceptable).
- The qualifications must be objective in that they do not depend on the contractor’s subjective judgment (e.g., a requirement of a college degree in accounting is acceptable
whereas a requirement that the individual have a degree from a “good school” would not be).

- The qualifications must be relevant to performance of the particular position and enable the contractor to accomplish business-related goals (e.g., requirement of an accounting degree may not be acceptable for a human resources position).

To reiterate, a job seeker must meet all of a company’s basic qualifications in order to be an Internet Applicant under the final rule.

SPECIAL NOTE: The OFCCP stresses the fact that employment tests used as employee selection procedures, including online tests, are not considered basic qualifications under the final rule. Also, factors such as an individual’s salary requirements, willingness to travel, willingness to work certain shifts, etc. are not basic qualifications. These factors are contemplated in the fourth criteria of the Internet Applicant definition – the individual at no point removes himself or herself from consideration.

6. The Final Rule Allows Contractors to Discount As Applicants Any Individual Who, Prior to Receiving an Offer of Employment from the Contractor, Removes Him or Herself from Further Consideration or Otherwise Indicates That He or She Is No Longer Interested in the Position

In the past, contractors used failure to show up for interviews or return telephone calls as a reason for rejecting applicants. The new rule clarifies that such conduct means the individual does not even have to be counted as an applicant. Even more significant is that the final rule allows contractors to infer lack of interest in the position from information it gleans from the resume or application form, such as salary requirements or shift availability. Thus, the final rule provides that a company may conclude that an individual has removed him or herself from consideration:

- if the individual has indicated that he or she is no longer interested in the position for which the contractor has
considered the individual, based on the individual’s express statement that they are no longer interested; or

- on the individual’s passive demonstration of disinterest shown through repeated non-responsiveness to inquiries from the contractor about the position in question (e.g., fails to respond to telephone calls, letters, etc.); or

- based on information the individual provided in the initial expression of interest (e.g., salary requirements, shift availability, etc.) provided that the employer has been consistent in not considering similarly situated individuals.\(^{10}\)

To take advantage of this criteria, contractors must be sure to fully document and retain any documentation regarding an applicant’s withdrawal from the applicant process; an applicant’s lack of response to the employer’s efforts to contact them; and conditions contained in the applicant’s initial expression of interest (e.g., salary requirements, etc.) in anticipation of scrutiny by the OFCCP during a compliance review. This will allow removal of such individuals from any adverse impact analysis.

7. **Under the Final Rule, in Addition to Substantial Recordkeeping Obligations, the Contractor Also Must Maintain Records of Those Who Do Not Meet the Contractor’s “Basic Qualifications” So That If Necessary, the OFCCP Can Review Whether the Contractor’s Applicant Definition Is Lawful**

The final rule mandates that companies retain substantial documentation relating to Internet Applicants as follows:

- Any and all expressions of interest through the internet or related electronic data technologies as to which the contractor considered the individuals for a particular position including on-line resumes and internal resume databases;

- All records identifying job seekers contacted regarding their interest in a particular position;

\(^{10}\) The final rule adds that if a large number of individuals meet the basic qualifications for a job, a company may employ data management techniques (described above) to limit the number of individuals an employer has to contact to determine the individuals’ continued interest provided that the sample is appropriate in terms of the pool of those meeting the basic qualifications.
For internal resume databases, a record of each resume that was added to the database (and the date it was added), the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search.

For external resume databases, a record of the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used, the date of the search, and the resumes of any job seekers who met the basic qualifications for the particular position who are considered by the company.

The OFCCP states that the records listed above must be maintained regardless of whether the individual qualifies as an Internet Applicant. Although the OFCCP’s final rule allows companies to determine themselves who possesses basic qualifications, employers can expect the OFCCP to closely scrutinize companies’ practices in this area to ensure equal employment opportunity. Employers must therefore maintain applications/resumes for Internet Applicants who do not possess basic qualifications, even if these applicants are not included in the applicant flow report and resulting adverse impact analysis.

8. The New Rule Requires Contractors to Solicit Race, Gender, and Ethnicity Data from All Individuals Who Meet the Definition of Internet Applicant and Permits Contractors to Make Identification Based on Visual Observation Only for Applicants Who Decline to Self-Identify

Under the final rule, companies are required to solicit race, gender, and ethnicity data from all individuals who meet the definition of Internet Applicant. The OFCCP further states that visual observation is permissible when the applicant appears in person and declines to self-identify their race, gender or ethnicity. The rule does not, however, mandate a specific time in the employment process at which such information must be solicited. The OFCCP continues to encourage the use of applicant self-identification methods such as tear-off sheets, auto responses, etc. Additionally, and as discussed in Section III below, the rule does not alter or affect the OFCCP’s prior April, 2004 Directive which instructed contractors to avoid guessing at an applicant’s
race or gender in situations where the applicant does not appear in person and declines to self-identify.

9. **To Make Sure a Contractor’s Applicant Definition Is Not Having an Adverse Impact, the OFCCP Can Review the Impact of the Definition Using Labor Force Statistics and Census Data**

The OFCCP has always expressed concern that the definition of “applicant” used by a company not be so limited that it destroys opportunities for minorities and females. With the adoption of the new basic qualifications standard, the OFCCP’s concern is magnified. The OFCCP had stated in the proposed rule that “the application process itself might not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.” Continuing its concern, the OFCCP states in the introduction to the final rule that it will refer to Census and “other labor market data” during compliance reviews to determine whether basic qualifications have an adverse impact on the basis of race, ethnicity, or gender. In other words, an applicant definition cannot itself have an adverse impact on minorities or females. To determine if this is occurring, the OFCCP may compare the composition of minorities or females in the resulting applicant pool, with their availability in the appropriate segment of the Census.

10. **What Can Employers Do Now?**

If you have not done so already, you may wish to consider the following preemptive steps:

- Reevaluate the definition of applicant and procedures for tracking applicant data in light of the final rule;

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11 If the OFCCP identifies a “significant” difference between the labor market data and the hiring activity of the company it will further investigate to ensure compliance with Executive Order 11246. The OFCCP confirms in the introduction to the final rule that it will use the traditional two standard deviation threshold for determining statistical significance.
- Consider what impact dual definitions of Internet Applicant and traditional applicant will have on current or future hiring and recordkeeping practices and consider always having an electronic component to any position opening to bring all openings within the electronic definition;

- Review recordkeeping policies and test applicant tracking systems to determine whether the company has the technological capacity to comply with the new recordkeeping requirements;

- Conduct an assessment of “minimum qualifications” contained in job descriptions, employment advertisement, requisitions forms, etc., to ensure the company can demonstrate that those minimum qualifications are: 1. non-comparative; 2. objective; and, 3. relevant to job performance and enable the company to accomplish business-related goals.

- Compare existing applicant flow data with availability data to identify areas of significant difference and consider broadening good faith outreach efforts in those areas to ensure that the company’s applicant flow data reflects surrounding Census and other labor market data;

- Provide training to human resources and recruitment staff regarding the new requirements.

X. UNDERSTANDING GOVERNMENT REPORTING OBLIGATIONS

A. The EEO-1 Report

Private employers of 100 or more employees, and federal contractors and sub-contractors with revenue from such contracts of $50,000 or more and 50 or more employees, are required to file annually the EEO-1 report, which requires a breakdown of the workforce by job category, race, ethnicity, and gender.

See the U.S. Equal Employment Opportunity Commission’s (EEOC) website for more information relating to the Employer Information Report EEO-1: www.eeoc.gov/eeo1survey.
1. **Recent EEOC Changes To EEO-1 Report**

The revisions to the EEO-1 report require companies to account for four new race and ethnic categories:

1. the category of “two or more races, not Hispanic or Latino”;
2. the category of “Native Hawaiian or other Pacific Islander, not Hispanic or Latino”;
3. the category of “Asian, not Hispanic or Latino”; and
4. the category of “American Indian or Alaska Native, not Hispanic or Latino”.

The new EEO-1 categories also separate into two distinct categories “Asians” and “Pacific Islanders” and renames “Black” as “Black or African American” and “Hispanic Origin” as “Hispanic or Latino”.12

Perhaps most significantly, in the new EEO-1 reporting structure the EEOC has recast “Hispanic Origin” status as an **ethnicity** and no longer as a **race**. Importantly, the new EEO-1 classification system require companies to determine if employees are of “Hispanic” or “Non-Hispanic” ethnicity and separately determine – at least for those employees who identify as Non-Hispanic – their race designation(s). In addition, under the new record-keeping structure, employees must be given the option to identify multiple races, which will be captured on the EEO-1 form as “Two or More Races”.

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12 Thus, as revised, ethnicity/race is currently broken down as follows:

1. Hispanic or Latino;
2. White, not Hispanic or Latino;
3. Black or African American, not Hispanic or Latino;
4. Native Hawaiian or other Pacific Islander, not Hispanic or Latino;
5. Asian, not Hispanic or Latino;
6. American Indian or Alaska Native, not Hispanic or Latino; and
7. Two or more races, not Hispanic or Latino.
Additionally, the EEO-1 revisions, divide the category of “officials and managers” into two subgroups: “executive/senior officials and managers,” and “first/mid-level officials and managers.” Further, the revised EEO-1 form moves non-managerial business and financial occupations from the “officials and managers” category to the “professionals” category. The revisions also make clear that the EEOC strongly encourages employers to obtain gender, race and ethnicity data via employee self-identification (however, if the employee declines to provide the information, the employer can make personal observations or extract the information from personnel records if available). Finally, the revisions extend EEO-1 data collection by race and ethnicity to employers in Hawaii, which previously were exempt from the requirement.

While the OFCCP previously announced that it will provide guidance to contractors regarding changes to AAP obligations to conform these obligations to the new EEO-1 race and ethnicity classification system, the Agency has not yet released such guidance.

B. Understanding the Final Rule on Veterans Reporting Requirements for Government Contractors

On May 19, 2008, the Department of Labor’s Veterans' Employment and Training Service (“VETS”) issued a Final Rule implementing provisions regarding federal contractor and sub-contractor obligations to file annual reports on their employment of covered military veterans.\textsuperscript{13} The Final Rule implements amendments to the reporting requirements under the Vietnam Era Veterans’ Readjustment Act (VEVRAA) as required by the Job for Veterans Act in 2002 (JVA). Under the new regulations, employers with federal contracts of $100,000 or more entered into on or after December 1, 2003 must file the new VETS-100A report. Employers with federal contracts of $25,000 or more entered into before December 1, 2003 will continue to file VETS-100 reports. Moreover, despite numerous objections, contractors with both types of contracts must file both forms. This new rule took effect on June 18, 2008.

\textsuperscript{13} The definition of “veteran” is the same for both the Vietnam Era Veterans Readjustment Assistance Act of 1974 and VETS 100 or 100A reporting purposes.
The VETS-100A form complies with the revised reporting categories under JVA and requires covered contractors to track and report annually the following categories of veterans:

(1) “Disabled Veterans” which includes any veteran who: (a) is entitled to compensation, or who but for the receipt of military retired pay would be entitled to compensation under laws administered by the Secretary of Veterans Affairs, or (b) was discharged or released from active duty because of a service-connected disability;

(2) “Other Protected Veterans” which includes any veteran who served on active duty in the U.S. military, ground, naval or air service in a war, campaign or expedition in which a campaign badge has been authorized under laws administered by the Department of Defense;

(3) “Armed Forces Service Medal Veterans” which includes any veteran who, while serving on active duty in the Armed Forces, participated in a United States military operation for which a service medal was awarded pursuant to Executive Order 12985; and,

(4) “Recently Separated Veterans,” which includes any veteran during the three-year period beginning on the date of such veteran’s discharge or release from active duty.

While contractors subject to the VETS-100A filing requirement must begin collecting and maintaining the data prescribed by the new regulations as soon as the regulation becomes effective, the VETS-100A is due no later than September 30, 2009. Please note that the Final Rule does not address the question of whether contractors must re-survey their workforces to collect the new data. Hopefully, VETS will address this issue in some future FAQs.
IMPORTANT NOTES:

- This new reporting requirement only applies to contracts entered into with the federal government on or after December 1, 2003. Contractors with government contracts of $25,000 or more entered into prior to December 1, 2003 will continue to file the VETS-100 report.

- A contractor that has covered contracts entered into both before and on or after December 1, 2003 is required to file both the VETS-100 report and the VETS-100A report.

- A contract modified on or after December 1, 2003 that was entered into before December 1, 2003 creates a new contract and therefore requires the contractor to file a VETS-100A report.

- A contractor with a contract subject to the VEVRAA regulations that enters into a contract of $100,000 or more after the start of its affirmative action plan year does not have to file a VETS-100A report for that year.

- Instructions for completing the VETS-100A report state “entering into a covered federal contract or subcontract during a given calendar year establishes the requirement to file a VETS-100A report during the following calendar year.”

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