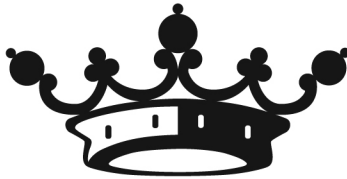


I N S I D E T H E M I N D S

Government Contracts Compliance

*Leading Lawyers on Navigating Evolving Requirements,
Developing Compliance Programs, and Collaborating
with Government Agencies*



ASPATORE

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The OFCCP Seeks to Strengthen
Enforcement, Engage Stakeholders,
and Revamp Its Affirmative
Action Requirements

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Synopsis

In the forty-fifth year since President Lyndon Johnson issued Executive Order 11246 prohibiting discrimination in the employment practices of federal contractors covered by its requirements, the Office of Federal Contract Compliance Programs (OFCCP) has a bigger budget, larger staff, and strong intentions of combining regulation and litigation with outreach to stakeholders in enforcing non-discrimination and affirmative action requirements in federal contracting. The OFCCP's efforts to strengthen enforcement and update reporting templates will occur as massive sums of federal funds are committed to contracts to stimulate economic growth.

For reasons that are more heavily competitive than regulatory, covered contractors seek to implement workforce diversity and vendor diversity programs to gain and keep market share. Affirmative action reporting requirements will become more demanding and litigation risks may increase if the OFCCP requires covered contractors to provide reports that facilitate more incisive analysis of their workforce practices. The OFCCP has announced its intention to obtain stakeholder input, particularly from the construction industry, before it formally proposes new regulations to update affirmative action requirements applicable to covered federal contracts.

OFCCP Non-Discrimination and Affirmative Action Requirements

When President Lyndon Johnson issued Executive Order 11246 in 1965, requiring non-discrimination in the employment practices of federal contractors, he activated a policy that had been enunciated in three prior presidencies. Now, the administration of President Barak Obama seeks to use that long-standing executive order and related laws to intensify and expand scrutiny of the employment practices of federal contractors and subcontractors, and to establish more rigorous standards for evaluating compliance with the requirements of the executive order related to affirmative action.

The administration seeks to engage federal contractors, organized labor, and other stakeholders in a year-long assessment of how to expand and strengthen affirmative action in the federal contracting arena, as massive

sums of money are expended in an effort to stimulate economic growth. Central to the administration's efforts is the OFCCP, an agency of the U.S. Department of Labor.

The OFCCP enforces the provisions of three laws that require covered federal contractors and subcontractors not to discriminate in employment decision-making on the basis of race, color, religion, sex, national origin, age, disability, status as a veteran of the Vietnam era, or status as a disabled veteran, and to take affirmative action to employ, advance in employment, and otherwise treat qualified applicants and employees without discrimination on these grounds. The OFCCP enforces Executive Order No. 11246, as amended by Executive Order No. 11375 and Executive Order No. 12086 (collectively Executive Order 11246); Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §793 (2002) (Section 503); and Section 402 of the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA), as amended, 38 U.S.C. §§4211-4212 (2000).

Together, Executive Order 11246, Section 503, and the VEVRAA and their implementing regulations in 41 C.F.R. §60-1, *et seq.*, require that federal contractors and subcontractors covered by their provisions recruit, select, advance, transfer, compensate and otherwise treat employees in a non-discriminatory manner *and* proactively or “affirmatively” recruit and develop employees who are protected from discrimination by the three laws the OFCCP enforces. Under Executive Order 11246, covered federal contractors and subcontractors must comply with OFCCP recordkeeping and reporting requirements and undergo “compliance evaluations” (i.e., compliance audits) upon demand. The OFCCP can refer instances of non-compliance to the solicitor of labor, who may initiate legal proceedings to seek remedies for discrimination. The remedies seek to “make discrimination victims whole, stop the discrimination, and prevent the violation from recurring” and include back pay, front pay, retroactive seniority, and orders to place individuals into the “rightful place” positions they would have obtained absent discrimination. See *Federal Contract Compliance Manual*, Section 7F00, *et seq.* at www.dol.gov/ofccp/regs/compliance/fccm/ofcpch7.htm#7F.

The OFCCP received additional powers and duties under the American Recovery and Reinvestment Act of 2009 (ARRA), which became law on February 17, 2009. The ARRA, which seeks to spark economic activity to lift the nation from recession, authorizes up to \$787 billion in stimulus measures, including tax cuts, domestic programs, and infrastructure spending through September 30, 2010. ARRA subjects contracts that it funds for \$10 million or more to the requirements of Executive Order 11246, Section 503, and the VEVRAA. Under the ARRA, prospective federal contractors receiving non-construction contract awards of \$10 million or more must undergo a pre-award clearance evaluation (unless they have undergone a compliance evaluation and were found to be in compliance with OFCCP regulations within the preceding twenty-four months).

With respect to the construction industry, the ARRA requires that all covered construction contracts and subcontracts incorporate the non-discrimination clause required by the OFCCP. Construction contractors must meet the affirmative action requirements of OFCCP regulations set forth in 41 C.F.R. 60-4, et seq.

The OFCCP's New Contractor Guide, issued in August 2009, summarizes the differences between the affirmative action requirements of Executive Order 11246, Section 503, and VEVRAA. See www.dol.gov/ofccp/TAGuides/New_Contractors_Guide.pdf. Because these requirements exemplify the meaning of "affirmative action" and because the specific meaning of that term is so widely misunderstood, examples from OFCCP regulations are set forth here in detail:

7. The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:

a. Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in

all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project.

The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.

b. Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.

c. Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefore, along with whatever additional actions the Contractor may have taken.

d. Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the union referral process has impeded the Contractor's efforts to meet its obligations.

e. Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.

f. Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.

g. Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.

h. Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and

providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.

i. Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.

j. Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.

k. Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR Part 60-3.

l. Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.

m. Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that

the EEO policy and the Contractor's obligations under these specifications are being carried out.

n. Ensure that all facilities and company activities are nonsegregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.

o. Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.

p. Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.

The OFCCP also states that a major focus of a construction compliance review will be the contractor's trade workforce in the geographical areas where the contract work is being performed, and its good-faith efforts to achieve equal employment opportunity. This review is to consider the contractor's total on-site construction workforce in the area, including those employees working on other construction projects, whether or not those other projects are federally funded or federally assisted.

The OFCCP Seeks to Intensify Enforcement, Expand the Scope of Coverage to Additional Sectors, and Place Greater Emphasis upon Affirmative Action

The OFCCP Budget: More Money for Enforcement and Advisory Services

The Department of Labor seeks to increase the budget of the OFCCP for fiscal year 2011 by 34.7 percent over the 2009 level (to \$113.4 million) and to sustain the increase in full-time-equivalent staff effected by the 2010 budget, which provided 37 percent more full-time equivalents than the 2009 budget (788 versus 575). Although some of the resources for this increase were derived from elimination of a unit of the Department of Labor through

which the OFCCP formerly reported to the secretary of labor, the budget increase nevertheless reflects the Obama administration's determination to intensify law enforcement and expand delivery of "advisory and assistance services" to federal contractors and their employees. The administration seeks to increase the budget for outreach to those stakeholders by twenty-seven-fold to \$3.1 million. The chart below, from the OFCCP's fiscal year 2011 Congressional Budget Justification, reflects the trend of OFCCP increases from 2006 to 2010.

Five-Year Budget Activity History		
Fiscal Year	Funding (Dollars in Thousands)	Full-Time Equivalents
2006	81,285	670
2007	82,442	625
2008	81,001	585
2009	84,172	596
2010	105,386	788

The OFCCP's 2011 budget request includes \$6,250,000 to restore funds the agency requested but did not receive in fiscal year 2010. Its hiring of the 213 additional full-time equivalents authorized for 2010 began in late January 2010. Thus, the full impact of the additional staffing will take several months to develop, especially in light of the Obama administration's decision to adopt additional requirements related to affirmative action through formal rule-making only after an additional year of outreach and consensus-building.

A Greater Policy Emphasis upon Affirmative Action, Eventually

OFCCP Director Patricia Shiu and U.S. Department of Labor Secretary Hilda Solis have, in presentations to Congress and the public, emphasized the administration's commitment to intensifying the OFCCP's affirmative action compliance activity, especially respecting the construction industry. A formal notice of rule-making setting forth new requirements with respect to affirmative action will follow a year or more of consultations with "stakeholders." The OFCCP's Congressional Budget Justification for fiscal year 2011 contains this statement:

OFCCP's enforcement efforts will be broadened to include a focus on aggressively identifying and resolving discrimination utilizing all enforcement tools available to the agency. OFCCP is renewing its commitment to strengthening affirmative action, combating discrimination against veterans and individuals with disabilities, as well as continuing to resolve systemic discrimination cases. The review processes will also focus on individual cases of discrimination including harassment, retaliation, termination, and failure to promote.

OFCCP Director Patricia Shiu, in a December 8, 2009, "Web chat" session, further described the agency's emphasis upon affirmative action:

The OFCCP Affirmative Action regulations and goals applicable to construction contractors were last updated about thirty years ago. We know much has changed in the construction industry and workforce since that time. As part of the rulemaking process, OFCCP will be reviewing barriers to equal opportunity in the construction industry including employment opportunities for women and minorities. OFCCP will also be considering how construction contractors may best ensure equal opportunities for all job applicants and employees. This Web chat is occurring early in the regulatory revision process so it is premature to discuss particular approaches or solutions we will propose until after we have heard from all our stakeholders.

OFCCP is considering ways to strengthen affirmative action requirements for federal contractors and subcontractors, for example, by requiring substantive analyses of recruitment and placement actions under VEVRAA, and requiring the use of numerical targets to measure the effectiveness of affirmative action efforts. OFCCP's goal is to increase employment opportunity for veterans protected by VEVRAA with federal contractors.

OFCCP views outreach to veterans' groups and education to the contractor community as critical components of its mission. As part of the announced VEVRAA NPRM, OFCCP will be inviting veterans' groups and others to provide ideas about the best way to strengthen affirmative action requirements for federal contractors, and ensure that contractors are clear on these requirements.

See Director Shiu's December 8, 2009, Web chat at www.dol.gov/regulations/chat-ofccp-static.htm.

These statements suggest that the OFCCP will seek to build understanding and gain support prior to moving forward, in January 2011, to propose formal changes to regulations pertaining to affirmative action. Observers may debate whether this timetable reflects an effort by the Obama administration to avoid igniting a national debate about affirmative action prior to the November 2010 mid-term elections or simply an adept effort to enlist the support of corporate, labor, and citizens' groups that largely welcome updating of long-standing regulations.

Given the effort to commit hundreds of billions in ARRA or or "stimulus" funding by September 30, 2010, a consensus-building and rule-making timetable that extends into 2011 may test the patience of stakeholders who want to see the administration use the vast carrot patch of federally funded ARRA projects to induce covered contractors to come forward faster with affirmative action initiatives. Some stakeholders will be eager to see the administration entice covered contractors more speedily to submit the more "substantive analyses of recruitment and placement actions" foreshadowed by OFCCP Director Patricia Shiu's December 8, 2009, public comments.

In ensuing months, the Obama administration will have the opportunity to announce how it intends to avoid having its new affirmative action policies rendered irrelevant to the contracts awarded by September 30, 2010. The administration might suggest that even if new regulations lag the execution of prime contracts, they need not lag performance of covered contracts and subcontracts. It might contend that the regulations, whenever they are adopted or amended, will apply to existing contracts. It also might assert,

with justification, that if more time is taken initially to assure that new regulations, when formally proposed, will enjoy broad stakeholder support, then their impact will be greater in the long run.

As important, the administration could predict that additional staffing at the OFCCP will increase the number and efficacy of compliance reviews. The risk of sanctions for violations and availability of advisory services could prompt covered contractors to intensify their self-assessment, compliance, risk-management, and reporting activities voluntarily, before revised regulations take effect. Yet by revising its existing regulations pertaining to the construction industry (41 C.F.R. §60-4), which were written thirty years ago, increasing technical guidance under the ARRA, and using its larger regulatory staff, the OFCCP seems likely to conduct compliance audits in larger numbers and intensify its focus upon the construction industry. That certainly is what the director's comments to Congress and the agency's budget proposal indicate.

A dialogue with industry regarding revising affirmative action regulations and reporting templates could benefit policymakers and stakeholders alike. Such a dialogue could lead to regulations that are relevant to industry conditions. The dialogue could help balance the considerable litigation risks that mandated delivery of certain statistical data could create for covered contractors with the legitimate benefits that policymakers seek to obtain on behalf of individuals in protected classifications.

A national debate about affirmative action could occur without broad public understanding of the legal, historical, and practical significance of of "affirmative action" as the term has been used in forty-five years of federal contracting under Executive Order 11246. The meaning imputed to the term "affirmative action" too often is wholly disconnected from the historical, legal, and operational contexts of federal contract compliance or even the remedial context of federal judicial decisions. Even in polite company, the phrase, "that was an affirmative action decision" implies that the successful candidate is a person of inferior qualifications. Time will tell whether the communications that precede formal OFCCP rule-making develop a consensus that includes covered employers, organized labor, civil

rights groups, and the other “stakeholders” the Department of Labor seeks to engage.

Extending the Scope of Coverage to More “Subcontractors,” Encompassing Larger Segments of the Health Care Sector

Through a 2007 decision, the Department of Labor extended the reach of the OFCCP to additional subcontractors and thus potentially to a much broader segment of the economy. Although the department’s position has not yet become extensively litigated in the federal courts, the seminal administrative decision warrants careful consideration.

In *OFCCP vs. UPC Braddock*, ARB Case No. 08-048 (May 29, 2007), the Administrative Review Board of the U.S. Department of Labor upheld the determination of an administrative law judge that a university hospital having a contract with the federal government to provide medical products and services to federal employees was a contractor, and that its affiliated hospitals reimbursed through the university hospital’s health plan, an HMO, were subcontractors covered by the non-discrimination provisions of the laws enforced by the OFCCP. The board affirmed the ruling of the administrative law judge that the university hospital system functioned principally as a provider of health care services rather than as a health insurer, even though it had an HMO. On that basis, the Administrative Review Board distinguished an earlier decision in which it held that a hospital that delivered services to a health plan was not a federal contractor. In that case, *OFCCP vs. Bridgeport Hospital*, ARB No. 00-023 (January 31, 2003), the health plan was an insurer that did not conduct delivery of health care products and services.

The controversy originated five years before the board’s decision when the OFCCP scheduled compliance reviews of hospital facilities and affirmative action plans. The hospitals refused to provide information on the basis that they were not covered subcontractors subject to OFCCP oversight. Subsequent to their refusal, the OFCCP initiated enforcement proceedings resulting two years thereafter in summary judgment on behalf of the OFCCP by the administrative law judge, whose decision was affirmed by the Administrative Review Board on May 29, 2009.

Although the University of Pittsburg Medical Center hospitals did not appeal to the federal courts from the adverse decision of the Administrative Review Board, the same issue may reach the federal courts for review in connection with other OFCCP enforcement actions that are challenged. Meanwhile, the decision represents an opportunity for the OFCCP to conduct compliance reviews and bring enforcement actions against certain hospitals in which payment is made pursuant to a care-delivery contract with a federal agency. Still unknown is the extent to which the Obama administration will seek to extend the reasoning of this case to other segments of the health care delivery system, in addition to university hospital systems that include a health plan. Also unknown is whether the administration will assert that the OFCCP has regulatory authority over subcontractors that previously did not fall within the ambit of its oversight of workforce practices.

The OFCCP's Emphasis upon Gathering Statistical Evidence Arises from a Legal Framework in Which Statistical Evidence May Be Used as Proof of Discrimination

The administration has expressed commitment both to conducting more OFCCP “compliance reviews” (audits of employers’ employment practices to detect discrimination) *and* requiring far more proactive means for expanding the pool of qualified applicants from protected classifications and facilitating their development into successful, long-term workforce participants. In principle, this is what affirmative action endeavors to achieve, as illustrated by the specific actions set forth in the previously quoted excerpt of OFCCP regulations. 41 CFR 60-4.

Covered employers devote significant attention and resources to compiling data reflecting workforce composition and employment transactions such as promotions. Affirmative action plans include data reflecting utilization of persons from statutorily protected demographic classifications (race, gender, disability, etc.) but need not and typically do not seek to explain by multi-variable regression the extent to which any disparities in rates of utilization, selection, training, promotion, compensation, and termination are unlikely to be explained by chance. Such analysis plays a central role in discrimination cases brought by governmental enforcement bodies and class action litigants. For this reason, covered employers justifiably refrain from presenting data in an affirmative action plan that tends to implicate

company practices in ways that are directly useful in establishing liability for discrimination. Rather, companies intent upon complying with reporting requirements and in prudently assessing practices with probative information will turn to legal counsel for guidance with respect to data assembly, analysis, retention, and protection from disclosure to adverse parties.

A recent case that illustrates the advantages to litigants, including the OFCCP, of using statistical evidence to establish a *prima facie* case of discrimination is *OFCCP vs. Bank of America*, DOL ALJ Case No. 1997-OFC-16 (January 21, 2010). That case arose in 1993 when the OFCCP sought to conduct a compliance review of the employment practices of the predecessor to Bank of America, Nations Bank, at its Charlotte facility. When the bank resisted disclosure of the requested information, years of litigation ensued about the government's rights to the information it sought.

Subsequently, the information was provided and used by the OFCCP as evidence of statistically significant race-based disparities, thus creating the inference of discrimination. That inference combined with the testimonies of individual applicants for entry-level jobs, plus expert testimony about the statistics, was used to establish the bank's liability in administrative proceedings before an administrative law judge. The opinion of the judge provides a relatively concise summary of the burden-shifting regime under which statistical evidence can be used as evidence of discrimination:

In a case involving actions brought under Executive Order 11246, the legal standards developed under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S. Code Section 2000e, which provides that it is unlawful for an employer to discriminate against any individual with respect to employment based on an individual's race, are applicable. A plaintiff has the burden of establishing a *prima facie* case of discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). Proof of discriminatory intent is required, but this proof can be based on circumstantial evidence, including statistical evidence. An unlawful motive may be inferred from a showing of a disparity between class members and comparably qualified

members of a minority group. *Hazelwood, supra*, 433 U.S. at 307. A *prima facie* case of a pattern or practice of discrimination may be entirely statistical. *Hazelwood, supra*; *OFCCP v. Greenwood Mills Inc.*, No. 89-OFC-39, slip. Op. at 21-2, 45 (Secretary, 1995).

A statistical disparity in the treatment of minorities may have one of the following three explanations:

1. it is the product of unlawful discriminatory animus
2. there is a legitimate nondiscriminatory cause
3. it may be the product of chance

Palmer v. Schulz, 815 F.2d 84, 91 (D.C. Cir. 1987). If the disparity is large enough, that is, if the probability that it resulted from chance is small enough, a court will infer that the disparity is the result of unlawful animus. *Hazelwood, supra*, 433 U.S. at 307-8. In *Hazelwood, supra*, the Supreme Court held that a disparity of two or three standard deviations is sufficient to establish a *prima facie* case of unlawful discriminatory animus.

If the plaintiff establishes a *prima facie* case, the burden shifts to the employer to rebut it by showing that the plaintiff's statistical evidence is inadequate. *Greenwood Mills, supra*, slip. op. at 22. The employer can do this by attacking the plaintiff's statistical methods, or by showing that the disparity resulted from a legitimate non-discriminatory factor. *Palmer v. Schultz, supra*, at 99. If the employer proffers evidence that the disparity was the result of a legitimate non-discriminatory factor, the plaintiff can prevail by showing that the factor was a pretext for unlawful discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1993).

Typically, the workforce utilization data cover a period of time such as a year. They do not facilitate analysis of the kind presented to the administrative law judge in *OFCCP vs. Bank of America* or in federal court

litigation in which the plaintiffs use statistical evidence to present a *prima facie* case of discrimination. An attempt to use an annual utilization report to conduct workforce analysis would be akin to conducting financial analysis using a “balance sheet” presenting a period of time, not a point in time, without the benefit of a statement of cash flows or income statement. A static depiction of a dynamic enterprise is less revealing than one that accounts for the movement of resources and the resulting effects upon organizational outcomes. This is the case with both financial resources and human resources.

It is unclear from the preliminary statements of the OFCCP director what precisely the Obama administration has in mind when it expresses interest in making affirmative action reporting more rigorous. In her December 8, 2009 Web chat, OFCCP Director Patricia Shiu referred to “requiring substantive analyses of recruitment and placement actions under VEVRRRA and requiring the use of the numerical targets to measure the effectiveness of affirmative action efforts.” The adoption of requirements for covered contractors to use targets or goals, beyond the goal-related provisions of existing affirmative action regulations, may imply that the OFCCP contemplates requiring covered contractors to provide data to account for disparities in utilization by statistical means that illuminate patterns and practices not just as to VEVRRRA, to which Director Shiu specifically referred, but also respecting Executive Order 11246 and Section 503. The extent to which new regulations require statistical analysis of workforce practices and outcomes would seem likely to figure prominently in the dialogue that the OFCCP initiates.

The Paradox of Findings of Non-Compliance Concurrent with the Conferral of Accolades for Diversity: Even Leading Companies Face OFCCP Compliance Issues

The rendering of a decision against Bank of America in 2010 for workforce practices that occurred in 1993 and between 2002 and 2005 illustrates at least two points. First, litigation, whatever the merits, is not always a means for effecting speedy change. Employment discrimination cases may reflect the application of extraordinary skills of advocacy, tenacity, and commitment by the lawyers on both sides. But, not surprisingly, the published statements of the OFCCP reflect the view that litigation will not be its primary instrument for effecting change. Also not surprisingly, the

OFCCP seeks to strengthen its capability to take cases to litigation even as it looks to develop more proactive means for encouraging voluntary compliance by, for example, delivering “advisory services.”

A litigation remedy may lag the unlawful practice by many years. Management may have long ago abandoned the subject practice. The sanction may be imposed after a company has become a model of corporate citizenship with respect to workforce diversity, vendor diversity, and a broad array of other commendable initiatives that expand equal employment opportunity and generate economic growth.

As the case of *OFCCP vs. Bank of America* illustrates, even companies that are recognized for high levels of commitment to non-discrimination, inclusion, and corporate citizenship are sued for discrimination. Placement atop a visible pillar of praise can make a company a convenient target of opportunity. But plaintiffs and regulators might suggest that heightened risks of adverse litigation outcomes and bad publicity also encourage voluntary compliance.

Corporate Initiatives: Workforce Diversity, Vendor Diversity, Segment Marketing

Leveraging Capabilities Gained through Federal Contract Compliance to Create Value throughout the Enterprise

A large company that performs a federal contract that is covered by the OFCCP may be engaged in several initiatives to increase workforce diversity, vendor diversity, and market to discrete demographic or geographic segments. OFCCP compliance represents but one part of its activity pertaining to individuals in statutorily protected classifications. Responsibility for execution of outreach and compliance initiatives may reside several places within the company—human resources, legal, purchasing, merchandizing, marketing, governmental relations, and public relations. OFCCP compliance may operate separately from other functions that can help a company become more inclusive.

Analytical rigor is required for execution of workforce diversity initiatives that comport with prevailing law. Any race-conscious or gender-conscious employment practices depend for their legality and efficacy upon the

framework of federal case law. Utilization analysis, attentiveness to the demographics of the applicant pool, and scrutiny of the entire pipeline of the employment experience are required to attain and sustain diversity and inclusion. If a company seeks to engage in race-conscious or gender-conscious decision-making with respect to terms and conditions of employment for purposes of achieving the objectives of its diversity program, then it will need guidance from legal counsel regarding compliance with non-discrimination laws.

Even when OFCCP requirements become more stringent, some companies will demand of themselves much more than minimal compliance. They will seek to assemble workforces that are attuned to the composition and tastes of markets in which they do business. Their advertising campaigns project an image of inclusiveness. These companies' employee populations, when surveyed by independent outside groups, reflect high levels of engagement and alignment.

Diversity as a Component of Corporate Ambition

Employers that devote resources to workforce diversity initiatives typically describe how they value all of their employees or "associates." They speak candidly about the unfulfilled aspirations of their companies to become more effective in recruiting and retaining a diverse workforce. They strategize about how to get insights from employees that help in marketing to customers. All of these activities are designed to create products that are responsive to diverse tastes.

Risk Associated with Analysis

Companies that thrive know they need to go further than preparing an affirmative action plan that complies with existing OFCCP requirements. Internally, they may need analysis that reveals discriminatory practices or patterns. No company wants to throw such findings into the public domain. Thoughtful counsel will say, "We are going to do this analysis. You may be sued. This analysis is preparation for litigation. Your communications with me are protected by the attorney-client privilege and the attorney work product doctrine."

The OFCCP is poised to use its regulatory mandate to seek substantial changes, not just incremental changes, in the approach to enforcement of employment discrimination laws. It will use not only compliance reviews and case-by-case adjudications, but also new regulations to guide covered contractors toward taking proactive measures to detect, report, and help it detect and eliminate practices that have the effect of unlawfully mistreating individuals in statutorily protected classifications. If information is power, then requiring disclosure of more information about the employment practices of covered contractors could empower not only the employers, but also potential litigants. That having been said, the extent and substance of what the OFCCP will seek cannot be determined from the preliminary public statements of the secretary of labor and the assistant secretary who leads the OFCCP.

Conclusion

Given the massive sums that will be devoted to federally funded projects in the near future, the economic stakes for federal contractors and the nation are enormous. An icon of federal infrastructure misspending is the “bridge to nowhere.” Proponents of the ARRA hope that it will create a “bridge to somewhere,” i.e. economic recovery and broadly shared prosperity.

Lawyers practicing in the area of federal contract compliance will want to monitor developments at the OFCCP closely and alert clients to the outreach efforts and rule-making notices of the OFCCP. Lawyers also will want to monitor developments in case law such for challenges to the regulatory initiatives of the invigorated OFCCP.

Companies that compete for federal contracts will want to evaluate and, where necessary, improve core processes for managing human capital to strengthen enterprise performance and avoid unlawful discrimination. Such companies can gain advantages over unprepared competitors by meeting any new OFCCP affirmative action reporting requirements, reducing litigation risks by proactively detecting and eliminating policies and practices that discriminate against persons in protected classifications, and assessing workforce diversity initiatives to assure that they comport with prevailing law. The OFCCP is determined to intensify scrutiny and strengthen enforcement.

Companies will want to prepare to compete in the new environment that the OFCCP has pledged to create.

Frank Scruggs is a partner with Berger Singerman. He has litigated employment law cases as co-chairman of the labor and employment law practice group of an international law firm, advised contractors and governmental bodies regarding affirmative action and diversity policies, worked as executive vice president of human resources in a Fortune 150 company, and served as secretary of labor for the state of Florida.

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