

Facts on Executive Order 11246 -- Affirmative Action

Revised January 4, 2002

A. OFCCP Mission Description

The Department of Labor's Employment Standards Administration's Office of Federal Contract Compliance Programs (OFCCP) enforces the Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended and the affirmative action provisions (Section 4212) of the Vietnam Era Veterans' Readjustment Assistance Act, as amended. Taken together, these laws ban discrimination and require Federal contractors and subcontractors to take affirmative action to ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, national origin, disability or status as a Vietnam era or special disabled veteran.

- OFCCP's jurisdiction covers approximately 26 million or nearly 22% of the total civilian workforce (92,500 non-construction establishments and 100,000 construction establishments). The Federal Government awarded more than \$179 billion tax-payer dollars in prime contracts in Fiscal Year 1995.
- OFCCP requires a contractor, as a condition of having a federal contract, to engage in a self-analysis for the purpose of discovering any barriers to equal employment opportunity. No other Government agency conducts comparable systemic reviews of employers' employment practices to ferret out discrimination. OFCCP also investigates complaints of discrimination. In Fiscal Year 1999, OFCCP conducted 3,833 compliance reviews. Moreover, OFCCP programs prevent discrimination. Further information about the OFCCP programs may be obtained from the Internet.

B. Operation of the Executive Order Program. The EEO clause

Each contracting agency in the Executive Branch of government must include the equal opportunity clause in each of its nonexempt government contracts. The equal opportunity clause requires that the contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered minorities for purposes of the Executive Order. This clause makes equal employment opportunity and affirmative action integral elements of a contractor's agreement with the government. Failure to comply with the non-discrimination or affirmative action provisions is a violation of the contract.

A contractor in violation of E.O. 11246 may have its contracts canceled, terminated, or suspended in whole or in part, and the contractor may be debarred, i.e., declared ineligible for future government contracts. However, a contractor cannot be debarred without being afforded the opportunity for a full evidentiary hearing. Debarments may be for an indefinite term or for a fixed term. When an indefinite term debarment is imposed, the contractor may be reinstated as soon as it has demonstrated that the violations have been remedied. A fixed-term debarment establishes a trial period during which a contractor can demonstrate its commitment and ability to establish personnel practices that are in compliance with the Executive Order.

If a matter is not resolved through conciliation, OFCCP may refer the matter to the Office of the Solicitor of Labor, which is authorized to institute administrative enforcement proceedings. After a full evidentiary hearing, a Department of Labor Administrative Law Judges issues recommended findings of fact, conclusions of law, and a recommended order.

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On the basis of the entire record, the Secretary of Labor issues a final Administrative Order. Cases also may be referred to the Department of Justice for judicial enforcement of E.O. 11246, primarily when use of the sanctions authorized by the Order is impracticable, such as a case involving a sole source supplier.

The regulations implementing the Executive Order establish different affirmative action provision for non-construction (i.e., service and supply) contractors and for construction contractors.

C. Executive Order Affirmative Action Requirements

i. For Supply and Service Contractors

Non-construction (service and supply) contractors with 50 or more employees and government contracts of \$50,000 or more are required, under Executive Order 11246, to develop and implement a written affirmative action program (AAP) for each establishment. The regulations define an AAP as a set of specific and result-oriented procedures to which a contractor commits itself to apply every good faith effort. The AAP is developed by the contractor (with technical assistance from OFCCP if requested) to assist the contractor in a self-audit of its workforce. The AAP is kept on file and carried out by the contractor; it is submitted to OFCCP only if the agency requests it for the purpose of conducting a compliance review.

The AAP identifies those areas, if any, in the contractor's workforce that reflect utilization of women and minorities. The regulations at 41 CFR 60-2.11 (b) define under-utilization as having fewer minorities or women in a particular job group than would reasonably be expected by their availability. When determining availability of women and minorities, contractors consider, among other factors, the presence of minorities and women having requisite skills in an area in which the contractor can reasonable recruit.

Based on the utilization analyses under Executive Order 11246 and the availability of qualified individuals, the contractors establish goals to reduce or overcome the under-utilization. Good faith efforts may include expanded efforts in outreach, recruitment, training and other activities to increase the pool of qualified minorities and females. The actual selection decision is to be made on a non-discriminatory basis.

ii. For Construction Contractors

OFCCP has established a distinct approach to affirmative action for the construction industry due to the fluid and temporary nature of the construction workforce. In contrast to the service and supply affirmative action program, OFCCP, rather than the contractor, establishes goals and specifies affirmative action which must be undertaken by Federal and federally assisted construction contractors. OFCCP issued specific national goals for women. The female goal of 6.9 percent was extended indefinitely in 1980 and remains in effect today. Construction contractors are not required to develop written affirmative action programs. The regulations enumerate the good faith steps construction contractors must take in order to increase the utilization of minorities and women in the skilled trades.

D. Goals, Timetables, and Good Faith Efforts

The numerical goals are established based on the availability of qualified applicants in the job market or qualified candidates in the employer's work force. Executive Order numerical goals do not create set-asides for specific groups, nor are they designed to achieve proportional representation or equal results. Rather, the goal-setting process in affirmative action

planning is used to target and measure the effectiveness of affirmative action efforts to eradicate and prevent discrimination. The Executive Order and its supporting regulations do not authorize OFCCP to penalize contractors for not meeting goals. The regulations at 41 CFR 60-2.12(e), 60-2.30 and 60-2.15, specifically prohibit quota and preferential hiring and promotions under the guise of affirmative action numerical goals. In other words, discrimination in the selection decision is prohibited.

II. Examples of Affirmative Action Programs

OFCCP federal affirmative action in action is exemplified by the EEO programs of the award recipients of the Department of Labor Secretary's Opportunity 2000 Award and Exemplary Voluntary Efforts (EVE) awards. Each year, these awards are given to contractors with outstanding affirmative action programs. Affirmative action refers to the aggressive recruitment programs, mentoring, training, and family programs that work to recruit and retain qualified individuals. Corporate programs nominated for a Secretary 2000 or EVE award include innovative outreach and recruitment, employee development, management development and employee support programs. Past Secretary's Opportunity 2000 award recipients include:

The Rouse Company (2001)

Union Bank of California (2000)

Eli Lilly and Company of Indiana (1999)

United Technologies Corporation of Connecticut (1998)

Pacific Gas and Electric of California (1997)

In addition, the Department recognizes other exemplary federal contractors through its EVE awards and exemplary EEO efforts of community organizations through the EPIC awards.

III. Successes

OFCCP efforts benefit real people through systemic contractor investigations and through partnerships with private industry and state and local agencies.

In general, OFCCP programs helped many Fortune 1,000 companies and other major corporations break the glass ceiling for women and minorities. In 1970, women accounted for 10.2 percent of the officials and managers reported on the Employer Information Report (EEO-1) form submitted by federal contractors. In 1993, women were 29.9 percent of all officials and managers, according to the EEO-1 data.

Many minorities and women have gained access to employment on large construction projects because of the Department's construction mega-projects. For example, on the Oakland Federal Building project, eight percent of the hours worked on the site were by women. On the New York Federal Courthouse project, 35 percent of the hours were worked by minorities and approximately six percent by women. In addition, OFCCP has recognized the affirmative action efforts of award recipient construction contractors like the Hyman Construction of Manhattan, New York and the Law Company of Kansas.

Working women moved from welfare to forklift operator jobs and other non-traditional construction jobs in Philadelphia and Chicago through OFCCP outreach efforts.

Native Americans are now employed on federal highway construction projects in conjunction with the Council for Tribal Employment Rights and the Cheyenne River Sioux

Tribe. Both received Department EPIC awards for their efforts.

More than 70 individuals with disabilities have been employed in computer positions in Columbus, Ohio through a partnership between the department and Goodwill Industries. This cooperative agreement has resulted in prototypes of workplaces specifically designed to welcome persons with severe disabilities.

After highly publicized cases in which veterans were unaware of job openings, a Seattle company hired a specialist to address Vietnam-era veterans' issues.

Because of affirmative action requirements, federal contractors are reviewing their employment policies, including compensation systems, and training their managers and supervisors to identify and correct discrimination and harassment in the workplace.

Following are real people who have benefited from federal affirmative action, according to the Council of Presidents' *Women Speak Out: Affirmative Action Resource Guide*:

Bernadette, of Washington, DC., works as a carpenter because of a federal affirmative action program. She is an African-American single parent with two children, who says "because the company had an affirmative action program, I got on the job site."

Janice became an astronaut with NASA at the Johnson Space Center in July 1991, because of NASA's affirmative action program. She has since logged over 438 hours in space. She describes the NASA equal employment opportunity policy: "Under NASA's developing equal opportunity and diversity policies, all hiring and advancement decisions are based on individual qualifications and merit, but recruitment and development programs are structured such that high-quality candidates are available to help achieve a representative workforce."

Paulette is now an Officer of NYNEX, responsible for Marketing in Maine, New Hampshire, Rhode Island and Vermont. She says that "Without NYNEX's willingness to actively pursue affirmative action goals, my talents and skills would have never taken me this far in the business world."

Lisa is a laborer in Hammond, Indiana, employed at an expansion project. Before she entered the trades, she worked for \$5.00 an hour, without benefits as a seamstress. She now earns over \$20 an hour with benefits. She says that without affirmative action, she would probably still be working for \$5.00 an hour and have no opportunity for advancement.

Judy is a journey structural ironworker and single parent of two teenage sons in Chicago, Illinois. Before entering the trades, she worked two jobs, with no room to advance. She credits her new job to affirmative action and says "employers will not hire without affirmative action." She was one of 20 women in her union of 2,321 members.

Kathy worked in the skilled trades in Chicago, said "the affirmative guidelines allowed me to earn a higher wage than all of the service jobs that I had worked before. Working construction gave me the confidence and strength to know that I could excel in any field if given the opportunity."

OFCCP uncovers examples of discrimination every day during its compliance evaluations, including the following incidents:

A hostile working environment at an aircraft maintenance facility, including racial slurs, sexually inappropriate statements, graffiti on bathroom walls, offensive drawings in the workplace, and racial jokes.

Black professionals required to scrub toilets and subjected to racial harassment.

An individual with a disability (Native American amputee) was subjected to verbal harassment because of his disability, physically assaulted, and denied benefits and

opportunities provided his non-disabled colleagues.

Affirmative action is necessary to prevent discrimination and to address stereotypical thinking and biases that still impede employment opportunity.

Overall findings from a DOL survey found that women advanced more quickly in contractor firms than in non-contractor firms.

Federal contractors have changed the corporate climate in ways that are not statistically measurable because of the requirements of Executive Order 11246 and other laws enforced by OFCCP. For example, corporations now post job announcements and do not rely solely on word of mouth recruitment. Corporate sensitivity to issues like sex and race harassment and wage discrimination has increased, as has the awareness of the benefits of a family friendly environment. Employers now view ability, not disability.

Excerpts from Department's EVE awards:

**"Equal employment opportunity is good for business."
United Technologies Corporation, Hartford, CT
October 1, 1998
Secretary's Opportunity 2000 Award Honoree**

**"When you do the right thing by people,
it's usually the right thing for business."
Jim Adamson, Chief Operating Officer
United Space Alliance, Houston, TX
Oct. 1, 1998 EVE Awards**

 [Back to Top](#)

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