

Chapter 4

When Does the Department of Labor Consider a Supplier of Energy Products a Federal Contractor or Subcontractor, and Why Should We Care?

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§ 4.01. Introduction.

In recent months, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP or “the Agency”) has adopted a decidedly more aggressive enforcement stance. The OFCCP is now aggressively

targeting entities that never thought of themselves as federal government contractors or subcontractors, is conducting more — and more extensive — on-site audits, is pursuing data and information well beyond the scope of what it has previously sought, and is pursuing a substantial broadening of the regulatory requirements that attach to government contractors and subcontractors.

The OFCCP is the federal agency charged with enforcing laws mandating that government contractors and subcontractors comply with affirmative action and equal employment opportunity obligations. Like many federal agencies, the OFCCP's enforcement posture varies from administration to administration. Periods of relative predictability are followed by periods of uncertainty, as enforcement priorities shift and more or fewer resources flow into the Agency. We are currently in a period of aggressive enforcement by the OFCCP, as the Agency makes ever-more-burdensome demands upon government contractors, heightens its presence and visibility as an enforcer of equal opportunity laws, and proposes sweeping regulatory change.

In addition to strengthening its enforcement regime, the OFCCP is also expanding the reach of that regime. While the OFCCP's jurisdiction clearly extends only to government contractors and subcontractors, ambiguity has existed as to what entities are considered a "subcontractor" for purposes of OFCCP's jurisdiction. The current OFCCP has made it clear that it will expansively define who it considers a covered "subcontractor." This expansive approach to its jurisdictional reach creates myriad issues for companies — or members of corporate families — that have never before considered themselves to be subject to the jurisdiction of the OFCCP. As a result of the OFCCP's aggressive approach and expanding reach, companies must take particular care now to determine whether the obligations of a federal subcontractor are applicable and, if so, whether they are in compliance.

This chapter will review the key executive order and most relevant statutes that set forth the primary employment-related affirmative action obligations to which government contractors and subcontractors are subject. It will then review the evolving law defining "subcontractors" for purposes of OFCCP's jurisdiction, including an analysis of cases addressing the issue

in the energy sector, and also address the “related entity” test through which OFCCP claims one member of a corporate family is subject to its jurisdiction by virtue of the federal contracts or subcontracts held by another member of its corporate family.

§ 4.02. Key Obligations of Government Contractors and Subcontractors.

Federal contractors and covered subcontractors must comply with a number of requirements to satisfy their affirmative action and equal employment opportunity obligations. These obligations include obligations to draft “affirmative action plans” (AAPs) on an annual basis, requirements to track the demographics of their employees and applicants, obligations to conduct statistical analyses of personnel decisions on a regular basis, and broad recordkeeping requirements.¹ Though federal contractors and subcontractors are subject to additional legal obligations, the key obligations discussed here are set forth in three primary laws: Executive Order 11246 (Executive Order 11246), Section 503 of the Rehabilitation Act of 1973, as amended (Rehabilitation Act), and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended (VEVRAA).² Each of these laws establishes obligations for contractors and subcontractors, which are explained below.

¹ See *e.g.* Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 24, 1965).

² On January 30, 2009, President Obama issued three Executive Orders imposing additional obligations on federal contractors and subcontractors. Those Executive Orders: (1) require the successful bidder on a successor service contract to offer the employees of the predecessor contractor a right of first refusal of employment under the new contract (Exec. Order No. 13495); (2) require federal contractors to post notices informing employees of their affirmative right to organize under the National Labor Relations Act (Exec. Order No. 13496); and (3) prohibit federal contractors from being reimbursed for expenses incurred in efforts to influence employees’ decision to form unions or engage in collective bargaining (Exec. Order No. 13494). Because none of the Obama Executive Orders implicates affirmative action obligations, this chapter will not further discuss the Obama Executive Orders.