

Affirmative Action Plan Development and Audit Strategies

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What Will Be Covered

- How to prepare a written affirmative action plan (“AAP”) – an overview
- Required steps beyond the written AAP
- Strategies for handling a compliance review
- Preparing for an on-site review
- Tips for employers covered by affirmative action requirements

Preparing a Written AAP

- Keep in mind various potential “audiences” for a written AAP
 - OFCCP
 - Members of management
 - Plaintiffs’ lawyers and members of the public
 - Employees/Job Seekers (at least with respect to AAP for Veterans and Persons with Disabilities)

Preparing a Written AAP

Warnings

- AAP can be a liability document!
- AAP may reveal that contractor doesn't comply with OFCCP regulations
- AAP could be used against contractor in employment lawsuits
- AAP could be basis for breach of contract claim filed by employees

Preparing a Written AAP

Warnings

- Don't recite regulation language in AAP if you aren't going to meet commitments
- Include protective language in AAP such as no contractual rights, goals not intended to discriminate, and AAP developed in accordance with regulatory guidelines
- Typically you need a separate AAP for each Company location

Preparing a Written AAP

Warnings

- Maintain confidentiality of AAP
 - Legend on front page
 - Include discussion regarding confidentiality/OFCCP response to FOIA request
 - Need only disclose to employees/job seekers the AAP for veterans and persons with disabilities (upon request)

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THE RIGHT RESPONSE AT THE RIGHT TIME

**Preparing a Written AAP
(Women/Minorities)**

- Major Narrative Elements
 - EEO policy and annual reaffirmation

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**Preparing a Written AAP
(Women/Minorities)**

- Major Narrative Elements
 - Dissemination of EEO Policy
 - Internal dissemination (postings, harassment policy, meetings with management, diversity of workforce featured in internal publications)
 - External dissemination (recruitment sources informed, EEO clause in subcontracts/purchase orders, help wanted ads, diversity of workforce in product or consumer advertising)

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**Preparing a Written AAP
(Women/Minorities)**

- Major Narrative Elements
 - Responsibility for Program Implementation
 - CEO
 - Duties of EEO Coordinator/AA Officer
 - Duties of Managers

Preparing a Written AAP (Women/Minorities)

- Major Narrative Elements
 - Identification of Problem Areas – Be Careful!
 - Composition of Workforce
 - Selection Process
 - Promotion Practices
 - Terminations
 - Sponsored events and programs
 - Technical requirements review
 - Summary by job group and department
 - Compensation practices
 - Other employment practices

Preparing a Written AAP (Women/Minorities)

- Major Narrative Elements
 - Action-oriented programs – Be careful!
 - Meant to address issues in problem areas/good faith efforts to meet “goals”
 - Recruitment
 - Promotions/Training
 - Retention
 - Internal audit and reporting systems (tracking/analyzing applicants, hires, promotions and terminations, assessing progress/good faith efforts, developing solutions, reports to management)

Preparing a Written AAP (Women/Minorities)

- Major Narrative Elements
 - Internal audit and reporting systems to measure effectiveness of program
 - Tracking/analyzing applicants, hires, promotions and terminations
 - Assessing progress/good faith efforts
 - Developing solutions
 - Reports to management

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Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - Work Force Analysis
 - Snapshot of facility's workforce at a given time
 - Broken down by department or organizational unit
 - Listing of each job title, # of employees in each job title, salary range, EEO-1 group, sex and race breakdown (from lowest to highest paid)
 - Identification of supervisor
 - OK to use wage codes for purposes of confidentiality (retain key)

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Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - Work Force Analysis
 - OFCCP looking to see if imbalances exist where females or minorities are employed within the Company
 - Supervisor white while work group minority
 - Women in clerical positions, men in other more highly paid positions
 - Minorities concentrated in a single department, while similar positions in another department held by non-minorities

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Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - Job Group Analysis – employer creates “job groups”
 - Identifying job groups is difficult, but critical
 - Job groups form the basis of the “availability analysis,” the setting of goals, and further analyses with respect to hiring, promotions, terminations, and compensation

Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - How to Create Job Groups
 - Organizing employee roster into a grouping of jobs that cut across departmental lines
 - Considerations
 - Similar job skills, content, and responsibility
 - Similar wage rates (increasingly important!!)
 - Similar promotional opportunities
 - Start with EEO-1 categories

Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - Availability Analysis
 - What is availability?
 - Estimates the percentage of women and minorities “available” for employment in each job group
 - How is availability determined?
 - External availability
 - Internal availability
 - Why is availability important?

Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - Incumbents vs. Availability
 - What is the difference?
 - Is the difference greater than would reasonably be expected?
 - Any difference
 - Difference greater than one whole person
 - “80% Rule” (+ “whole person rule”)
 - Two standard deviation

Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - Placement Goals
 - Set in job groups where difference between incumbents and “availability” is less than would reasonably be expected
 - Goal = “availability”
 - Placement goal set for AAP year for job group (goal to hire/promote females or minorities at rate equal to placement goal)

Preparing a Written AAP (Women/Minorities)

- Statistical Elements
 - Placement Goals
 - Once goals are set, the obligation is to demonstrate good-faith efforts to achieve goals in coming AAP year
 - Does not mean goals must be met or function as a quota, just that good faith efforts must be made

Preparing a Written AAP (Disabled/Veterans)

- Major Elements
 - EEO Policy/Reaffirmation
 - Dissemination (internal/external)
 - Equal Opportunity Postings
 - Responsibility for Program Implementation
 - Action Oriented Programs

Required Steps Beyond the Written AAP

- Annual Obligations (Major/Audit Rqmts.)
 - Tracking employment activity data
 - Analyzing prior year’s hiring, promotion, and termination activity
 - Evaluate prior year goals and good faith efforts to achieve them
 - Tracking/analyzing compensation

Required Steps Beyond the Written AAP

- Track hiring, promotions, transfers, terminations, and **applicant flow**
 - Logs for prior 12-month periods re hiring, promotions and transfers
 - Voluntary self-identification forms to identify race/gender - confidential
 - Use of an applicant flow log
 - Paper applicants vs. “Internet Applicant” issue

Required Steps Beyond the Written AAP

- Overview of “Internet Applicant” Rule
 - Meant to apply to job seekers applying through Internet or related electronic data technologies
 - Prescribes records contractors must maintain/produce to OFCCP
 - Requires contractors to solicit race, ethnicity, and gender data from all “Internet Applicants”

Required Steps Beyond the Written AAP

- Definition of "Internet Applicant"
 - 1. Expression of interest through Internet or related technologies
 - 2. Individual considered for employment in particular position
 - 3. Indication of "basic qualifications"
 - 4. No indication of withdrawal

Required Steps Beyond the Written AAP

1. Expression of interest through Internet or related technologies
 - Fax
 - E-mail
 - Résumé posted with third-party vendor (such as Monster)
 - Paper and electronic received

Required Steps Beyond the Written AAP

2. Individual considered for employment in particular position
 - Employer "assesses the substantive information" with respect to the qualifications for a particular position
 - Includes determining whether a candidate meets the basic qualifications

Required Steps Beyond the Written AAP

- 3. Indication of "Basic Qualifications"
 - Must be:
 - Objective
 - Noncomparative
 - Relevant to performance of job and enable employer to accomplish business related goals
 - Also must be advertised/established in advance, in writing

Required Steps Beyond the Written AAP

- 4. No indication of withdrawal
 - Express withdrawal prior to offer
 - Passive withdrawal
 - Failure to respond to employer contacts
 - Expression of interest does not fit job applied for (salary, location, type of work, etc.)

Required Steps Beyond the Written AAP

- "Internet Applicant" Record Retention
- Expressions of interest through Internet where considered for particular position
 - External résumé databases – retain all expressions of interest for those meeting "basic qualifications" and all considered
 - Internal databases – info re résumés added and searches
 - External databases – info re searches

Required Steps Beyond the Written AAP

- Annual Obligations
 - Perform analysis of prior year’s hiring, promotion, and termination activity
 - By job group (or more refined)
 - Caution re self-help
 - OFCCP will do statistical analysis – Fisher’s Exact Test or Two Standard Deviation
 - Analysis of hiring activity (in particular) can be a science

Required Steps Beyond the Written AAP

- Annual Obligations
 - Evaluate prior year goals and good faith efforts to achieve them
 - Done by job group
 - Some include this in the AAP
 - “Progress” can be measured in different ways – placement rates (hires and promotions)
 - When in audit, be thorough – include all good results

Required Steps Beyond the Written AAP

- Compensation Analyses
 - Year in/out
 - Data to be submitted to OFCCP in audit
 - Know when to consult with a lawyer/statistical expert!!
 - Compensation is a hot issue with the OFCCP

Other Required Steps

- Use of veterans/disabled self-identification form (post-offer)
- File EEO-1/VETS-100 forms annually
- Post jobs with local unemployment office
- EEO clause in subcontracts/purchase orders
- Record retention – typically 2 years
- Employee/applicant access to vets/disabled AAP
- Notification to unions – nondiscrim./aff. action

Strategies for Handling a Compliance Review

- OFCCP's goal – concentrate resources on identifying and remedying cases of systemic discrimination and to quickly and efficiently close out reviews where there are no indicators of systemic discrimination
 - Disparate impact
 - Disparate treatment

Strategies for Handling a Compliance Review

- Best defense is a good offense (prepare)
 - 30 days is not a lot of time!!
 - Goal to get OFCCP to find the AAP and data acceptable and close the audit without the need for an onsite, a notice of violations and/or a conciliation agreement
 - Call your lawyer!!
- If OFCCP closes audit, establishment is exempt from further audit for 24 months from date of closure (but other facilities are fair game)

Compliance Review Strategies - Preparation

- Post all required postings and notices (for employees and job seekers)
- Collect responses to veterans/disabled self-identification form, if needed
- Compile list of reasonable accommodations requested, declined, and made

Compliance Review Strategies - Preparation

- Compile documentation of employment openings sent to state unemployment office
- Make sure EEO-1s and VETS-100 forms have been filed
- Review I-9 forms for errors/remove from personnel files
- Verify that EEO clause is incorporated in covered purchase orders/subcontracts

Compliance Review Strategies - Preparation

- Verify that previous commitments made with OFCCP (or in AAP) have been fulfilled
- Make sure applicant flow, hire, promotion, and termination logs are up-to-date
- Collect employment ads and letters to recruiting sources
- Compile documentation of good faith efforts

Preparing for an On-site Review

- Approach the on-site audit like a business or labor negotiation
- Remember OFCCP investigator is an agent of federal government
 - Provide only info requested and answer question only when you can provide an informed answer
- The OFCCP has the right to examine and/or copy relevant documents/conduct interviews

Preparing for an On-site Review

- What happens during an on-site review?
 - Entrance conference – CEO/Affirmative Action Officer
 - Human resources meeting
 - Facility tour
 - Management interviews
 - Employee interviews
 - Document review (including I-9s)
 - Exit conference

Preparing for an On-site Review

- Entrance conference – CEO/AA Officer
 - Critical for setting tone
 - Demonstrate contractor's commitment to affirmative action
 - Ask investigator re expected length and who expected to be interviewed

Preparing for an On-site Review

- Entrance Topics – Suggested topics
 - CEO's personal understanding and commitment to EEO and affirmative action
 - Specific actions taken at executive level
 - Appropriate history of the Company
 - Review of current diversity and affirmative action initiatives/themes
 - Show familiarity with goals for women and minorities and commitment to make progress

Preparing for an On-site Review

- HR/Affirmative Action Officer preparation
 - Draft summary description of recruiting, selection, and promotion processes
 - Prepare summary of candidate tracking process
 - Draft summary description of compensation practices/how contractor monitors compensation to assure non-discrimination
 - Identification of individual situations (terminations, job-related reasons females/minorities were rejected for hire/promotion, compensation by job title)
 - Review records OFCCP could ask for/review any medical information from personnel files

Preparing for an On-site Review - Interviews

- Note: AA Officer may be present during interview with managers/supervisors
- Questions the OFCCP may ask supervisors
 - Harassment/discrimination complaint procedures
 - Receipt of complaints
 - Knowledge of the AAP/affirmative action concepts
 - Placement opportunities
 - Placement goals

Preparing for an On-site Review - Interviews

- Questions the OFCCP may ask supervisors
 - Why were certain persons hired or not hired, not promoted or terminated?
 - Minimum (or basic) qualifications for jobs
 - Interview questions/tests used
 - Affirmative action recruiting conducted
 - Job postings
 - AAP training

Preparing for an On-site Review - Interviews

- Preparing supervisors for on-site audit
 - Nature of OFCCP review
 - Company's EEO/Affirmative Action Policy
 - Supervisor's affirmative action responsibilities
 - Placement goals in their areas
 - Basic legal considerations in interviewing/selection
 - Individual decisions/salary criteria
 - Conduct rehearsals with supervisors likely to be interviewed

Preparing for an On-site Review - Interviews

- Note: AA Officer is not allowed to be present during interviews of non-management employees
- Questions the OFCCP may ask employees
 - Employee background and qualifications
 - Employer policies
 - Knowledge of the AAP/equal opportunity policy
 - Employee's individual experiences
 - Any instances of discrimination or harassment
 - Whether they believe they are compensated fairly

Preparing for an On-site Review - Interviews

- Preparing employees for on-site audit
 - Nature of OFCCP review
 - Reminder about equal opportunity/affirmative action policies
 - Policies against discrimination and harassment
 - How to make complaints of discrimination/harassment
 - Let them know about potential interviews – up to them whether or not they want to submit

Preparing for an On-site Review

- The exit conference
 - Could indicate issuing letter closing out review process
 - Could be informal discussion with contractor about deficiencies
 - Could issue notice of violations
 - Pattern or practice issues
 - Individual discrimination findings
 - Other deficiencies identified

Preparing for an On-site Review

- The exit conference
 - Think of it as an initial negotiation regarding a potential conciliation agreement
 - Present further information on earlier raised issues
 - Address new findings of discrimination/non-compliance with explanations, if known
 - Once the contractor receives written findings, it is more difficult to negotiate
 - If you did not have an AAP prior to audit, you will have some technical violations

Preparing for an On-site Review

- If discussion regarding deficiencies that are more than minor technical violations – possible discrimination – contact a lawyer, if you haven't already (may need to live with prior contractor mistakes in submissions or may be costly – but necessary – to try to correct them at this point)
 - Documentation/response to allegations
 - Negotiation/proposed remedy
 - Conciliation agreement

Tips for Employers Subject to Affirmative Action Regulations

- Periodically audit your organization to determine whether or not you are covered by affirmative action requirements
- Make sure you're marking the correct box on the Company's EEO-1 forms (particularly if consolidated report for more than one company)
- Make sure the language in your AAPs tracks and/or complies with OFCCP regulations
- Avoid making inaccurate statements about compliance efforts

Tips for Employers

- Maintain current applicant flow, hire, promotion, and termination logs
- Maintain required records, such as applications, pay, and termination records
- Ensure all appropriate openings are posted with your state's unemployment office

Tips for Employers

- Periodically measure progress towards placement goals and existence of adverse impact
- Never submit data – hires, promotions, terminations, job seekers, compensation -- to OFCCP without first analyzing the data much like the OFCCP will
- If you receive notice of a compliance review, call your attorney to minimize disruption to your organization during the review process, guide the organization's responses to OFCCP requests for information, and minimize your organization's monetary exposure

Questions?

Thank you!
