



## **A Guide to Determining “Covered” Federal Government Contractor Status**

### **Helping Employers Determine if They Must Comply with Affirmative Action and Specific Anti-Discrimination Rules**

Having a federal government contract or subcontract can trigger the need to comply with serious affirmative action obligations and burdensome recordkeeping requirements imposed on “covered” federal government contractors. It is critical that a business know if particular contracts trigger these obligations so that it can properly evaluate the true benefits and burdens of such contracts. A business should not learn of these obligations for the first time in a government audit that could result in significant financial costs.

The Question: Do you need to comply with the affirmative action and specific anti-discrimination requirements that are imposed on “covered” government contractors?

Determining if you must comply: Use the “50-50” Test

- Do you have more than 50 employees AND
- A single contract worth at least \$50,000 that is:
  - With the federal government; OR
  - With a federal government contractor to provide goods or services that are “necessary” to the performance of the ultimate contract with the federal government; OR
  - Are you part of a “single entity” that is a covered federal government contractor
- If you answer YES then your company must comply with the following requirements:
  - Affirmative action plans (AAPs) compliant with Executive Order 11246
  - Detailed recordkeeping
  - Posting and notice requirements
  - Submission to audits

The Ramifications of Noncompliance: Failure to prepare AAPs and keep detailed records can lead to significant back pay awards, notices of violations, years of federal government oversight, negative public press and possible disbarment.

What you should do now:

- Determine if your company needs to comply.
- Get into compliance before being audited.

## Case Study: The Unsuspecting Subcontractor

In *OFCCP v. Monongahela Railroad Company*, the Office of Administrative Law Judges (OALJ) addressed whether the Office of Federal Contract Compliance Programs (OFCCP) had jurisdiction over a company that sold goods to another company that contracted with the federal government. The facts in *Monongahela* are typical of many subcontractor relationships with covered federal government contractors. Monongahela transported coal by rail for a portion of the trip from the coal mines to Detroit Edison's Monroe, Michigan, power plant. Detroit Edison contracted with the General Services Administration (GSA) to supply electric and steam service to federal facilities from all its power plants including the Monroe plant. The federal government used approximately 0.4 percent of the electricity generated by Detroit Edison on a yearly basis.

When the OFCCP sought to audit Monongahela it objected, asserting it was not a government subcontractor. It argued that its services were not necessary to Detroit Edison's government contract because Detroit Edison produced electricity without interruption even when the Monongahela did not transport any coal to it. The OALJ rejected that argument, pointing out that "[a]s the type of service provided by defendant, i.e. the transportation of coal, is necessary to the performance of Detroit Edison's government contract to supply electricity, defendant meets the definition of a subcontractor in the regulations."

Monongahela also argued that there was no way to prove that its coal was used to produce the electricity that was sold to the GSA, and that the amount of electricity purchased was so minimal that the coal it sold created "such a weak and tenuous connection to the provision of contractual services to the government that it cannot be considered a subcontractor." In rejecting this argument the OALJ found that once it was determined that the coal was "necessary" to the government contractor, "it should not make any difference whether the defendant's contribution to the government contract is large or small, significant or insignificant." Accordingly, Monongahela was found to be a "covered" federal government contractor, and thus required to comply with affirmative action obligations.

As the case study demonstrates, a business can become a "covered" federal government contractor not only by directly contracting with the federal government, but by being a subcontractor to a federal government contractor. Further, the subcontractor can become covered even if the connection between the goods and services provided and the ultimate government contract are minimal or the connection remote or tenuous. Moreover, the company will be obligated to comply even if it does not know there is an ultimate federal government contract.

**Key Takeaway:** A company will have affirmative action obligations if what it sells is necessary to an ultimate government contract, whether minimal, remote or even unknown to the company. Therefore, knowing whether contracts trigger such obligations is critical.

A business can also become a covered federal government contractor by being a part of a "single entity" that includes a covered federal government contractor. A "single entity" is a closely integrated corporate family that generally shares common ownership, management and controls or operations. A business that is part of a single entity that includes a federal government contractor will have affirmative action obligations even though the business has no involvement in the federal

government contract. Accordingly, there are multiple ways that businesses can become covered federal government contractors, and in particular two possible ways – subcontracting and being part of a single entity – that can come as an unpleasant surprise to a business.

The purpose of this White Paper is not to suggest that businesses should avoid becoming covered federal government contractors. Rather, what should be avoided is the surprise of being a covered federal government contractor without knowing it because being surprised eliminates the ability to weigh the costs and benefits of covered federal government contractor status. Your business should have full information about what federal government contractor status entails in order to make an intelligent business decision about whether to sell goods and services to the federal government, whether directly or indirectly.

This White Paper contains:

- A simple methodology to help companies identify whether they are a “covered” federal government “supply and service” contractor, including:
  - The “Red Flag Checklist” to help gather necessary information; and
  - The “50-50” Decision Tree to aid in analyzing whether a company must comply;
- An explanation of the compliances obligations costs;
- A discussion of the ramifications of noncompliance; and
- An appendix that provides summaries of the major laws and compliance obligations that apply to covered federal government contractors.

### **Determining If You Must Comply: The Methodology**

STEP ONE: Use the Red Flag Checklist to gather the information needed to evaluate whether your company satisfies the “50-50” Test.

STEP TWO: Use the “50-50” Decision Tree to evaluate the information gathered with the Red Flag Checklist to determine if your company must comply.

STEP THREE: If after evaluation you determine your company must comply, review your practices and procedures against the requirements imposed on “covered” federal government contractors and take corrective action as needed. In addition, evaluate the ongoing costs of compliance to determine the relative benefits and burdens of being a covered federal government contractor.

STEP FOUR: Repeat this process on a regular basis as circumstances change.

### **The Threshold Requirements for Compliance**

Merely having a contract to supply goods or services to the federal government does not obligate a company to be in compliance with the regulations governing “covered” federal government contractors. Rather, apply the “50-50” Test to determine if the threshold requirements are satisfied:

**AT LEAST 50 EMPLOYEES AND \$50,000 CONTRACT = COVERED FEDERAL GOVERNMENT CONTRACTOR**

50 Employee Requirement: If the company has less than 50 employees, it will not be a covered federal government contractor, even if it has a contract worth more than \$50,000.

\$50,000 contract requirement: The \$50,000 contract does not need to be directly with the federal government. Rather, the \$50,000 contract with the government may arise from one of four possible contracting relationships:

1. Direct federal government contract;
2. Direct federal government contract by another division of your company;
3. Subcontract for necessary goods or services to an ultimate government contract; or
4. Contract by another company in the same single entity as your company.

Note: “Federal financial assistance” (which means loans or grants of federal funds) is not a “contract” for purposes of the “50-50” Test, and thus does not trigger covered federal government contractor status even if more than \$50,000. Medicaid is an example of federal financial assistance.

The “Red Flag” Checklist: The Red Flag Checklist on the following page guides you through potential sources of information to check to determine whether your company meets the \$50,000 contract threshold requirement. Once you have gathered the necessary information, you can use the “50- 50” Decision Tree under Step Two to determine if you must comply with the requirements imposed on covered federal government contractors.

**STEP ONE: THE “RED FLAG CHECKLIST”**

Yes	No	<b>Sources of Information To Gather To Address the Following Four Questions</b>
		1. Do you have a federal government contract for $\geq$ \$50K?
		<ul style="list-style-type: none"> <li>• Ask your procurement personnel.</li> <li>• Check the federal procurement databases.</li> <li>• Check EEO-1s</li> </ul>
		2. Do you have a branch office/division with a federal government contract $\geq$ \$50K?
		<ul style="list-style-type: none"> <li>• Ask your divisions and branch offices.</li> <li>• Check the federal procurement databases.</li> <li>• Check all EEO-1s</li> </ul>
		3. Do you do $\geq$ \$50K business with a federal gov’t contractor?
		<ul style="list-style-type: none"> <li>• Get a list of customers that you do <math>\geq</math> \$50K business with.</li> <li>• Eyeball for obvious federal government contractors.</li> <li>• Check the federal procurement databases.</li> <li>• Check contracts <math>\geq</math> \$50K for incorporation language or reference to:               <ul style="list-style-type: none"> <li>• Executive Order (EO) 11246</li> <li>• 41 C.F. R. Part 60;</li> <li>• Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended;</li> <li>• Section 503 of the Rehabilitation Act of 1973, as amended;</li> <li>• Jobs for Veterans Act of 2002,</li> <li>• FARs (52.222-26, -35, -36, -54).</li> </ul> </li> <li>• Check for contractor certification forms.</li> <li>• If you have an initial contract <math>\leq</math> \$50K, has it been added to or amended to increase the total amount to <math>\geq</math> \$50K?</li> <li>• Is what you provide necessary to your customer’s government contract?</li> </ul>
		4. Are you part of a tightly controlled corporate group that includes a covered federal government contractor?
		<ul style="list-style-type: none"> <li>• Ask your parent, subsidiaries and sister companies if they are covered federal government contractors.</li> <li>• Check the federal procurement databases for parent, subsidiaries and sister companies.</li> <li>• If yes, conduct a <i>Single Entity</i> analysis</li> </ul>

## **STEP TWO: EVALUATING THE INFORMATION**

### **DIRECT GOVERNMENT CONTRACTS**

Evaluating direct government contracts is usually rather straightforward, even if the contract is with another division or office of the same legal entity. Thus, it is usually possible to readily determine whether you are a direct federal government contractor by locating such contracts.

### **SUBCONTRACT TO AN ULTIMATE GOVERNMENT CONTRACT**

The more difficult question to analyze is whether you have a subcontract that is necessary to someone else's federal government contract. You need not be the first tier subcontractor to be covered. For example, if you sell ball bearings to a company that manufactures jet engines that are sold to a company that manufactures jets airplanes under a contract to sell them to the Air Force, the ball bearings are likely "necessary" to the ultimate government contract for the sale of jet airplanes to the Air Force. Thus, the company manufacturing ball bearings likely has affirmative action obligations, even if it was unaware that its ball bearings were eventually going to the Air Force.

- Step One: Determine if you are selling at least \$50,000 of goods or services to a covered federal government contractor or covered subcontractor.
- Step Two: Determine if what you are selling is necessary to the government contract.

Determining what is necessary is not always easy. Certain kinds of administrative services or "back office" functions may or may not be necessary to the performance of the government contract. For example, in *Liberty Mutual Insurance Company v. Friedman* the court held that the OFCCP did not have jurisdiction over Liberty Mutual merely because it provided blanket worker's compensation coverage to government contractors. Nonetheless, employers should not assume that such services are always unnecessary to an ultimate federal contract without undergoing a thorough analysis.

### **SINGLE ENTITY ANALYSIS**

A company that has nothing to do with federal government contracts may still qualify as a covered federal government contractor if it is part of a tightly controlled corporate family known as a "single entity" with a parent, subsidiary or sister company that is a covered federal government contractor. Further, two companies that separately might not be covered may, when combined, become a covered federal government contractor. For example, in *OFCCP v. Manheim Auctions, Inc.* there were two companies, one with the government contract worth more than \$50,000 but less than 50 employees, and the other entity, with no government contract but more than 50 employees. While neither entity standing alone qualified as a government contractor, as a single entity they both did because the separate legal status is ignored for purposes of determining obligations under the EO and regulations. Thus, both entities were covered and required to comply with recordkeeping and reporting (AAP) obligations.

The test used to determine whether a corporate family constitutes a "single entity" for purposes of subjecting all members companies to the compliance requirements is similar to the test used under

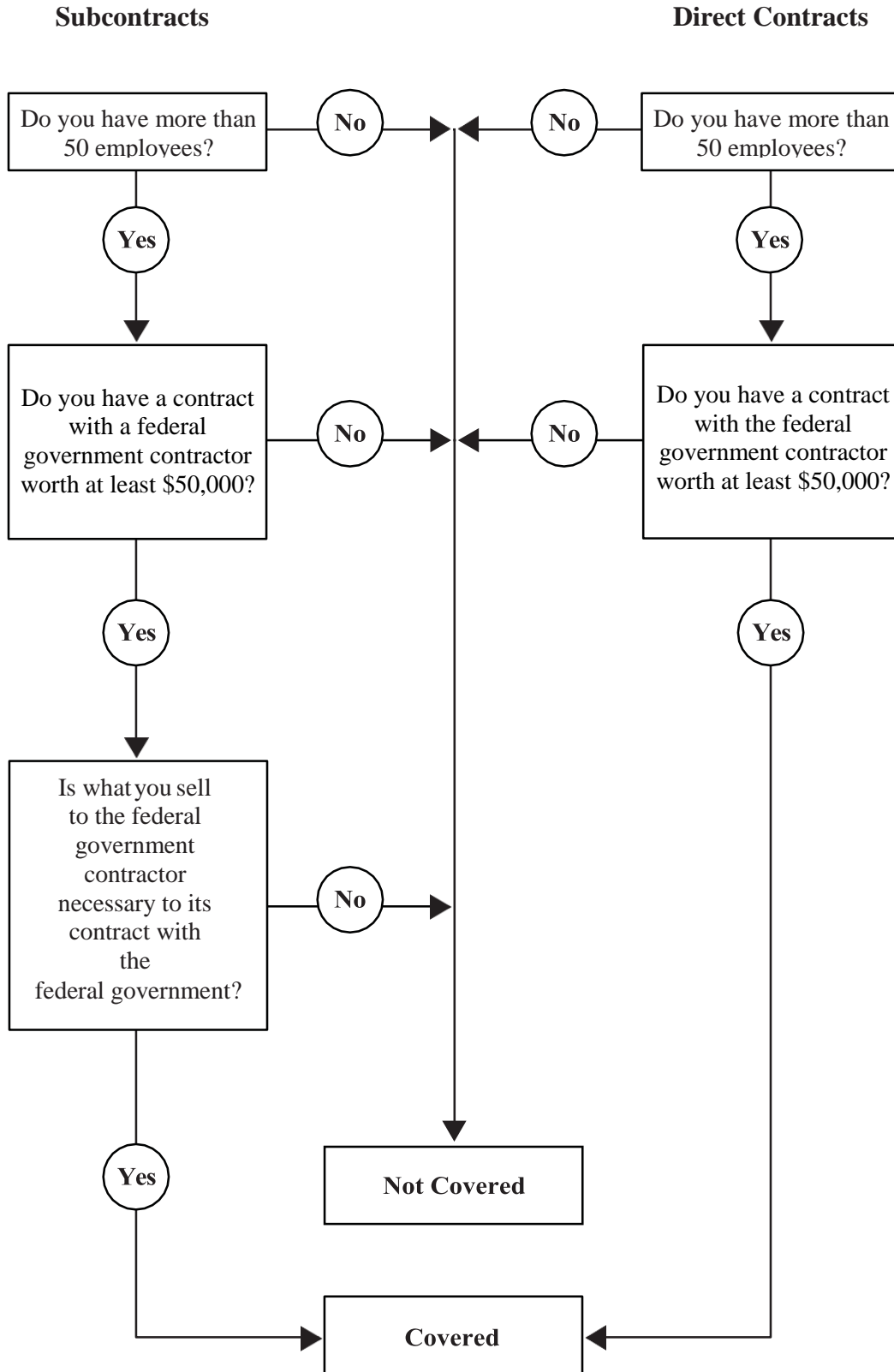
Title VII and the National Labor Relations Act, and is a facts and circumstances test that takes into account five general factors:

- Do the entities have common ownership?
- Do the entities have common officers and directors?
- Does one of the entities exert day-to-day control over the other companies through policies, management and supervision of the other companies' operations?
- Do the companies have common or centralized personnel policies?
- Are the operations dependent upon each other or principally for the benefit of each other, such as shared management, office space or other services?

Thus, when a company is part of a corporate family, it must make inquiries not only of itself or its branches and divisions, but of the other companies in its corporate family using the same sources of information that it would review for direct contracts or subcontracts (see the Red Flag Checklist). If one company turns out to be a covered federal government contractor, then it must be determined whether it may be treated as part of a single entity with any other companies in the corporate family under the test outlined above. With careful planning it is possible to isolate covered federal government contractors so that not all related companies become part of a single entity, but again a company must know about the potential for being a covered federal government contractor before it can plan to isolate such risk.

50-50 Decision Tree: The 50-50 Decision Tree on the next page provides a simple way to analyze whether a company meets the minimum requirements for being a covered federal government contractor.

# THE "50-50" DECISION TREE





## STEP THREE: REVIEWING COMPLIANCE RISKS

If you determine that your company must comply with the requirements imposed on covered federal government contractors, you should determine your level of compliance, take remedial steps to get into compliance and the attendant risks of noncompliance, and evaluate the benefits and burdens of ongoing covered federal government contractor status.

### COMPLIANCE OBLIGATIONS

- Equal Employment Opportunity (EEO) compliance personnel: A covered federal government contractor may need dedicated personnel to handle the obligations associated with being a covered federal government contractor. These personnel costs are often a hidden cost of compliance when evaluating the potential profit from a government contract and can be expensive depending upon the number of dedicated personnel.
- AAPs: AAPs can cost several thousands of dollars to prepare each year. They are generally prepared for each “establishment” (meaning a single physical location, which can include several different buildings in the same place), and thus a large company can have dozens of AAPs.
- Detailed Recordkeeping: Data tracking must include:
  - Tracking the race, gender, veteran status, disability status of both applicants and employees.
  - Detailed statistical analyses, including:
    1. applicants, hires,
    2. competitive promotions, non-competitive promotions,
    3. voluntary terminations, layoffs, involuntary terminations,
    4. compensation.
- Audits: The OFCCP has a right to audit covered federal government contractors. Audits can be very burdensome and require the production of significant amounts of data and require thousands of employee hours to address.
- Company-wide: Once a company becomes a covered federal government contractor, the compliance obligations infect the entire company, not just the particular location or division involved in federal contracts. Thus, any facility could be audited, even if it has no involvement in the federal government contract.

### RAMIFICATIONS OF NONCOMPLIANCE

- **Audits:** The OFCCP aggressively audits covered federal government contractors, issuing notices of violations and seeking substantial monetary penalties. As a result, covered federal government contractors have a strong incentive to pay careful attention to whether (1) they are covered federal government contractors, and (2) the requirements for compliance. If a company is subject to audit and has not been in compliance, it is unlikely to have the necessary documentation to explain any discrepancies in hiring, promotion, termination or compensation that the OFCCP determines exist.
- **Back pay awards:** OFCCP seeks back pay awards, usually two years plus interest, based on alleged patterns of discrimination based on race and gender. For example, if the OFCCP accuses a company of having discriminated against 10 women in hiring into a position that

pays \$50,000 per year (including the value of benefits), the OFCCP can seek a back pay award of \$1 million (\$50,000 annual pay for two years times 10 women) plus additional interest. Thus, back pay awards can be substantial.

- **Conciliation Agreements:** The OFCCP generally demands noncompliant covered government contractors enter into Conciliation Agreements for 2 or more years that requires additional reporting requirement and subjects the company to continued scrutiny and oversight.
- **Negative Press:** The OFCCP can issue press releases indicating how much back pay it has collected from noncompliant contractors. Such press releases can create negative public perceptions that have other unintended consequences for companies.

Key Takeaway: Compliance costs can outweigh the profit from a federal contract, and even a single back pay award could wipe out total contract revenues, let alone profits. Thus, it is critical for businesses to know what those compliance costs and risks are when determining the benefits of covered federal government contractor status.

## CONCLUSION

It is critical for employers to know if they are covered federal government contractors so that they can properly evaluate all the costs and burdens in addition to the benefits and make intelligent business decisions based on full information. The costs of compliance can be significant, and costs of noncompliance even more so, such as to make any profits from government contracts illusory.

Many employers can become covered federal government contractors without knowing it or actively seeking to become federal government contractors. Thus, employers should evaluate on a regular, periodic basis whether they are a covered federal government contractor and take steps to address compliance if they are.

**Employers should contact SESCO to help evaluate their status and ensure compliance with all affirmative action and anti-discrimination obligations. Please contact SESCO should you have any questions. For assistance, contact us at 423-764-4127 or by email at [sesco@sescomgt.com](mailto:sesco@sescomgt.com).**

## **APPENDIX: PRIMARY LAWS SPECIFICALLY AFFECTING COVERED FEDERAL GOVERNMENT CONTRACTORS**

### **EO 11246 AND OFCCP REGULATIONS**

EO 11246 prohibits discrimination in employment by federal government contractors on account of race, color, religion, sex or national origin. Further, companies must engage in activities designed to ensure that all employees and candidates for employment are treated without regard to race, color, religion, sex or national origin. These activities are known as “affirmative action.”

The OFCCP, which is part of the United States Department of Labor, audits federal government contractors for compliance with these affirmative action and non-discrimination laws. Under the OFCCP’s regulations (promulgated under 41 C.F.R. 60-1 et seq.) a covered federal government contractor must annually prepare an AAP and related documents and analyses. A separate AAP is generally required for each “establishment” or company location. Thus, a business could have dozens of AAPs depending upon the size of the company. An AAP must include the following information:

- Organizational profile or workforce analysis;
- Job group analysis;
- Placement of employees in job groups;
- Determination of availability of women and minorities for jobs in each job group;
- Comparison of percentage of employees in each job group to their estimated availability in the labor market and within the company;
- Placement goals;
- Designation of company personnel responsible for implementing the AAP;
- Identification of Problem Areas (analysis of its employment process to determine whether and where impediments to equal opportunity exist), which at a minimum include a detailed evaluation of the following:
  - The workforce by organizational unit and job group to determine whether there are problems of minority or female utilization or of minority or female distribution;
  - Personnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities;
  - Compensation systems to determine whether there are gender-, race-, or ethnicity-based disparities; and
  - Selection, recruitment, referral and other personnel procedures to determine whether they result in disparities in the employment or advancement in employment of minorities or women;
  - Action-oriented programs to address identified problem areas; and
  - Periodic internal audits.

There are other recordkeeping requirements, such as the need to maintain employment applications, as well as requirement that may overlap other employment laws, such as the obligation to maintain employee files.

## **LAWS PREVENTING DISCRIMINATION AGAINST THE DISABLED**

In addition to EO 11246 and OFCCP regulations, Section 503 of the Rehabilitation Act of 1973 prevents discrimination against disabled persons and requires an employer to invite individuals to self-identify as disabled after an offer of employment has been extended. In addition, covered federal government contractors are required to:

- **EEO Statement:** Annually prepare an equal employment opportunity policy statement that indicates the President's commitment.
- **Annual Procedure Review:** Review personnel processes to ensure they provide for careful and systematic consideration of the job qualifications of applicants and employees with disabilities.
- **Review Job Qualifications:** Establish a schedule for the periodic review of all physical and mental job qualification standards to ensure that qualification standards are job related and do not screen out otherwise qualified disabled applicants and employees.
- **Reasonable Accommodations:** Make reasonable accommodation to the physical and mental limitations of otherwise qualified individuals with disabilities unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.
- **No Harassment:** Develop and implement procedures to ensure that its employees are not harassed because of any disability.
- **Outreach and Recruitment:** Undertake appropriate outreach and positive recruitment activities to recruit qualified individuals with disabilities.
- **Organizational Buy-In:** Ensure adequate internal support from supervisory and management personnel to encourage them to take the actions necessary to meet the contractor's affirmative action obligations, and disseminate its policy internally.
- **Internal Auditing:** Design and implement an audit and reporting system that measures the effectiveness of the contractor's affirmative action program.
- **Responsible Employee:** Designate an official to be assigned responsibility for implementing the contractor's affirmative action program.
- **Training:** Train all personnel involved in the recruitment, screening, selection, promotion, evaluation, and discipline systems to ensure that the contractor's commitments are implemented.

## **LAWS PREVENTING DISCRIMINATION AGAINST VETERANS**

The Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) requires covered federal

government contractors to take affirmative steps to employ veterans. Covered federal contractors must fill out an annual VETS-100A form, which is similar to the EEO-1 form. In addition, covered federal contractors are required to:

- EEO Statement: Annually prepare an equal employment opportunity policy statement that indicates the President's commitment.
- Annual Procedure Review: Review personnel processes to ensure they provide for careful and systematic consideration of the job qualifications of applicants and employees who are known special disabled veterans.
- Review Job Qualifications: Establish a schedule for the periodic review of all physical and mental job qualification standards to ensure that qualification standards are job related and do not screen out otherwise qualified disabled veterans.
- Reasonable Accommodations: Make reasonable accommodation to the physical and mental limitations of an otherwise qualified special disabled veteran unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.
- No Harassment: Develop and implement procedures to ensure that its employees are not harassed because of their status as veterans.
- Outreach and Recruitment: Undertake appropriate outreach and positive recruitment activities to recruit qualified veterans.
- Organizational Buy-In: Ensure adequate internal support from supervisory and management personnel to encourage them to take the actions necessary to meet the contractor's affirmative action obligations, and disseminate its policy internally.
- Internal Auditing: Design and implement an audit and reporting system that measures the effectiveness of the contractor's affirmative action program.
- Responsible Employee: Designate an official to be assigned responsibility for implementing the contractor's affirmative action program.
- Training: Train all personnel involved in the recruitment, screening, selection, promotion, evaluation, and discipline systems to ensure that the contractor's commitments are implemented.

## **OTHER OBLIGATIONS IMPOSED ON COVERED FEDERAL GOVERNMENT CONTRACTORS**

There are other employment related rules and laws applicable to covered federal government contractors, including (but not an exhaustive list):

- E-Verify: Federal government contractors that use E-Verify must do so to determine the

work eligibility of all employees assigned to work on a federal government contract.

- Worker's Rights Notice: EO 13496 requires covered federal government contractors to post a "Worker's Rights Notice" in the workplace informing employees of their rights regarding union dues and under the National Labor Relations Act.
- No Union Avoidance Activities: EO 13494 prohibits the federal government from paying any of the costs of any activities undertaken to persuade employees to exercise or not exercise their rights to collectively bargain.
- Offer Jobs to Predecessor's Employees: EO 14395 requires covered federal government contractors to offer jobs to qualified employees of a predecessor contractor when a covered government contract changes from one contractor to another contractor.
- Prevailing Wage Laws. Covered federal government contractors may have obligations under various prevailing wage laws such as Davis-Bacon Act, the Service Contract Act, the Walsh-Healey Public Contracts Act and other similar laws.
- Minimum Wage Requirements. EO 13658 required covered federal government contractors to pay a higher minimum wage (currently- \$10.35 per hour, January 1, 2019- \$10.60 per hour) for (1) procurement contracts for construction covered by the Davis-Bacon Act (DBA); (2) service contracts covered by the Service Contract Act (SCA); (3) concessions contracts, including any concessions contract excluded from the SCA by the Department of Labor's regulations at 29 CFR 4.133(b); and (4) contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

Key takeaway: There are a variety of laws that apply to covered federal government contractors that prohibit discrimination in the hiring, promotion and termination of employees and applicants based on race, color, gender, religion or national origin, that require affirmative steps to promote to the hiring or veterans and the disabled, and that bar the use of federal money to address union activities.



**P.O. Box 1848**  
**Bristol, Tennessee 37621**  
**(423) 764-4127**  
**(423) 764-5869 (Fax)**

**web site: [www.sescomgt.com](http://www.sescomgt.com)**  
**e-mail: [sesco@sescomgt.com](mailto:sesco@sescomgt.com)**