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MANAGEMENT UPDATE

Federal Contractor Compliance Guidance

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Introduction

Employers that do work pursuant to Federal Government contracts are required to comply with higher standards of equal employment laws than those that do not. There are many general employment statutes that apply to virtually all employers [*e.g.*, Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment act (ADEA) among others]. In addition to these laws, Federal Contractors and Subcontractors (referred to in this pamphlet collectively as "Federal Contractors") also are subject to a set of rules aimed at achieving an even higher level of equal employment opportunity, including affirmative action. As amended, Executive Order 11246, Section 503 of the Rehabilitation Act, and The Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), are the three Federal Laws that collectively, along with the accompanying implementing regulations, set forth the high standards applicable to Federal Contractors. It is imperative that businesses subject to Federal Contracts become familiar with these requirements so that their hiring practices and other employment decisions comply with Federal Law. Non-Compliance with the provisions laid out in the various laws and regulations pertaining to Federal Contracts can result in serious consequences, such as contract cancellation and/or debarment from any future contracts with the Federal Government, or suspension of a contract or a portion of the contract.

Virtually all Federal Contracts contain a provision referred to as the "Equal Employment Opportunity Clause." By including this clause in its contracts, the Federal Government conditions the awarding of the contract on the Federal Contractor's ability to maintain the anti-discrimination and affirmative action policies outlined in Executive Order 11246, Section 503, and VEVRAA. Each of these laws sets forth a certain threshold amount that triggers its effectiveness (either contained in the relevant Contract or the implementing regulations). If the monetary value of the contract meets this amount, the Contractors are required to comply with the policies and procedures set forth accordingly subject to certain caveats and exceptions.

In addition to Executive Order 11246, Section 503 of the Rehabilitation Act and VEVRAA, this pamphlet also contains information regarding Executive Orders signed during the Bush and Obama Presidencies that establish even more rules applicable to Federal Contractors. These Executive Orders mandate that Federal Contractors comply with certain notice requirements, electronically verify their employees eligibility to work in the United States, and subject construction contractors to certain labor hiring requirements.

The U.S. Department of Labor through its Office of Federal Contract Compliance Programs (OFCCP) is charged with implementing and enforcing the rules governing the equal opportunity requirements specific to Federal Contractors. Accordingly, it is important to pay attention to developments in OFCCP's most current rules and practices.

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Executive Order 11246

President Lyndon B. Johnson signed Executive Order 11246 in 1965 with the goal of requiring Federal Contractors to establish and maintain non-discriminatory hiring and employment practices. Under Executive Order 11246, any Federal Contractor, Subcontractor, or Federally assisted construction contractor or subcontractor maintaining a contract with the Federal Government with a value exceeding $10,000 in a 12-month period is expressly forbidden from discriminating against employees and applicants on the basis of race, national origin, color, gender, and religion. Specifically, American Indian or Alaskan Native, Asian or Pacific Islander, Black, and Hispanic individuals are considered racial minorities for purposes of EEO clause compliance. There are, however, certain limited exemptions that Contractors should discuss with their attorneys. Furthermore, the regulations implementing Executive Order 11246 contain many concrete prohibitions and additional procedures that must be observed by Federal Contractors to avoid being out of compliance with the contract provisions and subject to sanction.

In order to ensure compliance procedures are having the desired effect, the OFCCP mandated that covered Federal Contractors establish Affirmative Action Plans that measure the participation and utilization of minorities and women among the Contractor's workforce. These programs are intended to be a mechanism by which Federal Contractors can self-audit how well their recruitment and advancement policies are working. The regulations make a distinction between construction contracts and supply and service contracts, as the former is not required to adopt and maintain a written Affirmative Action Plan ("AAP"). Instead, the Office of Federal Contract Compliance sets the goals and specifies the affirmative action that must be undertaken for construction contractors in order to comply with Executive Order 11246.

For supply and service contracts, those employers with 50 or more employees are required to develop their own written AAPs for each of their establishments within 120 days from the start of the government contract if one of the following conditions is met: their contract is for $50,000 or more; they serve as a depository of Federal funds; or they are a financial institution issuing and paying agents for U.S. savings bonds and notes.

The OFCCP mandates that the AAP procedures should be result oriented, and a good faith effort must be made by the Contractor to comply. Contractors are expected to look to the availability of qualified women and minorities in the local job market in formulating their specific AAP. In order to do so, Contractors should use the current statistical data that is available in making these determinations (i.e., U.S. Census data). Where problems are identified, the AAP should specify the corrective measures planned.

While the OFCCP does monitor compliance with these requirements and will penalize Contractors for failure to comply with their Plans, Federal Contractors should not be penalized for not meeting goals set

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in AAPs or those set by the OFCCP. The goals should be used to measure the effectiveness of the current measures employed by the Contractor to attract qualified minority and female applicants.

Section 503 of the Rehabilitation Act

Section 503 of the Rehabilitation Act protects qualified individuals who currently are disabled, have suffered from mental or physical disabilities in the past, or are perceived to be disabled Federal Contractors are subject to the rules set forth in Section 503 of the Rehabilitation Act if they procure a contract with the government for more than $10,000. If employers' contracts exceed the $10,000 threshold, they are expected to take steps to hire and advance persons with disabilities having the necessary skills and qualifications for the job. Employers are also required to make reasonable accommodations for employees and applicants with known physical or mental limitations unless doing so would impose an undue hardship on the employer.

Additionally, if the Federal Contractor has 50 or more employees and their government contracts or subcontracts total $50,000 or more, they must adopt and maintain a written AAP, under Section 503. Like the requirements under Executive Order 11246, the Plans are intended to measure the utilization of disabled persons in the work force. Not all persons with disabilities are protected; individuals must have the necessary education, skills, and meet the job related requirements. Also, in order to fall into the category of protected persons, the individual must be able to perform the necessary job functions with or without special accommodations. Employers are expected to make reasonable accommodations for qualified employees or applicants with disabilities unless doing so would impose an undue hardship. During compliance reviews, compliance officers will inquire into the steps taken and the efforts made to achieve equal opportunities for persons with disabilities through affirmative action. The employer should review this program on an annual basis to ensure that its effectiveness is maintained.

Vietnam Era Veterans' Readjustment Assistance Act

Under the Vietnam Era Veterans' Readjustment Assistance Act of 1974, Federal Contractors and Subcontractors are subject to certain requirements intended to protect specified categories of veterans from employment discrimination. In 2002, Congress amended VEVRAA with the Jobs for Veterans Act ("JVA"). These changes are pertinent to any contract entered into after December 1, 2003, leading to the development of two coverage thresholds that Federal Contractors must be aware of in order to ensure compliance.

Contracts entered into before December 1, 2003 will be subject to VEVRAA if they meet or exceed

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$25,000. Those entered into after December 1, 2003 will be subject to the requirements if the contract meets or exceeds $100,000.

The JVA also made sweeping changes to the Veterans protected by VEVRAA. If the contract was entered into before December 1, 2003 the following groups will be considered "protected" for the purpose of compliance:

- Vietnam Era Veterans
- Special Disabled Veterans
- veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized

A Vietnam Era Veteran is an individual who:

(i) Served on active duty for more than 180 days, any part of which occurred between August 5, 1964 and May 7, 1975; and
(ii) Was not dishonorably discharged from service; and
(iii) Any part of active duty was performed in either the Republic of Vietnam between February 28, 1961 and May 7, 1975 or between August 5, 1964 and May 7, 1975 in any other location; or
(iv) Was discharged from active duty for a service connected disability if any part of active duty was performed in either the Republic of Vietnam between February 28, 1961 and May 7, 1975 or between August 5, 1964 and May 7, 1975 in any other location

A special disabled veteran is an individual who:

(i) Is entitled to compensation under laws administered by the Department of Veterans Affairs for a disability rated at 30% or more; or rated at 10 or 20 percent if the veteran has been determined to have a serious employment handicap.
(ii) A person who was discharged from active duty because of a service-connected disability.

If the contract was entered into after December 1, 2003, the following changes to the protected groups will need to be taken into account while planning and implementing the designated affirmative action procedures. First, the category of Vietnam Era Veteran has been eliminated from express protection. Additionally, the category of special disabled veterans was expanded so that all veterans discharged or released from active duty because of service connected disabilities, or those who are entitled to compensation under laws administered by the Secretary of Veterans Affairs are entitled to special protection under VEVRAA. Protection was also extended to another category of veterans, the Armed Forces Service Medal Veterans. Also, the protection afforded to recently separated veterans was extended from 1 year out of service to 3 years.

Federal Contractors with at least 50 employees and a contract of $100,000 or more if entered after December 1, 2003 or $50,000 before must have a written AAP that includes provisions covering protected veterans at each establishment maintained by the employer. The Plan must also spell out the steps the Contractor will take to recruit, train, and promote veterans protected under one of more of the categories listed under the Act. Moreover, as part of the Plan employed, Federal Contractors are

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required to list with local State employment service the majority of employment openings; excepted from the job listing requirement are jobs expected to be filled from within, executive positions, and those jobs lasting three days or less.

If the Contractor maintains separate Federal contracts, one executed before December 1, 2003 and another after, it is essential that the Contractor is aware of the differences, as it will be expected to comply with both for the respective contracts covered. This, however, will not affect the written AAP, as no changes were made to the requirements governing their content by the JVA.

2013 Final Rule Changes Requirements under VEVRAA and Section 503 of the Rehabilitation Act

On September 24, 2013, the OFCCP published a Final Rule that makes several significant changes to the Regulations interpreting VEVRAA and Section 503 of the Rehabilitation Act of 1973. This means that Federal Contractors will have new obligations with regard to hiring protected veterans and disabled individuals when the Final Rule takes effect on March 24, 2014. The Final Rule requires Federal Contractors to establish annual "benchmarks" for hiring protected veterans in accordance with standards that will be published by the OFCCP or based on workforce data gathered by the Federal Bureau of Labor Statistics (BLS) and Veterans Employment and Training Service / Employment and Training Administration (VETS / ETA). With regard to hiring disabled individuals, the Final Rule requires Contractors to establish placement or "utilization" goals based on its entire workforce, which will be functionally similar to the hiring goals currently mandated for affirmative action plans based on gender and race.

The Final Rule also requires Contractors to conduct analyses of hiring data based on disability and veteran's status and to retain this data for up to three years, which is an increase from the current two-year retention requirement.

Under the new rules, Contractors now must provide applicants the opportunity to identify themselves as a veteran or as an individual with a disability at the pre-offer stage, as well as the post-offer stage of the hiring process. Current regulations provide new hires the chance to self-identify only at the post-offer stage. This requirement creates a serious challenge for Contractors because applicants who self-identify and are not hired may claim that they were discriminated against because of their disability or veteran's status in violation of the Americans with Disabilities Act (ADA) or VEVRAA respectively.

Contractors also should be aware of the following additional changes made by the Final Rule issued in August 2013:

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- New specific language must be used when incorporating an Equal Opportunity (EO) clause into a certain purchase orders and subcontracts by reference.
- Contractors who post vacancies with a State Workforce Agency (SWA) clearly must now provide information about each vacancy in a manner and format established by the SWA to provide for "priority referral" of protected veterans.
- The OFCCP must be allowed by Contractors to review documents related to compliance with VEVRAA and Section 503 of the Rehabilitation Act either on-site or off-site, at the option of the OFCCP.

This list of changes is not exhaustive, and Contractors should contact their Labor & Employment counsel to make sure they understand the new requirements imposed by the Final Rule and to determine the most effective methods for recruiting and hiring veterans and disabled individuals without increasing their risk of a liability under discrimination laws or running afoul of other legal obligations.

Veterans' Employment and Training Service (VETS)

The Veterans' Employment and Training Service ("VETS"), like the OFCCP, is a division of the U.S. Department of Labor. VETS is charged with administering the requirement that Federal Contractors track and report annually to the Secretary of Labor the number of protected veterans they employ. They do this by demanding that Federal Contractors file either a VETS-100 or a VETS-100A Report every calendar year.

Federal Contractors are required to submit a VETS-100 Report if they have a current government contract in the amount of $25,000 or more that was entered into before December 1, 2003. VETS-100 Reports require Federal Contractors and subcontractors to report the number of employees and new hires during the year who are included in one of the categories of protected veterans under VEVRAA prior to the JVA Amendment.

The VETS-100A Report should be used for any contracts entered into after December 1, 2003. After the JVA amendments to VEVRAA, a new report was required and a few reporting requirement changes were made distinguishing the VETS-100 Report from the VETS-100A Report. Any Federal Contractor or Subcontractor with a Federal Contract entered into after December 1, 2003 for more than $100,000 must file a VETS-100A Report. Additionally, the categories of veterans reported were changed in conformity with the JVA Amendment.

EEO-1 Report

The EEO-1 Report is a government form requiring employers meeting certain thresholds to provide a

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count of their employees by job category and then by ethnicity, race and gender. All Federal Contractors with 50 or more employees that maintain a Federal Contract, Subcontract, or purchase order for $50,000 or more; serve as a depository of government funds in any amount, or is a financial institution which is an issuing and paying agent for U.S. Savings Bonds and Notes are required to file an EEO-1 Report every year. Employers with multiple establishments must file an EEO-1 Report for each establishment that employs 50 or more persons. The report must be filed by September 30 of every calendar year, and should use employment statistics from any pay period occurring between July and September of the same calendar year.

E-Verify

President George W. Bush signed amended Executive Order 12989 on June 11, 2008. Subsequent to its enactment, all Contractors are required to electronically verify employment authorization of the employees performing work under qualifying federal contracts. The U.S. Department of Homeland Security designated "E-Verify" as the electronic employment eligibility verification system that all Federal Contractors must use to comply with the amended Executive order.

Contractors will be required to use E-Verify when their contract contains what is known as the "FAR" E-Verify clause (Federal Acquisition Regulation). Contracts will be affected if they meet the following criteria:

Prime Contracts:

- Value greater than $150,000;
- Period of Performance totaling 120 days or more; and
- Some of the work under the contract is performed in the US.

Subcontracts:

- Value of at least $3,000;
- Contract is for commercial or noncommercial services or construction; and
- Some of the work under the contract is performed in the United States
- Note: Subcontractors who act as suppliers are NOT required to use E-Verify.

Executive Order 13496 and Executive Order 13495

During his first term, President Obama signed two executive orders having the effect of revoking two Bush-era notices and placing new requirements on Federal Contractors.

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Executive Order 13495, which reversed President George W. Bush's Executive Order 13204, mandates the inclusion of a clause in service contracts for performance of the same or similar services at the same location requiring successor Contractors to provide incumbent employees with a right of first refusal of employment under the successor contract. According to the Obama Administration, Executive Order 13495 prevents the displacement of a large number of workers, while also ensuring that the Federal Government project is being continued with the benefits of employees familiar with the project.

Further, Executive Order 13496, has the effect of revoking the Bush-era "Beck Notice" requirements and now mandates that Federal Contractors and Subcontractors provide notice to employees of their rights under the National Labor Relations Act (NLRA). The NLRA governs the relations between employers and unions in the private sector. This notice advises employees of their rights to bargain collectively and the protections they are afforded while exercising their rights to form a union. Additionally, the notice also provides examples of illegal conduct on the part of employers and the contact information for the National Labor Relations Board (NLRB), the agency charged with enforcing the NLRA.

Conclusion

If you have any questions about the subjects discussed in this article, or you need any advice regarding any other labor and employment law matter, please contact our Firm.

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About Breazeale, Sachse & Wilson, L.L.P.

Established in 1928 in Baton Rouge, Breazeale, Sachse & Wilson, L.L.P. (“BSW”) is one of the oldest law firms in the state of Louisiana. We take great pride in our long history of client service. With more than 70 attorneys in Baton Rouge, New Orleans and the North Shore, the firm is among the largest firms in the state and one of the larger law firms in the South. BSW’s clients range from individuals and start-up companies, to Fortune 500 corporations, governmental entities and not-for-profit institutions.

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