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OFCCP

How to Unknowingly Become a Government Contractor (The Surprise “Gotcha” In Buying a Company or Real Estate)



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After months of negotiation and diligence, you are successful in your acquisition of a company that sells goods and services to the full range of commercial customers. Or maybe you bought (or foreclosed on) a large and fully leased office building. The celebration ends and your business moves forward. Some time later, you are advised by the federal government that you are in violation of your reporting requirements as a government contractor and are facing significant penalties.

You are convinced it must be a mistake; you have never entered into a contract with the government. Unfortunately, there is no mistake. The company you bought, with revenues of \$150 million, has a \$150,000 per year subcontract with a large defense contractor. The 250,000 square foot office building you now own includes a 1,500 square foot lease to the General Services Administration. Surprise! You are now a federal contractor.

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So what is the practical impact of that determination? It means your company now has reporting obligations for the acquired company pertaining to equal opportunity/antidiscrimination policies, and possibly affirmative action obligations, regarding women, minorities, veterans, and individuals with disabilities. Significantly, these reporting requirements may apply not only to the federal contractor, but may extend to all other affiliated entities under the corporate umbrella.

Enforcement of these requirements is handled by the Labor Department's Office of Federal Contract Compliance Programs (“OFCCP”). In determining whether to extend the reporting requirements to affiliates, OFCCP analyzes and balances five factors:

1. whether the specific entity and the federal contractor have common ownership;
2. whether they have common directors and officers;
3. whether one entity has de facto day-to-day control over the other through policies, management or supervision of operations;
4. whether the personnel policies of the two entities emanate from a common source; and
5. whether the operations of the two entities are dependent upon one another.

The more remote the ownership and the less control over management and operations, the less likely the federal government will be able to successfully argue that the affiliate group, as a whole, is a government con-

tractor. More control likely results in the affiliate needing to also comply with the reporting requirements of the federal government, even if the affiliate itself has no government contracts.

The lesson to be learned here is clear: you need to make sure as part of your due diligence whether the target company or property has any contract or, indirectly, a subcontract with the federal government. If it does, you need to work with someone knowledgeable in government contracting and OFCCP regulations to help structure the deal *before* you close, so as to minimize any unanticipated consequences. If the government work is not material, there may be a way to exclude it from the transaction. Alternatively, there are ways to structure the transaction so as to minimize the likelihood that affiliates of the buyer will be included in the reporting obligations. As noted above, the key is to minimize any control or involvement of any of the affiliates in the operations of the federal contractor. If you have already closed a deal, it is still possible to restructure the company or property ownership to keep affiliates outside the reporting requirement regime. However, this does not eliminate the obligations for reporting that arise before the restructuring takes place.

What are the equal employment opportunity and affirmative action obligations imposed on government contractors¹ by the federal government? The rest of this article addresses those compliance obligations.

Federal Laws Governing Equal Employment Opportunity and Affirmative Action Obligations of Federal Contractors.

There are three federal laws that govern equal employment opportunity and affirmative action obligations for federal contractors: Executive Order 11246 (“EO 11246”), as amended; Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. § 701, et seq. (“Section 503”), as amended; and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (“VEVRAA” or “Section 4212”).

Enforcement of these requirements is handled by the Labor Department’s Office of Federal Contract Compliance Programs (“OFCCP”). OFCCP is responsible for ensuring that employers who do business with the Federal government comply with the laws and regulations requiring nondiscrimination and affirmative action in employment. OFCCP has been in existence in one form or another since 1965 and its mission is based on the principle that employment opportunities generated or funded by Federal dollars should be available to all Americans on an equal and nondiscriminatory basis.

With significant funding and backing under the Obama Administration, today’s OFCCP is as visible and aggressive as it has ever been, with an active enforcement agenda. As a result, it is critical for companies to be diligent in determining whether they qualify as a federal contractor under some or all of these laws, and to ensure compliance if they do so qualify.

Executive Order 11246

¹ The terms “contract” and “contractor” encompass “subcontracts” and “subcontractors,” as the regulations discussed herein apply equally to both qualifying contracts and subcontracts, and contractors and subcontractors.

EO 11246 requires that companies with contracts of \$10,000 or more² with a federal contracting agency³ refrain from discrimination in employment decisions on the basis of race, color, religion, sex, or national origin, and ensure equal opportunity in employment. 41 C.F.R. § 60-1. All government contracts and subcontracts covered under EO 11246 must contain an equal employment opportunity clause.⁴

Contractors with federal contracts of \$50,000 or more, and with 50 or more employees, must also satisfy specific and detailed affirmative action obligations, including the creation of yearly affirmative action plans to assess the participation of minorities and women in the workplace. 41 C.F.R. § 60-1.40.

Section 503 of the Rehabilitation Act of 1973.

Section 503 prohibits companies with contracts of \$10,000 or more with a federal contracting agency⁵ from discriminating against any employee or applicant because of physical or mental handicap or disability who, with reasonable accommodation, can perform the essential functions of a job. As with EO 11246, contractors with a federal contract of \$50,000 or more and 50 or more employees must also take affirmative action to employ and advance in employment qualified individuals with disabilities. 29 U.S.C. § 793. Section 503 also requires inclusion of an equal employment opportunity and affirmative action clause in contracts and subcontracts and provides that covered contractors shall report on their affirmative action progress at least annually.

Vietnam Era Veterans’ Readjustment Assistance Act of 1974

Section 4212/VEVRAA, prohibits discrimination in employment by federal contractors⁶ against otherwise qualified Vietnam era veterans, special disabled veterans, recently separated veterans (within three years of discharge or release from active duty), and veterans who served on active duty during any war, campaign, or expedition for which a campaign badge was authorized. Federal contractors must also take affirmative action to employ, advance in employment, and otherwise treat such qualified veterans without discrimination in all employment practices.

² Companies holding government contracts for less than \$10,000 are still covered if in any 12-month period the aggregate total value of government contracts exceeds \$10,000. 41 C.F.R. § 60-1.5(a)(1). Also covered are companies holding government bills of lading or contracts in any amount with depositories of Federal funds or with financial institutions which are issuing and paying agents for U.S. Savings bonds and savings notes. 41 C.F.R. § 60-1.5.

³ Under EO 11246, a “contracting agency” is defined as “any department, agency, establishment, or instrumentality in the executive branch of the government, including any wholly owned government corporation, which enters into contracts.” 41 C.F.R. § 60-1.3.

⁴ Failure to physically incorporate the required clauses in a covered contract and/or subcontract does not defeat coverage, however, as these clauses are considered a part of every contract and subcontract by operation of the regulations. 41 C.F.R. §§ 60-1.4(e), 60-250.5(e), 60-741.5(e).

⁵ Under Section 503, unlike under EO 11246, the term “contracting agency” is not limited to executive agencies. As a result, a contract with any federal agency meeting the threshold limits is covered.

⁶ As under Section 503, Section 4212 does not limit “contracting agency” to executive agencies.

For contracts entered into on or after December 1, 2003, the threshold amount for coverage under VEVRAA is a single contract of at least \$100,000. 38 U.S.C. § 4212(a). For contracts entered into before December 1, 2003, the threshold amount for coverage under VEVRAA is a single contract of \$25,000. *Id.*

Impact of Coverage Under Equal Employment Opportunity and Affirmative Action Laws.

Depending on the size of the company and the value of the government contract(s), there are various actions that are required to ensure compliance with federal regulations.

Government Contracts of \$10,000 or More

If you have a federal contract or contracts worth at least \$10,000, you must take steps to comply with basic nondiscrimination requirements of EO 11246 and Section 503.

1. Nondiscrimination Obligations Under EO 11246 and Section 503.

a. Commitment to Provide Equal Employment Opportunities

- All hiring and employment decisions must be made without regard to race, color, religion, sex, or national origin.
- Refrain from discriminating against any employee or applicant because of physical or mental handicap or disability who, with reasonable accommodation, can perform the essential functions of a job.

b. Recruiting/Job Postings

- Review job descriptions and job postings to ensure they include the basic qualifications for each position. Basic qualifications are the objective, non-comparative minimum requirements for a particular position that are relevant to the performance of the particular position and enable the employer to accomplish business-related goals.
- Review physical and mental job requirements in job descriptions to ensure they reflect actual job responsibilities.
- Review any physical or medical examinations. Ensure they are administered post-offer, job-related and consistent with business necessity. To the extent an examination is used to screen out any applicant, assess whether the applicant could perform the related essential job function with a reasonable accommodation. If so, do not revoke any job offer.
- Include the EEO/AA tag line (for example, "Equal Opportunity Employer M/F/D/V") on all recruitment advertising.
- Send letters to recruitment sources and community organizations regarding the employer's EEO/AA policy and request their support, including third party recruiting/search firms, temporary agencies, or staffing companies, if used to fill open positions.
- Assess the effectiveness of accessibility language for website career pages and/or online application

systems. At a minimum, ensure that the site clearly states that the employer will accommodate persons with disabilities who need assistance to apply for employment as follows:

[Employer Name] is committed to working with and providing reasonable accommodation to individuals with disabilities. If, because of a medical condition or disability, you need a reasonable accommodation for any part of the employment process, please send an e-mail to (*email address*-.com) or call 1-(xxx) xxx-xxxx and let us know the nature of your request and your contact information.

- Assess the compatibility of your online application system with assistive technology for individuals with disabilities. Further information can be found on the following websites: the Department of Labor's Office of Disability Employment Policy ("ODEP") (<http://www.dol.gov/odep/>), ODEP's accommodation solutions page (<http://www.dol.gov/odep/bsense/bsense0211.htm>), and the Job Accommodation Network (<http://askjan.org/>).
 - Conduct outreach activities for disabled individuals at each establishment. Make and document contacts with disabled recruitment sources or local organizations representing people with disabilities. Consider attending career fairs hosted by these organizations, inviting representatives from these organizations to the establishment for a tour and review of job qualifications, and establish a regular exchange of information regarding open jobs and qualified candidates for these jobs. Maintain documentation of each contact showing that you have developed personal and active relationships. Track the disposition of candidates referred from these sources to assess the effectiveness of your outreach efforts.
- ### c. Training, Communication, & Internal Monitoring
- Provide periodic EEO/Anti-harassment training to employees, including management, on such topics as protected characteristics, affirmative action and reasonable accommodations.
 - Annually review the EEO/AA policy with managers and supervisors.
 - Review all policies, procedures, and practices to ensure non-discrimination in hiring, promotions, transfers, compensation, benefits, layoffs and return from layoff, employer sponsored training, education, tuition assistance, and social and recreational programs.
 - Review policies or practices for reasonably accommodating employees' and applicants' sincerely held religious beliefs, observances and practices, unless such accommodation would cause undue hardship.
 - Confirm that an effective, anti-harassment policy is in place that protects against any and all workplace harassment, and that this policy contains an effective internal complaint procedure with multiple complaint channels and a strong anti-retaliation provision.
- ### d. Workplace Posters

- Update, sign, and post at each facility or location the EEO/AA Policy Statement.
 - Verify that all required postings, including the Federal “EEO Is The Law,” the Service Contract/Walsh-Healy Public Contracts Act, and Family and Medical Leave Act posters, along with any other required federal, state and local postings are posted and visible to employees and applicants (the referenced posters can be accessed at <http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm>, <http://dol.gov/whd/regs/compliance/posters/fmlaen.pdf>, and <http://www.dol.gov/whd/regs/compliance/posters/govc.pdf>).
 - Consider posting your EEO, anti-harassment and reasonable accommodation policies, in hard copy and/or electronically, in addition to distributing them through the usual means.
 - Update and post an Invitation to Self-Identify Disabled Individual Status where employees and post-offer applicants can see it. We do not recommend using a questionnaire to solicit information regarding disability status.
 - If any post-offer applicant or employee self-identifies as having a disability, invite him or her to provide information about any necessary accommodations and be prepared to engage in the interactive process to determine the medical necessity and reasonableness of any accommodation request.
 - Ensure that no inappropriate postings or graffiti are displayed in the facility including break areas, restrooms, and locker rooms.
- e. *Subcontractors and Union Notices*
- Incorporate EEO and other required clauses in all covered purchase orders and subcontracts of \$10,000 or more, such as the following:

Non-Discrimination and Affirmative Action: [Employer] is an Equal Opportunity and Affirmative Action Employer. Unless exempt, the Equal Opportunity Clauses set forth at 41 CFR § 60-1.4(a), 41 CFR § 60-250.5(a), 41 CFR § 60-300.5(a), and 41 CFR § 60-741.5(a); the provisions of 41 CFR § 61-250.10 and 41 CFR § 61-300.10 (which relate to veterans’ employment reports); and the provisions of 29 CFR Part 471, Appendix A to Subpart A (posting of employee notice) are incorporated by reference as terms and conditions of this agreement and are binding on Subcontractors/Vendors. Subcontractors/Vendors may be required to develop written affirmative action programs and/or otherwise comply with the regulations at 41 CFR Part 60.

f. *Other Policies/Practices*

- Participate in community support activities related to EEO/AA.
 - Develop and/or reexamine a reasonable accommodation policy for disabled individuals.
 - Document and maintain documentation relating to workplace accommodation requests, including leaves of absence.
- Retain all outreach correspondence and document outreach activities.
 - Ensure that buildings, parking, and rest rooms are accessible to persons with disabilities and are properly marked with appropriate signage.

Government Contract of \$50,000 or More and 50 or More Employees

If you are a federal contractor with 50 or more employees and a single federal contract worth \$50,000 or more, you must develop a written Affirmative Action Plan (“AAP”) covering minorities and females for each of your establishments. Each AAP must be redeveloped each year using current employee data. OFCCP regulations set forth the specific required contents of an AAP and covered contractors and their counsel should be familiar with the specific obligations as set forth in the regulations.

Contractors with a federal contract worth at least \$50,000 and with 50 or more employees must also develop a written AAP covering individuals with disabilities under Section 503.

1. Affirmative Action Obligations Under EO 11246

a. Prepare Written AAP Under EO 11246 & Conduct Mandatory Analyses

- Determine the AAP structure for the entire organization choosing either development by location, development under OFCCP’s functional affirmative action plan (“FAAP”), or a combination of the two. OFCCP approval must be obtained prior to any FAAP development.
- Determine the number of AAPs, who will be included in each plan, and the starting date for each AAP. For each establishment with 50 or more employees, develop a separate AAP for minorities and females, and be sure to keep it separate from any required AAP for disabled individuals under Section 503, as amended, and for covered veterans under Section 4212/VEVRAA, as amended.
- For establishments with fewer than 50 employees, there are three options: (1) develop a written AAP for the establishment, (2) include the employees in the AAP that covers the location of the HR function which supports the establishment, or (3) include the employees in the AAP that covers the location of the official to whom they report.
- Once developed, EO 11246 AAPs must be redeveloped annually. Each year, the AAP must contain current employee statistics and data regarding applicant flow, hires, promotions, and terminations for the twelve months preceding the start of the AAP year. Key elements of an EO 11246 AAP include:
 - ▶ **Organizational Profile.** A depiction of the staffing pattern within a facility. It provides an overview of the workforce at a facility that may help in identifying organizational units where women or minorities are underrepresented or concentrated. Typically, employers prepare what is called a “workforce analysis” for their organizational profile. A workforce analysis lists each job title, from lowest to highest paid within each department or organizational unit,

including departmental or unit supervision. For each job title, the number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be identified: Whites/Caucasians, African Americans/Blacks, Hispanics/Latinos, Asians, Hawaiians/Pacific Islanders, and American Indians/Alaskan Natives. The wage rate or salary range for each job title must also be listed.

- ▶ **Job Group Analysis.** Jobs at a particular facility with similar content, wage rates, and opportunities are combined to form job groups. The job group analysis must include a list of job titles and identify the percentage of minorities and women in each job group.
- ▶ **Availability Analysis.** Determine the availability of minorities and women for each job group, identifying “external availability” and “internal availability” for each. “External availability” is the percentages of minorities and women with the requisite skills for the job group in the reasonable recruitment area as determined from census data. “Internal availability” is the percentages of minorities and women within the employer’s internal “feeder” job groups from which employees often are promoted. Once external and internal availability percentages are determined, each is weighted according to its importance in filling openings in each job group.
- ▶ **Utilization Analysis or Placement Goals.** Compare the race and gender composition of the existing workforce to the availability data and determine whether the employment of minorities or women in any job group is significantly less than would be expected based on statistical analysis. If underutilization of minorities or females is found for any job group, placement goals must be established, equal to the minority or female availability percentages for each underutilized job group.
- ▶ **Good Faith Efforts.** Placement goals are not quotas, and a contractor should always hire the best qualified person. If a contractor has placement goals, it must make good faith efforts to meet those goals during the AAP year. Such efforts could include expanding the recruitment of qualified minorities and women and/or enhancing developmental opportunities for minority and women employees in order to qualify them for promotion.
- ▶ **Goal Attainment.** Measure minority and/or female hires and promotions against the placement goals that were set the previous AAP year. Where goals were not achieved, describe the good faith efforts made to achieve the goals and determine whether different or additional efforts are warranted in order to make progress toward goals.
- ▶ **Responsibility for Implementation, Review of Employment Selection and Other Processes, Development of Action-Oriented Programs, and Internal Audit.** Designate the person(s) responsible for program implementation, provide a narrative of the in-depth analysis of the total employment process vis-à-vis equal employ-

ment opportunity performed each year, identify any focus areas based on that analysis, describe action-oriented programs designed to address any focus areas identified, and outline periodic internal audits to monitor the results of its affirmative action program.

- **Conduct adverse impact analyses by race (including for minorities as a whole, for each particular race/ethnicity group, and based on favored group analysis) and gender on all hires, promotions, and terminations during the 12 month period preceding the beginning of the AAP year.** Strongly consider conducting these analyses under attorney-client privilege, as evidence of adverse impact can be considered a *prima facie* case of unlawful discrimination.
 - **Analyze and investigate any adverse impact findings to determine if they can be defended.**
 - ▶ For adverse impact in hiring, review selection process components to determine the source of the adverse impact, including a review of any pre-employment tests that may be causing adverse impact and require statistical validation. Consider the possibility that improper applicant tracking may be causing the impact. The applicant flow data, tracking system, and disposition codes should be reviewed.
 - ▶ For adverse impact in terminations or promotions, ensure that decisions are supportable with legitimate, non-discriminatory reasons and that proper documentation is maintained.
 - **Conduct preliminary compensation analyses by race (minorities v. non-minorities, and for each particular race/ethnicity group if so desired) and gender, according to methods currently used by OFCCP.**
 - **Investigate any disparities for defensibility with legal counsel using appropriate methodologies under the circumstances, and adjust pay as necessary.**
- b. *Recruiting/Applicant Tracking/Hiring*
- **Maintain applicant flow for all open positions.** Implement and maintain an applicant tracking system that invites applicants to self-identify their race/ethnicity and gender and that accurately records the screening process for all applicants using proper disposition codes. OFCCP defines “applicants” to include those who (1) express interest in employment, (2) are considered for a particular position, (3) meet the basic qualifications for the position, and (4) do not withdraw from consideration prior to receiving an offer of employment.
 - **Ensure that all recruiters and hiring managers (including new hires) are trained on selection processes, applicant tracking, and screening compliance.** Audit the applicant tracking system to ensure understanding and compliance. For example, if you have only one or a few applicants for a significant number of hires, recruiters may not be tracking all applicants.
 - **If a large percentage (for example, over 25 percent) of applicants in any job group have unknown race/ethnicity or gender, review the voluntary self-**

identification process to identify the reasons why the data is not being captured. Consider a supplementary visual identification process for applicants who are seen by the employer.

- If third party recruiting/search firms, temporary agencies, or staffing companies are used to fill open positions, send letters explaining the employer's EEO/AA policy and obligations. The letters should set forth expectations regarding assistance from these organizations in meeting annual affirmative action obligations. For example, advise that when applicants are considered for referral to the employer for a particular position, the firm is expected to collect race/ethnicity and gender information for all candidates who meet the basic qualifications for the position. Consider incorporating these expectations into your contracts with recruiting/search firms.
- If using third party recruiting/search firms, temporary agencies, or staffing companies, contact them when AAPs are being developed to request the prior AAP year's applicant flow data, including race/ethnicity and gender, for any employee position that was filled, including conversions from temporary non-employee worker to hire.
- Conduct outreach activities for minorities and women at each establishment. Make and document contacts with minority and female recruitment sources or local organizations representing these protected groups. Consider attending career fairs hosted by these organizations, inviting representatives from these organizations to the establishment for a tour and review of job qualifications, and establish a regular exchange of information regarding open jobs and qualified candidates for these jobs. Maintain documentation of each contact showing that you have developed personal and active relationships. Track the disposition of candidates referred from these sources to assess the effectiveness of your outreach efforts.

c. *Training, Communication, & Internal Monitoring*

- Determine the appropriate involvement of recruiters, talent acquisition personnel and key managers for making good faith efforts toward goal achievement. Develop a plan of action with hiring managers and recruitment personnel regarding good faith efforts to be made during the AAP year to address any placement goals.
- Conduct an internal audit of affirmative action plan effectiveness. Review recruiting and talent identification processes, performance management systems, training and skills enhancement programs, and management development programs to ensure they are not discriminatory and that they support progress toward the employer's specific affirmative action goals. Consider a review of pay equity prior to awarding compensation increases or supplemental pay such as bonuses or stock options. If a job group continues to have placement goals from one year to the next, redesign your good faith efforts to be more effective at recruiting and/or developing qualified minorities and women. Consider conducting some or all of the audit under attorney-client privilege.

- Advise top management of annual affirmative action plan results, including goal attainment, unresolved adverse impact findings, and unresolved compensation disparities. Employer leadership may want to consider linking good faith efforts toward goals with broader diversity initiatives.

d. *Recordkeeping*

- Retain the current and prior year's affirmative action plan documents.
- Retain all personnel/employment records for at least three (3) years from the making of the record or from the date of the personnel action involved, whichever date is later. This includes records that pertain to hiring and job assignments, demotion, transfer, layoff, and termination, rates of pay and other forms of compensation, selection for training or apprenticeship, records having to do with reasonable accommodation requests, results of any physical examinations, job advertisements and postings, applications and resumes, interview notes, tests and test results, and other employment screening criteria and results. Given OFCCP's interest in pay equity and that defense of pay differences may involve referring to an employee's employment records for their entire history as an employee, consider retaining all personnel/employment records for at least 2 years after the entire period of active employment.
- Maintain separate files for medical records, I-9 documentation, accommodations, and self-identification forms.
- Collect and retain personnel activity data for applicants, hires, promotions, transfers, and terminations for at least two (2), but preferably three (3), years.
- Retain all outreach correspondence and document outreach activities.
- Retain all searches of internal and external resume databases pursuant to the OFCCP's Internet Applicant Definition requirements.

e. *Annual Filings & Legal Reporting*

- Federal contractors and subcontractors with 50 or more employees must file a Standard Form 100 (EEO-1) report by September 30 of each year (for employers who are not federal contractors or subcontractors, the threshold is 100 employees). Online reporting and instructions for filing can be found at <http://www.eeoc.gov/eo1survey>.
- Review contracts to determine the applicability of E-Verify requirements and other obligations of federal contractors not related to affirmative action and equal employment opportunity.

2. Affirmative Action Obligations Under Section 503

- Prepare a written AAP for disabled individuals under Section 503 to employ and advance in employment qualified individuals with disabilities.⁷ Cur-

⁷ If an AAP for veterans under Section 4212/VEVRAA is also required, it is typically combined with the AAP for disabled individuals. *See infra*.

rently, such AAPs do not require the type of statistical analyses required of an EO 11246, but OFCCP is in the process of making changes to the AAP regulations to require more detailed analyses.

- Ensure that a copy of the Section 503 AAP for disabled individuals is available for review by employees and applicants.⁸
- Conduct an internal audit of affirmative action plan effectiveness. Review recruiting and talent identification processes, performance management systems, training and skills enhancement programs, and management development programs to ensure they are not discriminatory and that they support progress toward the employer's specific affirmative action goals. If you do not appear to be making any progress in recruiting or promoting disabled individuals, redesign your good faith efforts to be more effective at recruiting and/or developing qualified disabled individuals. Consider conducting some or all of the audit under attorney-client privilege.

Government Contracts of \$100,000 or More

If you have a single federal contract entered into on or after December 1, 2003 worth \$100,000 or more,⁹ you must satisfy nondiscrimination and affirmative action obligations with regard to covered veterans under VEVRAA/Section 4212, as well as some additional workplace posting obligations.

1. Nondiscrimination Obligations Under Section 4212/VEVRAA

a. Commitment to Provide Equal Employment Opportunities

- Refrain from discriminating against any otherwise qualified employees or applicants based on their status as a Vietnam era veteran, special disabled veteran, recently separated veteran (within three years of discharge or release from active duty), and/or veteran who served on active duty during any war, campaign, or expedition for which a campaign badge was authorized.

b. Recruiting/Job Postings

- Ensure each establishment is posting all openings with the appropriate employment service delivery system, except for executive and top management positions, positions that will be filled from within the organization, and temporary positions lasting no more than three days. The employment service delivery system includes the workforce agency job bank or employment service in the state or local area where the job opening occurs.
- Conduct outreach activities for veterans at each establishment. Make and document contacts with veteran recruitment sources or local organizations representing veterans. Consider attending career

⁸ AAPs under EO 11246 do not have this requirement; consequently, it is recommended that EO 11246 AAPs be maintained separate from AAPs for Section 503 and VEVRAA/Section 4212.

⁹ As discussed above, the threshold amount for contracts entered into before December 1, 2003 is a single contract of \$25,000.

fairs hosted by these veterans organizations, inviting representatives from these organizations to the establishment for a tour and review of job qualifications, and establish a regular exchange of information regarding open jobs and qualified candidates for these jobs. Maintain documentation of each contact showing that you have developed personal and active relationships. Track the disposition of candidates referred from these sources to assess the effectiveness of your outreach efforts. Retain all outreach correspondence and document outreach activities.

c. Workplace Posters

- Update and post an Invitation to Self-Identify Veterans Status¹⁰ where employees and post-offer applicants can see it. If an employee or post-offer applicant self-identifies as a veteran or disabled veteran, provide a document requesting information about the specific veteran's category (recently separated veteran, Armed Forces service medal veteran, disabled veteran, or other protected veteran) that applies.
- Consider being more proactive in gathering self-identification information from veteran employees by distributing a questionnaire during employee orientation.

d. Subcontractors and Union Notices

- Incorporation of required EEO and affirmative action clauses concerning covered veterans in all purchase orders and subcontracts, such as the following:

Non-Discrimination and Affirmative Action: [Employer] is an Equal Opportunity and Affirmative Action Employer. Unless exempt, the Equal Opportunity Clauses set forth at 41 CFR § 60-1.4(a), 41 CFR § 60-250.5(a), 41 CFR § 60-300.5(a), and 41 CFR § 60-741.5(a); the provisions of 41 CFR § 61-250.10 and 41 CFR § 61-300.10 (which relate to veterans' employment reports); and the provisions of 29 CFR Part 471, Appendix A to Subpart A (posting of employee notice) are incorporated by reference as terms and conditions of this agreement and are binding on Subcontractors/Vendors. Subcontractors/Vendors may be required to develop written affirmative action programs and/or otherwise comply with the regulations at 41 CFR Part 60.

e. Annual Filings & Legal Reporting

- Federal contractors and Subcontractors with 50 or more employees must file a VETS-100A report by September 30 of each year. On-line reporting and instructions for filing can be found at <https://vets100.vets.dol.gov> (for federal contracts and subcontracts entered into before December 1, 2003, a VETS-100 report should be filed). Consider that OFCCP often analyzes Vets-100A results year over year to ascertain trends.

2. Affirmative Action Obligations Under Section 4212/VEVRAA

- Prepare a written AAP for covered veterans under Section 4212/VEVRAA to employ, advance in em-

¹⁰ The typical invitation usually invites self-identification of veteran status and/or disability status.

ployment, and otherwise treat qualified veterans without discrimination in all employment practices.

- Combine with AAP for disabled individuals under Section 503 and follow same steps as described above for Section 503 AAPs.
- Conduct an internal audit of affirmative action plan effectiveness. Review recruiting and talent identification processes, performance management systems, training and skills enhancement programs, and management development programs to ensure they are not discriminatory and that they support progress toward the employer's specific affirmative action goals. If you do not appear to be making any progress in recruiting or promoting veterans, redesign your good faith efforts to be more effective at recruiting and/or developing qualified veterans. Consider conducting some or all of the audit under attorney-client privilege.

3. Other Posting Obligations

- For federal contracts of \$100,000 or more and federal subcontracts of \$10,000 or more (resulting from solicitations issued on or after June 21,

2010), verify that the Executive Order 13496 employee rights notice is physically posted in conspicuous places and electronically posted if employee notices are regularly posted via the employer's intranet. (See <http://www.dol.gov/olms/regs/compliance/EO13496.htm> for the Executive Order 13496 poster and posting instructions). Also ensure that the required flow-down language referencing 29 CFR Part 471, Appendix A to Subpart A (posting of employee notice) is included in your subcontracts and purchase orders. Employers exempt from the National Labor Relations Act, such as the federal government and Federal Reserve Banks, do not need to comply with this posting requirement. Check with counsel if you are uncertain as to your Executive Order 13496 coverage.

Conclusion.

Buying a company or a property that has even minimal contractual obligations to the federal government can result in significant reporting requirements, both for the company/property owner and for its affiliates. Pre-transaction structuring can minimize the likelihood of having affiliates brought into the reporting web. If that is not done, post-transaction restructuring can help going forward, but does not relieve the obligations that arose before the restructuring took place.