

One Minute Memo[®]



What The Presidential Election Means For Federal Contractors: Insight Into What's Ahead For Affirmative Action

The re-election of President Barack Obama this week virtually guarantees that the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) will move full speed ahead with increased vigor to implement its regulatory agenda during the upcoming administration. In fact, the OFCCP is well positioned to implement significant changes over the next four years given the groundwork that has been laid over last four years. For a deeper discussion of the key issues in the following summary and our recommendations for your planning for 2013 and beyond, please register for our November 27, 2012 webinar [here](#).

New Disability and Veterans Regulations

First on the horizon will likely be efforts by the OFCCP to publish final versions of the much awaited revised regulations governing affirmative action for veterans and individuals with disabilities. Both sets of proposed regulations were first published in 2011 and have now made their way through much of the regulatory process. The published proposed regulations would significantly strengthen and increase affirmative action obligations for federal contractors. For a more detailed discussion of the proposed regulations concerning individuals with disabilities, [click here](#), and relating to veterans, [click here](#). Look first for the veterans regulations; they are likely to precede the disability regulations. In fact, President Obama specifically mentioned the employment of veterans in his speech the night of his re-election, stating that our country should be one where "no one who fights for this country ever has to fight for a job [] when they come home." Although the final revised regulations may differ somewhat from the revised regulations as proposed, we anticipate that the revised regulations will substantially increase the obligations and burdens on federal contractors with regard to affirmative action for people with disabilities and veterans.

Pay Equity, Pay Equity, Pay Equity

Throughout his first term in office and during his re-election campaign President Obama has placed a high degree of emphasis on the eradication of gender and race-based compensation discrimination. As a result, we expect that the OFCCP will continue to develop new compensation auditing tools and practices. Although some of the OFCCP's efforts appear to have been derailed by the findings of the National Academy of Sciences Report, [click here](#) for more information, we anticipate that the OFCCP will remain steadfast in their quest to audit compensation to ensure "fair pay" in the workplace.

New Audit Scheduling Letter

The proposed modification of the audit scheduling letter and itemized listing of required data that is used to initiate every compliance evaluation of supply and service federal contractors and subcontractors is held up in the Office of Management and Budget (OMB). It may be approved during President Obama's next term. If approved, in addition to affecting the

complexity of OFCCP audits from the outset, the changes also will affect the way federal contractors and subcontractors develop portions of their annual affirmative action programs and maintain their human resources information systems and will necessitate that contractors be “audit-ready” at all times, as it will be nearly impossible to gather all of the required information within the 30 day deadline. For example, if approved, contractors will be required to provide the gender and particular race/ethnicity composition of the “actual pool of candidates who applied or were considered for promotion,” which will require contractors and subcontractors ensure their internal promotions policies and processes, including their internal applicant tracking technology, allowing them to identify specific pools. It will also require that managers and human resources professionals involved in the competitive promotion process are adequately trained to accurately record those who are considered for each competitive promotional opportunity. [Click here](#) for our comments on the proposed changes to the scheduling letter.

Strategic Selection Process, Updated Compliance Manual, and Focus on the Construction Industry and Women

We can look ahead to what the Obama administration may try to accomplish in its next four years by looking back to the OFCCP’s prior pronouncements on its agenda. The U.S. Department of Labor’s budget request for 2013 and the Agency’s unified regulatory agenda provides a roadmap for what lies ahead with the OFCCP. [Click here](#) for the OFCCP’s budget request and [here](#) for the Regulatory Agenda. In addition to the OFCCP’s agenda items discussed above, in these documents the OFCCP indicated a willingness to:

- **Implement a “strategic” selection process to prioritize enforcement efforts and pinpoint multi-establishment and industry-wide deficiencies and violations.** Contractors have been hearing for some time now about OFCCP’s plan to search out enterprise-wide patterns of discrimination. Over the next four years, the OFCCP may seek to enhance its ability to target these contractors.
- **Focus on construction contractors.** The budget justification provides some specifics about the OFCCP’s plans to get actively involved with federal and federally-assisted construction contractors and subcontractors at the earliest stages of construction and to encourage construction contractors’ recruitment and retention efforts of women and racial/ethnic minorities. OFCCP states that it will be directing its enforcement efforts specifically toward so-called Mega Projects, which OFCCP defines as “federal or federally-assisted construction projects lasting longer than one year, and likely to have a major employment or economic impact on a community.” In addition, the OFCCP has publically stated its intent to revise the construction guidelines. [Click here](#) for the OFCCP’s pre-rule on these guidelines. If you are a construction contractor, especially on a Mega Project, you would be wise to conduct a mock audit to make sure you are ready when the OFCCP knocks on the door.
- **Implement new sex discrimination guidelines.** The OFCCP’s sex discrimination guidelines have not been updated since 1978 and the OFCCP said these regulations now “warrant[] a regulatory look back.” The OFCCP indicated [here](#) that it intends to issue a Notice of Proposed Rulemaking to create sex discrimination regulations that reflect what the OFCCP believes is the current state of the law in this area.
- **Update its compliance evaluation manual with revised enforcement procedures, which the aim of supporting a more robust and thorough compliance evaluation process, as well as create a level of consistency across regions.** Although this document is intended to guide the compliance officers, rather than federal contractors, the manual is of extraordinary value to contractors because it provides a blueprint for how the OFCCP will audit contractors. The revised compliance evaluation manual was expected to be published last year but the Administration apparently is waiting for the final veterans and disability regulations.

What This Means for Contractors

Contractors should be prepared to implement steps to comply with the final regulations and the additional obligations they will likely impose. This will include being prepared to make changes to human resources and recruiting policies and procedures and an increased focus on the collection and analysis of employee and applicant data. We recommend that you conduct mock audits under the attorney-client privilege to help your organization assess its state of readiness for the anticipated regulatory changes and smooth the way for implementation once the regulations are finalized. We can assist you with these self-audits by either guiding you in how to conduct such an audit or conducting the audit for you with an independent eye for compliance issues. We will keep you updated on developments as they occur and will provide more in-depth analysis once the OFCCP publishes the final revised regulations. Please [join us](#) on November 27th at noon central for a more in-depth discussion and next steps.

By: *Valerie Hoffman, Christine Hendrickson and Annette Tyman*

Valerie Hoffman is a partner in Seyfarth Shaw's Chicago and Los Angeles offices. *Christine Hendrickson* is senior counsel and *Annette Tyman* is an associate in the firm's Chicago office. If you have questions about this One Minute Memo, please contact the Seyfarth Shaw attorney with whom you work, any attorney on our [OFCCP, Affirmative Action, and Diversity Consulting Team](#), Valerie Hoffman at vhoffman@seyfarth.com, Christine Hendrickson at chendrickson@seyfarth.com or Annette Tyman at atyman@seyfarth.com.



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