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Received through the CRS Web

Katrina Relief: U.S. Labor Department Exemption of Contractors from Written Affirmative Action Requirements

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Summary

On September 9, 2005, the Employment Standards Administration (ESA) issued a memorandum to all federal contracting agencies waiving for a three-month period written affirmative action program, reporting, and notice requirements imposed by E.O. 11246 and related disability laws with respect to federal contracts for Hurricane Katrina relief efforts. Generally, regulations of the Office of Federal Contract Compliance Programs (OFCCP) under E.O. 11246 require federal contractors and subcontractors, with 50 or more employees, and contracts in excess of \$50,000, to refrain from discrimination and to take affirmative action with respect to the employment of racial and ethnic minorities, women, and religious adherents. Section 503 of the Rehabilitation Act of 1973, as amended, requires contractors to take affirmative action and make reasonable accommodations in hiring qualified individuals with disabilities. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA) requires employers with government contracts in excess of \$100,000 or more to take affirmative action "to employ and advance in employment" disabled veterans and qualified veterans of the Vietnam era.

The ESA invoked a regulatory exemption to relieve contractors of the obligation "to develop the affirmative action program, prepare the reports, or provide the notices usually required" by Labor Department (DOL) regulations under the three laws. However, while avoiding affirmative action planning and reporting aspects – possibly including goals, timetables, and perhaps other "proactive" hiring and recruitment methods – the memorandum indicates that federal contractors remain subject to the basic anti-discrimination bans under those laws, which may be enforced by individual complaint or agency compliance review. The waiver and exemption appear to expire after three months, but the memorandum makes clear that they are "subject to an extension should special interests in the national interest so require."

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and related disability laws with respect to federal contracts for Hurricane Katrina relief efforts.¹ Generally, regulations of the Office of Federal Contract Compliance Programs (OFCCP) under E.O. 11246 require federal contractors and subcontractors, with 50 or more employees, and contracts in excess of \$50,000, to refrain from discrimination and to take affirmative action with respect to the employment of racial and ethnic minorities, women, and religious adherents. Section 503 of the Rehabilitation Act of 1973,² as amended, requires contractors to take affirmative action and make reasonable accommodations in hiring qualified individuals with disabilities. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA)³ requires employers with government contracts in excess of \$100,000 or more to take affirmative action "to employ and advance in employment" disabled veterans and qualified veterans of the Vietnam era.

The central premise of E.O. 11246 is that absent discrimination, the racial, gender, and ethnic composition of a contractor's workforce will come to reflect that of the qualified labor pool from which the contractor recruits and selects its employees.⁴ Accordingly, a contractor's written affirmative action plan is to include an analysis of the composition of its workforce in comparison to that of the relevant labor pools. A plan of action, with appropriate goals and timetables, to address underutilization of minorities and women in the contractor's workforce is another element. The remainder of the plan outlines "good faith affirmative action activities" the contractor intends to take in order to meet its goals and timetables and to remedy any other inequalities found to exist.⁵ Thus, an acceptable plan includes provisions for outreach and positive recruitment of underutilized groups as well as internal and external procedures for communicating and acting upon the contractor's EEO commitment, including audit and reporting systems.⁶

The ESA invoked a regulatory exemption⁷ to relieve contractors of the obligation "to develop the affirmative action program, prepare the reports, or provide the notices usually required" by Labor Department (DOL) regulations under the three laws. As a general matter, the waiver and exemption appear to be a permissible exercise of DOL's

¹ Charles E. James, Sr., Deputy Assistant Secretary, "Memorandum to all Contracting Agencies of the Federal Government Re: Contracts for Hurricane Katrina Relief Efforts," (September 9, 2005). Reprinted on OFCCP's website, [<http://www.dol.gov/esa/ofccp/>].

² 29 U.S.C. § 793.

³ 38 U.S.C. § 4212.

⁴ 41 CFR § 60-2.10(a) (2004).

⁵ Id. at § 60-2.35.

⁶ Id. at § 60-2.17, 2.21. Specifically, the executive order requires inter alia that contractors and subcontractors state in all job advertisements that qualified applicants will be considered for employment without regard to race, color, religion, or national origin; advise labor unions and include in every subcontract or purchase order a statement of their obligations under the order; furnish all information and reports required by the enforcing agency and permit access to books, records, and accounts; and file regular compliance reports describing hiring and employment practices. Id. at §§; 60-1.40 to 1.47.

⁷ See 41 CFR 60-1.5(b)(1), 60-250.4(b)(1), and 60-741.4(b)(1).

plenary rulemaking authority under the executive order⁸ and of the Rehabilitation Act, which specifically includes provision for a Presidential waiver “in the national interest.”⁹

No similarly explicit statutory authority exists in VEVRA; but it might reasonably be inferred in the present circumstances from a directive that DOL “coordinate[]” reporting under that law with any other required reports to the Secretary – such as those required by the other two exempted laws.¹⁰ However, while avoiding affirmative action planning aspects – e.g., goals, timetables, and perhaps other “proactive” hiring and recruitment methods – the memorandum indicates that federal contractors remain subject to the basic anti-discrimination bans under those laws, which presumably may continue to be enforced by individual complaint or agency compliance review. In addition, according to OFCCP Director James, covered contractors would continue to be subject to Federal Acquisition Regulation requirements for posting “Equal Opportunity is the Law” notices; recordkeeping and record retention; and employment listings with appropriate local employment service offices.¹¹

The waiver and exemption appear to expire after three months, but the memorandum makes clear that they are “subject to an extension should special interests in the national interest so require.” Accordingly, it could be argued that the ESA memorandum amounts to an exemption of indefinite duration pertaining to a range of contracting opportunities, the full scope of which are neither defined nor explicitly limited by its terms. It is uncertain, for example, how broadly or narrowly the agency considers “covered contracts entered into to provide Hurricane Katrina relief” and what categories of contracts are to be exempted or for how long. In particular, it might be questioned whether the waiver and exemption relate only to contracts directly performed in the Katrina destruction areas, or might extend, as well, to procurement of goods and services by FEMA or other agencies that aid the relief effort from off-site locations.

Others would argue, however, that given the urgent demand for relief goods and services posed by the disaster – and the possibly temporary or one-time nature of at least some contract procurements – full compliance with all affirmative action planning and reporting requirements, prescribed by departmental rules and regulations,¹² may not be practicable in every case. Note that vendors supplying goods or services to the government, whether by purchase order or formal written contract, are apparently viewed as contractors for executive order purposes regardless of duration of the transaction if

⁸ E.O. 11246, § 201, 43 FR 46501 (1978): “The Secretary of Labor shall be responsible for administrative enforcement of Parts II and III of this Order. The Secretary shall adopt such rules and regulations as are deemed necessary and appropriate to achieve the purpose of Parts II and III of this Order.”

⁹ § 29 U.S.C. § 793 (c).

¹⁰ 38 U.S.C. § 4212 (d)(2). See e.g. *Butler v. McDonald Douglas*, 93 F.R.D. 384 (S.D. Ohio 1981)(DOL regulations under § 4212 must be given persuasive authority as to proper interpretation of the statute).

¹¹ See BNA, Daily Labor Report No. 176, p. A-1 (9-13-2005).

¹² See 41 C.F.R. Part 60-2 (2004) (Affirmative Action Programs); *Id.* at Part 250 (Special Disabled Veterans and Veterans of the Vietnam Era); and *Id.* at Part 741 (Affirmative Action Regarding Individuals with Disabilities).

other jurisdictional requirements are met.¹³ OFCCP regulations, however, provide a 120-day “grace period” from the date of contract commencement for affirmative action program development¹⁴ which, it could be contended, provides larger contractors covered by the law with ample opportunity to comply without interruption of necessary relief activities. And because smaller contractors – i.e., those with less than \$50,000.00 contracts or subcontracts or fewer than 50 employees – are not subject to written affirmative action requirements, the waiver and exemption would presumably not apply to them.

¹³ Cf. *United States v. Mississippi Power and Light Co.*, 638 F.2d 899, 905 (5th Cir. 1981)(affirmative action “is deemed a part of all government contracts whether or not the contract is written and whether or not the clause is physically incorporated in the contract. The regulation is an evocation of the strict policy that the affirmative action obligation is an understood and unalterable part of doing business with the government.”).

¹⁴ 41 C.F.R. at § 60-2.1(c).