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The Office of Federal Contract Compliance Programs and the Equal Opportunity Survey

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Summary

The Office of Federal Contract Compliance Programs (OFCCP) is an enforcement agency within the U.S. Department of Labor (DOL). In addition to other equal employment measures, the OFCCP oversees E.O. 11246, which prohibits discrimination in covered employers' workplaces on the basis of race, color, religion, national origin, and gender. The Johnson-era order further requires certain federal contractors and subcontractors to carry out affirmative actions to ensure that protected classes of workers have equal employment opportunities. After decades without substantive change, the Clinton Administration issued revised regulations in 1997 and 2000 — the most controversial component of which is the mandatory annual Equal Opportunity (EO) Survey. While it continued to send the survey to contractors through December 2004, the OFCCP hired Abt Associates in late 2002 to assess the survey's usefulness as a tool for focusing agency resources on those employers most likely to engage in systemic discrimination. The agency proposed, on January 20, 2006, to eliminate the EO survey based upon the results of the Abt study. The EO survey was rescinded effective September 8, 2006. This report will not be updated.

The OFCCP's Mandate

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces E.O. 11246, Section 503 of the Rehabilitation Act of 1973 and Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974. The amended order and statutes prohibit covered employers from discriminating against job applicants or employees based on race, color, religion, national origin, gender, disability and veteran status. They further require some covered employers to take positive steps (i.e., affirmative actions such as outreach, recruitment, or training) to ensure individuals have equal opportunities for employment.

The antidiscrimination provision of E.O. 11246 applies to federal contractors and subcontractors as well as federally assisted construction contractors and subcontractors who conduct business with the government worth more than \$10,000 in one year. In light

of the temporary nature of the construction industry's workforce, the OFCCP establishes the affirmative actions that approximately 100,000 construction establishments must make in an effort to achieve agency-set placement goals for the protected classes.

Nonconstruction (service and supply) employers with at least one federal contract of \$50,000 or more and at least 50 employees are required to develop written affirmative action programs (AAPs). The employer must analyze the use of minorities and women in its workforce, by job class, compared to the general availability of qualified or trainable minorities and women. If the employer determines through this self-audit that underutilization exists, it must develop placement goals and make "good faith efforts" to achieve them. The OFCCP is not authorized to penalize contractors for failing to meet their goals.

Regulations Revised During the Clinton Administration

E.O. 11246's regulations had not changed substantively for decades until August 1997, when the first of two final rules was issued based on a comprehensive review by the Clinton Administration. Both the 1997 and 2000 revised regulations cover *nonconstruction* contractors.

The first rule dealt with compliance monitoring by, among other things, instituting use of a tiered compliance evaluation process¹ and raising the contract threshold for mandatory pre-award compliance evaluations from at least \$1 million to at least \$10 million. It also addressed enforcement (e.g., specifying a fixed term of at least six months or an indefinite period as the length of debarment) and recordkeeping (e.g., employers must retain records for two years if the firm has 150 or more employees or a contract of at least \$150,000; otherwise, one year).

The Equal Opportunity (EO) Survey. In November 2000, a second final rule was published that focused mainly on AAPs and codified the new EO Survey. With regard to AAPs, the rule cut the factors considered in the availability test for minorities and women from eight to two; allowed contractors to continue using a variety of methods to identify underutilization; eliminated some AAP elements; and required contractors to appoint a company official with the authority to effectively implement the program.

The EO Survey was to query contractors annually about their AAP activities, personnel actions (e.g., hires and promotions), and compensation of full-time employees *aggregated* by job group and minority or gender status. Its stated purposes were to enable the OFCCP to better direct agency resources toward contractors most likely to be out of compliance, to make efficient use of the tiered compliance process, and to encourage self-awareness and self-evaluation among contractors as a means of increasing compliance. The final rule (41 CFR Part 60, Subpart B, Section 2.18) also specified that "[e]ach year,

¹ The tiered process consists of one or more of the following: a compliance review, heretofore the "one-size-fits-all" approach; an off-site review of records, which is similar to the desk-audit phase of the compliance review; a compliance check, which is an on-site visit to review the contractor's books and records to determine the accuracy and completeness of previously submitted information, proper maintenance of records under the executive order and/or that the contractor has developed an AAP consistent with OFCCP requirements; and a focused review.

OFCCP will designate a substantial portion of all nonconstruction establishments to” complete the EO Survey, which could only be changed under the following circumstances:

- (1) The Secretary must clearly demonstrate through statistical analyses of EO Survey submissions that the data element in question is no longer of value; and
- (2) The Secretary must follow Notice and Comment procedures.

Reaction and Background. Although women’s and civil rights groups largely supported the revised regulations, other parties did not. The mandatory survey was particularly controversial. Comments were made about the agency’s projection of the survey’s hours burden on employers and the potential for disclosure to competitors or the public under the Freedom of Information Act of contractor-provided information — especially compensation data.

In December 1999, almost a year before the second final rule was published, the Office of Management and Budget (OMB) approved the OFCCP’s proposal to require contractors to provide *summary* compensation information at an earlier phase of routine compliance evaluations (i.e., at the opening (desk-audit) stage). The agency, in December 1998, had proposed that contractors who were selected for reviews supply salary data for *individual* employees, which generated much opposition from the business community primarily due to confidentiality concerns. The OFCCP said early submission of compensation data would enable contract compliance officers to conduct more thorough initial checks and thereby more efficiently focus on specific problems. In mid-February 1999, after reviewing comments on the revised compliance evaluation scheduling letter, the agency asked OMB to grant a 90-day extension of the status quo in order to address Paperwork Reduction Act issues (e.g., burden and confidentiality). The OFCCP and OMB began circulating a draft of the EO Survey in September 1999, which reportedly was then being developed as an alternative to the agency’s attempt to require detailed compensation data from contractors early in the compliance process.

These OFCCP compensation initiatives were part of the Clinton Administration’s heightened efforts to narrow the gender wage gap. Other elements of the “Equal Pay Initiative” did not come to fruition (e.g., \$10 million in the FY2001 budget request for the Equal Employment Opportunity Commission (EEOC) to provide outreach — training and technical assistance — to employers, carry out a public service campaign about pay issues, and conduct training on the Equal Pay Act for some 1,000 EEOC employees).

The EO Survey During the Bush Administration

Women’s advocacy groups and some Members of Congress expressed concern that the Bush Administration had not sent out the third round of the EO Survey by spring 2001, because the completion date for the two prior rounds was May 31.² Just as the

² The April 2000 survey had to be completed and returned within 30 days. The survey sent on December 30, 2000 initially had a 45-day completion period from date of survey receipt, but in response to contractors’ requests for extensions, the Bush Administration lengthened the deadline to May 31, 2001.

precise format of the survey is not included in the final rule, neither is the meaning of “year” (e.g., fiscal, calendar, any 12-month period).

In December 2002, 2003, and 2004, the OFCCP mailed the unchanged survey. It went to 10,000 contractors each year who were randomly selected. This compares favorably with the 7,000 contractors to whom the survey initially was sent in April 2000; however, the agency said at that time that it expected to eventually query about one-half of the nonconstruction contractor population. When the survey was sent in December 2000, it went to 49,000 contractors.

Proposed Rule to Eliminate the EO Survey. The agency hired Abt Associates in late 2002 “to study and improve the Equal Opportunity Survey and the [contractor] selection methodology [for compliance reviews].”³ OFCCP Director Charles James stated that results of the study would provide a statistical basis on which to determine whether the EO survey can be utilized to better direct agency resources toward contractors that engage in discrimination.⁴ As previously noted, the regulation requires the use of “statistical analyses of EO Survey submissions” to invalidate a data element of the survey. The regulation further requires “Notice and Comment procedures” to be followed if changes to the survey are desired.

On January 20, 2006, the OFCCP issued a proposed rule to eliminate the EO survey based upon the Abt study’s results that most of the 125 predictor variables of discrimination derived from the survey bore no relation to findings of systemic discrimination in subsequent compliance reviews.⁵ Abt estimated that the predictive power of a model containing four of the 22 variables associated with systemic discrimination determinations was somewhat better than chance.⁶ It found, however, that many of the contractors that the four-variable model identified as likely to be engaged in discrimination were false positives (i.e., compliance evaluations did not uncover systemic discrimination).

Two of the four variables are available from the EEO-1 forms that contractors must provide the OFCCP. A model utilizing the two variables has slightly less, but nonetheless acceptable, predictive ability compared to a model utilizing all four variables.⁷ The OFCCP noted that it already utilizes the two variables to target its compliance activities.

³ [<http://www.dol.gov/esa/regs/compliance/ofccp/eosurvey/sfaqspol.htm>].

⁴ “OFCCP Schedules 2,000 Compliance Reviews to Analyze Controversial Pay Survey’s Validity,” *Daily Labor Report*, June 12, 2003.

⁵ Department of Labor, Office of Federal Contract Compliance Programs, “Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey; Proposed Rule,” 71 *Federal Register* 3374, Jan. 20, 2006. (Hereafter cited as 71 *Federal Register* 3374).

⁶ Abt Associates Inc., *An Evaluation of OFCCP’s Equal Opportunity Survey*, available at [<http://www.dol.gov/esa/ofccp/abtmain/abtforwd.htm>]. (Hereafter cited as Abt Associates, *An Evaluation of OFCCP’s Equal Opportunity Survey*. Note: Abt analyzed data from a randomly selected subset of contractors that both successfully completed the 2002 EO survey and subsequently underwent compliance evaluations. The total was 1,888 contractors.

⁷ *Ibid.*

The agency further stated that it is in the process of creating and implementing the Federal Contractor Selection System (FCSS), which is based upon the identification of relationships between EEO-1 workforce profiles and findings of discrimination in 10 years of data from compliance evaluations.⁸

The agency not only regarded the EO survey as duplicative, but also less informative than data gathered from contractors at the initial stage of the tiered compliance evaluation process.⁹ The agency and Abt discussed an alternative approach to creating a targeting model that would develop data elements, similar to those collected through the EO Survey, from information contractors usually provide to OFCCP personnel at the desk audit stage. The consultant noted that “[T]his approach has the advantage of collecting more-accurate and more-pertinent data than provided by the current EO survey.... A related advantage is that OFCCP would avoid the expense of the survey process.”¹⁰ These advantages presumably would apply as well to the agency’s FCSS discussed above. The OFCCP estimated that distribution, collection, and processing of the EO Survey cost the agency \$356,000 per year. It similarly considered the survey to be burdensome to contractors (e.g., \$5.8 million per year).¹¹

OFCCP also did not believe the EO survey increased contractors’ awareness of their equal opportunity performance, nor encouraged them to conduct self-evaluations to improve their compliance levels.¹² The agency has adopted other means of promoting contractor awareness (e.g., compliance assistance seminars and workshops, materials on the OFCCP webpage, and a telephone/email help desk).

Effective September 8, 2006, the agency rescinded the EO survey.¹³ It received a total of 2,736 comments: 62% (1,707) of commenters supported eliminating the survey, with about 1,600 of these commenters having submitted form letters; 38% (1,029) of commenters opposed the survey’s elimination, with about 1,000 of these commenters having submitted form letters.¹⁴ The OFCCP concluded that, in light of the findings from the Abt study and an earlier contractor’s analysis,

and careful review and consideration of the public comments, and the development of other OFCCP initiatives to accomplish the EO Survey’s objectives,...the EO Survey has no utility to OFCCP or to contractors. In fact, valuable enforcement resources are misdirected through the use of the EO Survey, and the burden to OFCCP to collect

⁸ *71 Federal Register 3374.*

⁹ *Ibid.*

¹⁰ Abt Associates, *An Evaluation of OFCCP’s Equal Opportunity Survey*, p. 39. Note: Abt encountered numerous problems with the quality of data from the EO survey.

¹¹ *71 Federal Register 3374.*

¹² *Ibid.*

¹³ Department of Labor, Office of Federal Contract Compliance Programs, “Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey; Final Rule,” *71 Federal Register 53032*, Sept. 8, 2006. (Hereafter cited as *71 Federal Register 53032*).

¹⁴ “Controversial Survey, Mandated Since 1999, But Never Utilized, Is Rescinded by OFCCP,” *Daily Labor Report*, Sept. 8, 2006.

and process EO Survey data that will yield such a poor targeting system are too significant to justify its continued use.¹⁵

¹⁵ *71 Federal Register 53032*