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

name redacted
Legislative Attorney

January 22, 2007
Summary

In September 2005, the Employment Standards Administration (ESA) of the Department of Labor (DOL) issued a memorandum to all federal contracting agencies waiving for a three-month period written affirmative action program, reporting, and notice requirements with respect to federal contracts for Hurricane Katrina relief efforts. 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 DOL regulations under E.O. 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRA). However, while avoiding affirmative action planning and reporting aspects—possibly including goals, timetables, and perhaps other “proactive” hiring and recruitment methods—the memorandum indicated that federal contractors would remain subject to the basic anti-discrimination bans under those laws, which may be enforced by individual complaint or agency compliance review. Although the ESA memorandum clarified that the waiver is “subject to an extension should special interests in the national interest so require,” the exemption does not appear to have been extended beyond the initial three-month period.
On September 9, 2005, the Employment Standards Administration (ESA) of the Department of Labor (DOL) 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 and veterans’ 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 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. Accordingly, a contractor’s written affirmative action plan must 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. 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 commitment to equal employment opportunity, including audit and reporting systems.

In the aftermath of Hurricane Katrina, 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 DOL regulations under the three laws. As a general matter, the waiver and exemption appear to be a permissible exercise of DOL’s plenary rulemaking authority under both the executive order and the Rehabilitation Act, which specifically includes provision for a Presidential waiver “in the national interest.” No similarly...

---

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/.
4 41 C.F.R. § 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 Id. at §§ 60-1.5(b)(1), 60-250.4(b)(1), and 60-741.4(b)(1).
8 E.O. 11246, § 201, 43 FR 46501 (1978) (“The Secretary of Labor shall be responsible for administrative enforcement (continued...)"
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.\(^9\) However, while avoiding affirmative action planning aspects—such as goals, timetables, and perhaps other “proactive” hiring and recruitment methods—the memorandum indicated that federal contractors would remain subject to the basic anti-discrimination bans under those laws, which presumably could 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.\(^{10}\)

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

Others argued, 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,\(^{11}\) were not practicable in every case. For example, 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 other jurisdictional requirements are met.\(^{12}\) On the other hand, OFCCP regulations provide a 120-day “grace period” from the date of contract commencement for affirmative action program development\(^{13}\) which, it was 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.
Ultimately, despite the fact that the waiver was “subject to an extension should special interests in the national interest so require,” the exemption does not appear to have been extended beyond the initial three-month period. As a result, the written affirmative action requirements that were suspended for federal contracts in the wake of Hurricane Katrina appear to have been reinstated.

Author Contact Information

(name redacted)
Legislative Attorney
[redacted]@crs.loc.gov, 7-....

Acknowledgments

This report was originally written by (name redacted), Legislative Attorney.
The Congressional Research Service (CRS) is a federal legislative branch agency, housed inside the Library of Congress, charged with providing the United States Congress non-partisan advice on issues that may come before Congress.

EveryCRSReport.com republishes CRS reports that are available to all Congressional staff. The reports are not classified, and Members of Congress routinely make individual reports available to the public.

Prior to our republication, we redacted names, phone numbers and email addresses of analysts who produced the reports. We also added this page to the report. We have not intentionally made any other changes to any report published on EveryCRSReport.com.

CRS reports, as a work of the United States government, are not subject to copyright protection in the United States. Any CRS report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS report may include copyrighted images or material from a third party, you may need to obtain permission of the copyright holder if you wish to copy or otherwise use copyrighted material.

Information in a CRS report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to members of Congress in connection with CRS' institutional role.

EveryCRSReport.com is not a government website and is not affiliated with CRS. We do not claim copyright on any CRS report we have republished.