



HR GUMBO

a vibrant conference centered around how HR, AAP, Inclusion, and Pay Equity intersect to create a beautifully balanced work culture.



The Future of DEI in Government Contractor Workplaces



Agenda

Legal regulations as the foundation or framework

Examples of lawful initiatives

What about initiatives not tied to a legally-mandated AAP

Privileged data analyses

Other cautions, initiatives that are being challenged

Speaker



Alissa A. Horvitz

Member Attorney, Roffman Horvitz, PLC



About Roffman Horvitz, PLC

About Alissa Horvitz

Collaboration with OutSolve

Presentation is Not Legal Advice

Foundations: Laws, Regulations, Definitions



Foundations: Laws, Regulations, Definitions

- Title VII of the Civil Rights Act of 1964, as amended, and the EEOC's Regulations
- Executive Order 11246 and OFCCP's implementing regulations
- Uniform Guidelines on Employee Selection Procedures
- 1866 Civil Rights Act (bars discrimination in the making of private contracts)
- Equal Protection Clause of the 14th Amendment (state/public actors)





EEOC's Regulations

- Expressly provide for the preparation of federal contractor AAPs under Executive Order 11246
 - 29 CFR Part 1608 (references affirmative action across several legal contexts)
 - 29 CFR Section 1608.5 addresses “Affirmative action compliance programs under Executive Order No. 11246, as amended.”
- ****
- 1608.6 – Affirmative Action pursuant to a conciliation agreement
 - 1608.7 – Affirmative Action pursuant to a state or local requirement
 - 1608.3 – Voluntary affirmative action

EEOC Regulation 29 CFR Section 1608.5

- If the AAP was previously approved
 - Commission will issue no reasonable cause finding
- If the AAP was not previously approved
 - The Commission can review it
 - OFCCP can review it
 - If it conforms to the EEOC's guidelines or OFCCP approves it – no reasonable cause





Do OFCCP's Regulations Define Affirmative Action?



They do not.

But they do set forth the Purpose and
Contents of an Affirmative Action Program

OFCCP's Regulations: 41 CFR Section 60-2.10

- Management tool designed to ensure equal opportunity
- Central premise – over time, workforce will reflect the gender, racial, and ethnic profile of the labor pools from which the contractor recruits and selects
- Diagnostic element
- Action-oriented programs: If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization
- Internal audit and reporting
- Institutionalizes equal opportunity



OFCCP's Regulations: 41 CFR Section 60-2.10(a)(3)

"An affirmative action program is, thus, more than a paperwork exercise. An affirmative action program includes those policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment. Affirmative action, ideally, is a part of the way the contractor regularly conducts its business. OFCCP has found that when an affirmative action program is approached from this perspective, as a powerful management tool, there is a positive correlation between the presence of affirmative action and the absence of discrimination."

41 CFR Section 60-2.17: Placement Goals

-- A Lot of "Nots"

- (1) Placement goals may **not** be rigid and inflexible quotas, which must be met, **nor** are they to be considered as either a ceiling or a floor for the employment of particular groups. **Quotas are expressly forbidden.**
- (2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do **not** provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, sexual orientation, gender identity, or national origin.

41 CFR Section 60-2.17: Placement Goals

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- (3) Placement goals do **not** create set-asides for specific groups, **nor** are they intended to achieve proportional representation or equal results.
- (4) Placement goals may **not** be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do **not** require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.





So, if those are the things we
are NOT supposed to do,
what is it that we are
allowed to do?

Examples of lawful initiatives: action-oriented programs on OFCCCP's website

OFCCP's FAQs

- What types of affirmative action obligations are covered by written AAPs?
<https://www.dol.gov/agencies/ofccp/faqs/AAFAQs>
 - Comparing the utilization of women and minorities to their availability
 - Setting placement goals if women or minorities are underutilized
 - Assessing recruitment and outreach efforts; and
 - Developing and executing action-oriented programs to address **identified** problems
- Pros and cons of identifying problems (2.17(b)(1-3) & 2.17(c))
- Pros and cons of tying initiatives to a closely-held AAP



Examples of Action-Oriented Programs Designed to Foster Inclusion

- OFCCP has two website pages devoted to outreach and recruiting
- <https://www.dol.gov/agencies/ofccp/compliance-assistance/outreach/hbcu-initiative/recruitment-strategies>
- <https://www.dol.gov/agencies/ofccp/compliance-assistance/outreach/hbcu-initiative/best-practices>





Recruitment Strategies (from OFCCP's Website)

- Recruit where diversity thrives
- Establish your brand (showcase ERGs)
- Partner with national and regional professional organizations and student groups organized around minorities and women (sponsorship, leadership)
- Attend virtual career fairs aimed at student groups
- Use social media to source and market to diverse talent

Fostering Equal Opportunity and Inclusion (from OFCCP's Website)

- CEO Leadership through correspondence and video
- Outreach Efforts
- Network Within
- Employee Resource Groups
- Internships
- Mentoring Programs
- Connect with National Organizations
- Apprenticeship Programs
- Career Fairs
- Social media
- Campus Information Visits
- Alumni Associations
- Establishing relationships with Department Heads at universities with strong substantive programs from which you have recruited successfully

**What about
initiatives not tied to
a legally mandated
affirmative action
plan?**

Voluntary Affirmative Action Plan Realm

- EEOC's regulations at 29 CFR Section 1608.3
- "Manifest imbalance"
- Adverse effect
 - "Employers, labor organizations, and other persons subject to Title VII may take affirmative action based on an analysis which reveals facts constituting actual or potential adverse impact, if such adverse impact is likely to result from existing or contemplated practices"
- Effects of prior discriminatory practices (next slide)
- Limited Labor pool (two slides)





Voluntary Affirmative Action Plan Realm (cont'd)

Effects of prior discriminatory practices

“The effects of prior discriminatory practices can be initially identified by a comparison between the employer's work force, or a part thereof, and an appropriate segment of the labor force.”

Voluntary Affirmative Action Plan Realm (cont'd)

Limited labor pool

- “Because of historic restrictions by employers, labor organizations, and others, there are circumstances in which the available pool, particularly of qualified minorities and women, for employment or promotional opportunities is artificially limited. Employers, labor organizations, and other persons subject to title VII may, and are encouraged to take affirmative action in such circumstances, including, but not limited to, the following:
 - (1) Training plans and programs, including on-the-job training, which emphasize providing minorities and women with the opportunity, skill, and experience necessary to perform the functions of skilled trades, crafts, or professions;
 - (2) Extensive and focused recruiting activity;
 - (3) Elimination of the adverse impact caused by unvalidated selection criteria (see sections 3 and 6, **Uniform Guidelines on Employee Selection Procedures**);
 - (4) Modification through collective bargaining where a labor organization represents employees, or unilaterally where one does not, of promotion and layoff procedures.”



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Are recruiting initiatives
subject to the Uniform
Guidelines on Employee
Selection Procedures?

No.

“These guidelines apply only to selection procedures which are used as a basis for making employment decisions. For example, the use of recruiting procedures designed to attract members of a particular race, sex, or ethnic group, which were previously denied employment opportunities or which are currently underutilized, may be necessary to bring an employer into compliance with Federal law, and is frequently an essential element of any effective affirmative action program; but recruitment practices are not considered by these guidelines to be selection procedures.” 41 CFR Section 60-3.2(c).

Data: In the AAP, Available to the Employer

What data is in an affirmative action plan? How do we harness this?

- Placement Goals
 - Census codes for each job title
 - Census availability for the jurisdictions in which the contractor recruits
 - Feeder populations
 - Weights – the percentage that the contractor recruits from the outside versus promotions from within
- Action Oriented Programs for Feeder Populations (think inclusion)
 - Mentor programs
 - Internal training programs (who is leading the training?)
 - External training opportunities
 - Employee Resource Groups



What data can we share internally with our DEI organization or the ERGs?

- Placement Goals
- External Census Data
- Employee population (be certain to reference the date on which the count is being made)



What about external reference points?



- EEOC's database: [EEOC Explore](#)
- Geography (national, region (4), division (9), state, CBSA, County)
- Job Category
- NAICS2
- NAICS3
- OutSolve's Diversity tools



Looking at data through a privileged lens

Race and Gender Lenses

- All applicants to qualified applicants
- Qualified applicants, Internet Applicants to Interviews
- Interviews to Offers
- Offers to Hires
- Time to Promotion Analyses
- Turnover rates based on promotions (received a promotion, likelihood of leaving; didn't get the promotion; likelihood of leaving)
- Succession Plans

Cautionary Practices and Other Related Topics

Other Topics

- Rooney Rule, Mansfield Rule, Diverse Interview Slate policies/practices
- Internships available only to one race or gender (EEOC, King & Spaulding Internship; white heterosexual applicant deterred from applying; “Candidates must have an ethnically or culturally diverse background or be a member of the LGBT community”)
- Internships available only to one educational institution
- Third party executive search firms, recruiting agencies, how do you evaluate success?



Questions





Alissa Horvitz

Member Attorney

ahorvitz@roffmanhorvitz.com

703-752-3776



ROFFMAN HORVITZ, PLC
LEGAL COUNSELING
FEDERAL CONTRACT COMPLIANCE & EMPLOYMENT DATA ANALYTICS