



## Employment Law Note

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# New DOL Rule Has Major Implications for Federal Contractors



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Over the last year, the federal government has increased its oversight of federal contractors' employment practices. This fact is illustrated by the Department of Labor's ("DOL") announcement it collected just under \$7 million in back wages for the month of October 2023. The DOL has had several high-profile matters in the last few months, including a settlement with Boeing Distribution Services, Inc. ("Boeing") to resolve discrimination allegations against KLX Inc., a company Boeing acquired in 2018, and an agreement with Pitney Bowes, where the company agreed to pay \$1.6 million in back wages and interest to settle allegations of race-based discriminatory hiring practices. A new DOL rule has allowed it to streamline its compliance review procedures and remove procedural barriers to issuing preliminary or final notices of discriminatory hiring or employment practices.

### Background

For decades, federal contractors have faced enhanced scrutiny by the DOL and other federal agencies due to their business relationship with the federal government. The Office of Federal Contract Compliance Programs ("OFCCP")—an agency within the DOL—is tasked with reviewing and ensuring federal employers comply with various statutes and orders aimed at preventing employment discrimination or retaliation. Among the statutes for which the OFCCP monitors federal contractors' compliance are Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment

Assistance Act of 1974 ("VEVRAA"). These statutes prohibit discriminatory hiring and employment practices against individuals with disabilities and veterans, respectively.

The OFCCP also reviews compliance with Executive Order 11246. As originally issued in 1965 by President Lyndon B. Johnson, Executive Order 11246 prohibited discrimination on race, color, religion, or national origin. Subsequent amendments expanded the protected classes to include sex, sexual orientation, and gender identity. The order also requires federal contractors and subcontractors to establish affirmative action policies in their hiring and employment practices.

### Changes to the OFCCP Review Process

A prominent factor behind some of the more recent penalties on federal contractors is a new rule that made key changes to the review process. On September 5, 2023, the DOL issued a final rule that effectively streamlines the review process and eases the evidentiary standard the previous 2020 rule required for the OFCCP to issue a Pre-Determination Notice ("PDN"), a preliminary finding of potential discriminatory practices. The new rule also reduces the contractor's period to respond to a PDN from 30 days to 15 days. Further, if the OFCCP finds subsequent employment violations after issuing a PDN, it can include them in the final Notice of Violation ("NOV"), rather than issue a subsequent PDN. The effect of these rule changes reduces the

time it takes the OFCCP to conduct and conclude its review process.

## Eligible Contractors

A business will fall under the OFCCP's purview and authority if it (1) holds a single federal contract, subcontract, or federally assisted construction contract in excess of \$10,000; (2) has federal contracts or subcontracts that, when combined, total in excess of \$10,000 in any 12-month period; or (3) holds U.S. Government bills of lading, serves as a depository of federal funds, or is an issuing and paying agency for U.S. savings bonds and notes in any amount.

## Penalties for Illegal Practices

Contractors and subcontractors can face severe consequences for violations of Executive Order 11246, VEVRAA, or Section 503 of the Rehabilitation Act. This can include steep penalties, fines, and cancelled contracts. Contractors found to have lied or intentionally misled the OFCCP can face federal criminal penalties.

One alternative contractors may pursue during the review process is to enter into a conciliation agreement with the OFCCP. Under a conciliation agreement, the contractor will agree to remedy purported violations without admitting wrongdoing and engaging in further legal proceedings. Boeing, for example, entered a conciliation agreement with OFCCP and agreed to pay \$402,000 in back wages as a condition of the agreement.

## What Employers Need to Know

Compliance with Executive Order 11426 (and the relevant statutes) requires constant effort and monitoring by employers. Violations could result in the termination of a contracting agreement with the federal government. To ensure compliance, employers subject to OFCCP reviews should do the following:

1. Have in place a written affirmative action plan.
2. Ensure each job posting/advertisement for employment includes an equal opportunity statement announcing that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, or other protected status.
3. Maintain and update employee handbooks.
4. Track hiring and promotion decisions.
5. Maintain thorough records regarding all hiring and disciplinary decisions.

The DOL's recent focus on federal contractors' hiring and employment policies likely signals a trend that contractors and subcontractors can expect increased oversight in the near future. Employers should ensure their affirmative action and hiring policies comply with federal requirements to increase the likelihood of a positive (and less costly) outcome during an OFCCP review. An ounce of prevention is worth a pound of cure.

Employers with questions about federal compliance issues are encouraged to call Matt Coughlan at 425-460-2292 or email him at [mcoughlan@sbj.law](mailto:mcoughlan@sbj.law).

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