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Secrets

of

Affirmative Action Compliance

**William H. Truesdell, SPHR
President
The Management Advantage, Inc.**

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CHAPTER 2

WHO MUST HAVE A WRITTEN AAP

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How Do I Know if I Must Prepare a Written AAP?

There are three types of written affirmative action programs:

- *Minorities & Women*
 - *Disabled*
 - *Veterans*
-

What Employers are Required to Have Written AAPs for Minorities and Women?

*41 CFR 60-1.7
E.O. 11246*

Requirements for prime contractors and subcontractors.

There are three conditions that can require an employer to develop and implement a written affirmative action plan. They are:

- Prime contractor or first tier subcontractors with 50 or more employees and \$50,000 or more in contract revenue during any 12-month period.
- A depository of Government funds in any amount.
- An issuing and paying agent for U.S. savings bonds and savings notes.

Any one of these conditions will trigger the requirement for a written AAP. Let's look at each one of them briefly.

The 50/50 Condition

This is the condition that captures most federal contractors into a requirement for developing and implementing a written AAP. The requirement is for both 50 employees and \$50,000 or more in revenue within 12 months. If you have fewer than 50 employees and more than \$50,000 in federal contract revenue, you are not required to have a written AAP. The \$50,000 minimum must be in a single contract, not a collection of contracts.

If you are a first tier subcontractor, supplying goods or services to a prime contractor that are directly linked to the prime contract, you must develop your own written AAP if you meet the 50/50 test. As we shall see, the requirement carries with it an obligation to do additional things beyond those required in a written AAP. Output from the subcontract must directly flow to the prime contract goods or services provided to the government.

Both prime contractors and first tier subcontractors are subject to compliance review by the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP).

The Depository of Government Funds Condition

Virtually any financial institution that is a member of the federal banking system will have government funds deposited from time to time. The OFCCP has determined that all banks fall into this category. Sometimes, savings and loan organizations, and finance institutions will also meet the criteria.

There is no employee headcount criteria. Simply having \$1.00 of government deposits at any time captures the organization and requires a written AAP.

The U.S. Savings Bond Condition

Many banks hold transfer authority for U.S. savings bonds. But, for the most part, they are already required to have written AAPs because of the deposit condition. Who else is captured, then, by the U.S. savings bond condition?

How about credit unions? Sometimes credit unions are not depositories for government funds, but they do have transfer agent authority for U.S. savings bonds. If that is the case, the credit union must have a written AAP.

Some private corporations also have transfer agent authority for U.S. savings bonds and offer the sale and redemption of those bonds to employees as a service and courtesy. If such a company is not required to have a written AAP because of the 50/50 rule, it will be required to have a written AAP because of this savings bond transfer authority rule.

It matters not the value of bonds that are transferred, nor over what period of time. If an employer has the transfer agent authority, it must have a written AAP.

Additional Requirements for Construction Contractors

The 50/50 rule applies to subcontracting construction companies, regardless of their position in the subcontracting hierarchy. It doesn't matter how far down the food chain the employer happens to be. If it meets the 50/50 test it must have a written AAP. Construction contractors should see the material in Chapter 19.

What Employers are Exempt from Written AAP Requirements for Minorities and Women?

41 CFR 60-1.5

-
- Transactions of \$10,000 or under.
 - Contracts/subcontracts for indefinite quantities not exceeding \$10,000.
 - Work outside the United States.
 - Contracts with State or local governments.
 - Contracts with certain educational institutions.
 - Work on or near Indian reservations.
-

These exemptions are not only exemptions from written AAP requirements, but also from any contract being subject to the standard government "Equal Opportunity Clause." Every government agency that contracts with non-government organizations for provision of goods or services must include the Equal Opportunity Clause in the contract.

Equal Opportunity Clause - All AAP Employers

A copy of the Equal Opportunity Clause can be found on the next several pages.

"The equal opportunity clause may be incorporated by reference in all Government contracts and subcontracts, including Government bills of lading, transportation requests, contracts for deposit of Government funds, and contracts for issuing and paying U.S. savings bonds and notes, and such other contracts and subcontracts as the Director may designate."

(41 CFR 60-1.4(d))

Actually, there are two clauses. One is for construction contractors and one for everybody else. Be sure you use the proper one in your purchase orders, contracts and bills of lading. Most

organizations find that it is easy to print this on the reverse of purchase order pages in a light gray (40% printing screen).

If you wish to avoid printing the entire clause, consider using a statement something like this instead:

“All parties agree that they will abide by the provisions of *41 CFR 60-1.4(a)* or *41 CFR 60-1.4(b)*, as appropriate.”

Executive Order 13279

On December 12, 2002, President George W. Bush signed Executive Order 13279. Doing so amended Executive Order 11246, Section 204, regarding exemptions and makes the affirmative action clause requirement of Section 202 inapplicable to religious groups that hold government contracts “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on ... of its activities.”

This exemption was enacted to permit faith-based organizations to participate in social service programs funded by the federal government. It means, religious employers may use religion as a criteria in employment decisions without concern about running afoul of affirmative action requirements. Title VII of the *Civil Rights Act of 1964* also allows an exemption for religious organizations from complaints of illegal discrimination based on religion. (If you are a religious organization you should heed the counsel of your affirmative action lawyer before plunging forward with selection decisions based on religious preference.)

Voluntary AAPs

Employers who are not government contractors, yet wish to establish voluntary AAPs may do so, on the condition that they follow all of the regulations set down by the government in 41 CFR Chapter 60. It is not a good idea to approach affirmative action plans thinking that you can pick and choose the portions you wish to use and those you wish to ignore. It's all or nothing for voluntary plans.

Some organizations find that it is advantageous to have a voluntary AAP because it is a requirement of doing business with state or local governments. Without a written AAP, contracting with such customers is not possible in some circumstances. So, the business decision is that a voluntary AAP will be developed and implemented in order to secure the customer's business.

A simple caution should suffice if you find yourself in this situation. Take it upon yourself to digest all of the federal requirements, and any additional requirements placed on you by the governmental entity with which you will be contracting. Be sure that you understand all of the requirements and how your response to them should be tailored.

Other organizations want to create written AAPs as an extension of their culture or management philosophy. Commendable as it is, these organizations must understand they are taking on an obligation to meet all the federal AAP regulations when they make such a decision.

Federal courts and the President have laid out guidelines for us regarding voluntary affirmative action programs. “Strict scrutiny” standards are now applied to federal, state and local affirmative action program requirements. In his July 19, 1995 memorandum to the heads of all federal departments, President Clinton directed the elimination or reform of all programs that use race, ethnicity or gender as a consideration if they:

- * Create a quota
- * Create preferences for unqualified individuals
- * Create reverse discrimination; or
- * Continue even after its equal opportunity purposes have been achieved.

To meet court-stated guidelines on affirmative action, employer’s programs must follow the federal regulatory guidelines as they are written. Each plan must last for a specified period of time (1 year) and address specific problems of representation in the workforce (utilization analysis and goals).

Public Employer Voluntary AAPs

“...The importance of voluntary affirmative action on the part of employers is underscored by Title VII of the Civil Rights Act of 1964, Executive Order 11246, and related laws and regulations – all of which emphasize voluntary action to achieve equal employment opportunity.” (41 CFR 60-3.17(1))

“(b)...Voluntary employer action can play a crucial role in furthering Title VII’s purpose of eliminating the effects of discrimination in the workplace, and Title VII should not be read to thwart such efforts.” (Johnson v. Transportation Agency, 480 U.S. 616 (1987))

Private Employer Voluntary AAPs

“1. Title VII’s prohibition in Section 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans.” (United Steelworkers of America v. Weber, 443 U.S. 193 (1979))

Who is Required to Have a Written AAP for Disabled?

*41 CFR 60-741
Rehabilitation Act of 1973,
Sections 503 & 504*

Requirements for contractors and subcontractors.

The following employers must have written AAPs addressing disabled workers.

- Any employer with a contract value or purchase order from the federal government worth \$10,000 or more.
 - Any employer with bills of lading of \$10,000 or more in 12 months.
-

Employers Exempt from AAP Requirements for Disabled

41 CFR 60-741.3

- Contracts or subcontracts not exceeding \$10,000 in 12 months.
 - Contracts or subcontracts for indefinite quantities not exceeding \$10,000.
 - Work outside the United States.
 - Contracts with State or local governments.
-

If you are an employer which meets the 50/50 test requiring a written AAP for minorities and women, then you know you must also have a written AAP for disabled. The thresholds are lower for disabled than for minorities and women.

What Individuals Are Covered?

The *Rehabilitation Act of 1973* defines individuals as “disabled” if they:

- Have a physical or mental impairment that substantially limits one or more of a person’s major life activities.
- Have a record of such impairment.
- Are regarded as having such impairment.

Individuals are considered “Qualified Disabled” if they are capable of performing a particular job with or without reasonable accommodation to their disability.

PLEASE NOTE: *The term “handicapped” is used in the Rehabilitation Act of 1973, which brought us the need for affirmative action toward that portion of the population. It is a term that has been replaced by the term “disabled.” For the purposes of affirmative action, the term “disabled” should now be used.*

Who is Required to Have a Written AAP for Veterans?¹

41 CFR 60-300.4

Vietnam Era Veterans

*Readjustment Assistance Act
of 1974 as amended*

38 U.S.C. 4212

- Contracts or subcontracts valued at \$100,000² or more.
 - Bills of lading of \$100,000 or more in 12 months.
 - Indefinite Contracts if the value may reasonably be expected to reach \$100,000 in one year, such as open-end contracts, requirement-type contracts, Federal Supply Schedule contracts, call-type contracts, and purchase notice agreements.³
 - 50 or more employees in addition to contract value.⁴
-

¹ The reference to “veterans” refers to United States of America veterans only. People who served in a foreign government military are not offered any protections or benefits under these laws and regulations. If asked, you must tell them they do not qualify under the provisions for veterans’ affirmative action in this country.

² 41 CFR 60-300.4 was raised from \$25,000 to \$100,000 effective September 7, 2007. (Federal Register: August 8, 2007, Volume 72, Number 152, Pages 44393-44416) The new higher limit applies to contracts dated on or after December 1, 2003.

³ 41 CFR 60-300.4(a)(2)

⁴ 41 CFR 60-300.40(a)

Employers Exempt from AAP Requirements for Veterans

41 CFR 60-300.4

Vietnam Era Veterans

Readjustment Assistance Act
of 1974 as amended

38 U.S.C. 4212

- Contracts or subcontracts not exceeding \$100,000 in 12 months.
 - Contracts or subcontracts for indefinite quantities not exceeding \$100,000.
 - Work outside the United States.
 - Contracts with State or local governments.
 - Contractors with fewer than 50 employees.
-

What Individuals Are Covered?

The *Jobs for Veterans Act of 2002* modified the *Vietnam Era Veterans' Readjustment Assistance Act of 1974* (VEVRAA) and it uses five categories of individuals in its definitions.

Disabled Veteran

- A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or
- A person who was discharged or released from active duty because of a service-connected disability. (41 CFR 60-300.2(n))

Qualified Disabled Veteran

- A disabled veteran who has the ability to perform the essential functions of the employment position with or without reasonable accommodation. (41 CFR 60-300.2(o))

Other Protected Veteran

- A veteran who served on active duty in the U.S. military, ground, naval or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense. (41 CFR 60-300.2(p))

Recently Separated Veteran

- Any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service. (41 CFR 60-300.2(q))

Armed Forces Service Medal Veteran

- Any veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209) (41 CFR 60-300.2(r))

How Long Will It Take To Prepare My AAP?

It wasn't until April 30, 1999, that the **OFCCP made an official estimate of hours required for preparation of an affirmative action plan.** The agency was required to do so as part of its application for collecting information via the compliance evaluation-scheduling letter. Here is what they said:

a. Recordkeeping Burden

A recordkeeping burden is imposed by OFCCP regulations to develop, update, and maintain Affirmative Action Programs. Using contractor estimates of the hours required to annually update an AAP, as well as discussions with District Office staff who regularly assist contractors to comply with the requirements, we have calculated recordkeeping hours for these three functions as follows:

1) Initial Development of AAP

It is estimated that only one percent of the contractor universe is first-time contractors required to develop their initial AAPs. However, for the one percent (898), it is estimated that the development time is more than 2½ times greater than the time required for the annual update. Size of the workforce influences the amount of time required. Small employers (50 to 100 employees) generally spend 133 hours. Large employers (1000+ employees) generally spend 366 hours.

*Average time required per contractor
for initial AAP = 179.5 hours*

2) Annual Updating of AAP

[OFCCP made an] estimate of professional and clerical time required for contractors to accomplish the annual update of their AAPs. Small employers are estimated to spend no less than 32 hours, split equally between professionals and clerical workers. Large employers are estimated to spend about 235 hours, about 2/3 of it by professionals and the remaining 1/3 by clerical workers.

**Average time required per contractor
for annual updates = 74.9 hours**

Remember, that's uninterrupted time during which you can concentrate. Let your boss know about these estimates. It is a budget item, particularly if you contract with a consultant or attorney for the development service.

If I Hire Someone to Prepare My AAP, What Will it Cost?

Asking how much it will cost to prepare an affirmative action plan is like asking how long is a piece of string. There are two major variables involved in determining cost:

- What will be included in the deliverables?
- What amount of support will you receive when you begin to implement your plan?

If you ask for bids from several consulting firms for your AAP preparation, you would be well advised to list the deliverables you expect them to provide. Do you want only statistical reports prepared for your minority's and women's AAP? Do you want the narrative sections included in the project? How about the AAPs for disabled and veterans? Are those to be included? What about statistical analysis required for your disparate impact testing of new hires, promotions and terminations? And, how about compensation analysis to determine equal pay discrepancies or illegal discrimination?

You see, what you include will help determine the cost of the project. It is not appropriate to compare bids until you know they have all been developed for the same set of deliverables.

Ask your attorney or consultant how much support they are willing to provide as you begin implementation of your AAP. Is management training included in their bid? Will they accept telephone calls and answer questions that arise during the course of your AAP year? Are any or all of those types of "extra" activities going to cost you more over time?

We know some AAP developers who price their jobs based on what the client is willing to pay. In my view, that is like picking a surgeon based on the amount of money you have in your pocket.

You don't want to waste money, but generally speaking, you get what you pay for.

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