
Law Firms Representing Federal Agencies Are Subject to Affirmative Action Requirements

by Julia E. Judish and Keith D. Hudolin

On October 31, 2011, in Office of Federal Contract Compliance Programs v. O'Melveny & Myers LLP, an Administrative Law Judge ("ALJ") held that a law firm's representation of a government agency made it a government contractor subject to the affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA").

Background

The Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") enforces and monitors compliance of various requirements imposed on federal contractors, including Executive Order 11246, the Rehabilitation Act, and VEVRAA. Combined, these laws prohibit federal contractors from discriminating on the basis of race, color, religion, sex, national origin, disability, and veteran status and require most federal contractors to develop and maintain a written Affirmative Action Plan ("AAP") on an annual basis for each establishment at the company, even if only part of the company is involved in performing the federal contract.¹

To comply with affirmative action obligations, federal contractors must undertake a number of recordkeeping and data analysis measures, including: soliciting demographic information from applicants; analyzing hiring, promotion, and termination decisions and compensation practices for potential adverse impact on minorities and women; comparing the utilization rates of minorities and women in every job group in the company with the expected representation based on applicable census and labor pool statistics; and engaging in good faith efforts to correct any imbalances or problem areas identified in this process. Under VEVRAA, federal contractors must also list most job openings with local State employment services. In addition, federal contractors are subject to routine compliance reviews by the OFCCP and

¹ Under Executive Order 11246 and the Rehabilitation Act, an AAP is required for federal contractors with 50 or more employees and a federal contract or subcontract of \$50,000 or more. VEVRAA requires an AAP for federal contractors with over 50 employees and a federal contract or subcontract of \$100,000 or more. VEVRAA also requires federal contractors to file an annual VETS-100 report, which reports the number of veteran employees and new hires, and the Executive Order requires that contractors file an annual EEO-1 report, showing a demographic profile of the company's workforce.

potential enforcement actions if the OFCCP finds unexplained compensation disparities, other forms of employment discrimination, or other violations of the affirmative action requirements.

The *O'Melveny* Decision

In 2001, O'Melveny and Myers LLP ("O'Melveny") agreed to represent the Department of Energy ("DOE") regarding the DOE's divestiture of a petroleum reserve. The contract O'Melveny signed incorporated the Federal Acquisition Regulation ("FAR") provisions, which require government contractors to comply with the OFCCP Requirements. O'Melveny thought the FAR provisions were inapplicable to its contract, however, as it believed that contracts for legal representation of government agencies are not the type of "government contract" governed by the FAR provisions. The OFCCP disagreed, however, and sent a letter to O'Melveny in January 2009 initiating a review of O'Melveny's compliance with the FAR provisions and requesting a copy of certain documents, including O'Melveny's AAP. O'Melveny refused to comply, which prompted the OFCCP to file a complaint with the Office of Administrative Law Judges on July 8, 2011.

On October 31, the ALJ granted summary judgment to the OFCCP and ordered O'Melveny to comply with the OFCCP review. The ALJ first rejected O'Melveny's argument that it lacked the requisite "government contract," which would have meant that the FAR provisions incorporated into the contract were not binding on O'Melveny. Instead, the ALJ noted that the first page of O'Melveny's DOE contract clearly stated that the FAR provisions were applicable.

The ALJ next rejected O'Melveny's argument that contracts for "legal advice and assistance" are "personal services contracts," which are exempt from OFCCP jurisdiction. According to the ALJ, a "personal services contract" is one that creates an employer-employee relationship between the Government and the contractor's personnel. Because no such relationship was created between the Government and O'Melveny's employees, the ALJ held that the contract was a "nonpersonal services contract," which is subject to OFCCP jurisdiction.

Having thus determined that affirmative action requirements applied to O'Melveny, the ALJ ordered O'Melveny to comply with the OFCCP review and submit its AAP and other requested documents.

Implications for Law Firms Representing Government Agencies

While it remains to be seen whether O'Melveny will appeal the ALJ's decision, this case represents an aggressive push by the OFCCP to force law firms representing federal government agencies to comply with Executive Order 11246, the Rehabilitation Act, and VEVRAA. This move may catch many law firms by surprise, as they now find themselves facing new administrative burdens.

Moreover, even terminating the representation of government agencies may not excuse a firm from compliance. O'Melveny argued that compliance was moot, because it had last performed work for the DOE in July 2010 (a year prior to the filing of the Complaint), and its contract expired in October 2011 (a few weeks prior to the ALJ's decision). However, the ALJ rejected this position, holding that an entity that violates its affirmative action obligations during the term of a government contract is still considered a contractor for enforcement purposes after it has completed its obligations under the contract.

Recommendations

Law firms that represent government agencies should ensure that they are aware of, and comply with, the laws enforced by the OFCCP. For representations in which the government agency will pay legal fees of less than \$50,000 (the threshold level at which an AAP is required), this should not be an additional burden, as other federal laws already ban law firms from discriminating on the bases covered by the laws enforced by the OFCCP. For larger representations, however, law firms representing government agencies may need to modify their recruiting and human resources practices to include the applicant tracking, recordkeeping, and data analysis elements that are necessary parts of developing and maintaining AAPs.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors of this alert.

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