DATA RIGHTS ASSERTIONS GIVE CLARITY—WITHOUT ONE, YOU HAVE NO CLUE

AFFIRMATIVE ACTION PLANS: YOUR COMMON QUESTIONS ANSWERED

January 2015 | $12.00

ContractManagement

Voice of the Professional Contract Management Community

www.ncmahq.org

Be Prepared:

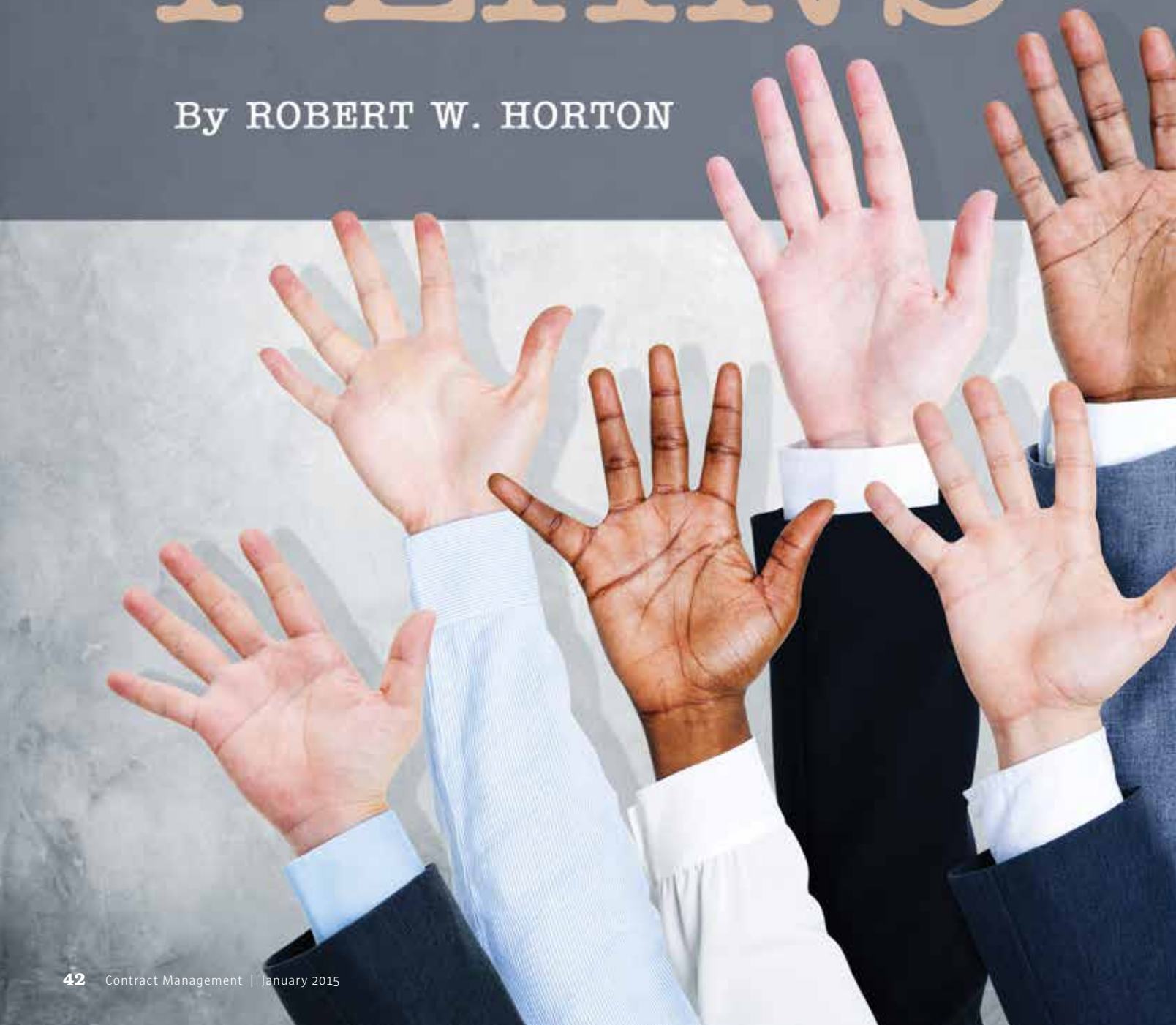
Understanding and Surviving a Government Termination for Convenience

Check out the NEW upgraded digital edition of the magazine!

User-friendly and easy to read on any device!

Affirmative Action PLANS–

By ROBERT W. HORTON



Your Common Questions Answered

If your company is required to prepare an "affirmative action plan," read on to learn the answers to several common questions.

For contractors doing business with the U.S. federal government, "affirmative action" is a lawfully required process. But what does "affirmative action" even mean? Is your company required to prepare an "affirmative action plan" (AAP)? And what is an AAP exactly? What access does the U.S. federal government have to HR processes once a company prepares an AAP?

What is Affirmative Action? What is an AAP?

"Affirmative action" brings to mind "quotas"—hiring an individual based upon his or her race or gender to meet some required "quota," and an AAP must be a plan to do exactly that, right? In fact, that is not what affirmative action means nor is that what an AAP is designed to do.

Affirmative action, at least as called for by Executive Order 11246 and the associated additional legislation affecting government contractors,[1] is really designed to require federal contractors to:

- Evaluate the racial and gender makeup of their workforce as compared to the makeup of the pool from which each employee is either hired or promoted and consider whether there is any disparity between the two that would suggest that unlawful discrimination might have occurred, and

- Evaluate the hiring, promotion, and termination decisions that occurred during the past year and consider whether any particular racial or gender group appears to be overrepresented with the respect to such actions based on a comparison of the race and gender of the applicants with those hired or the pool of current employees from whom employees were selected for either termination or promotion.

Such a comparison, by itself, clearly does not establish whether or not unlawful discrimination occurred, nor does the Office of Federal Contract Compliance Programs (OFCCP)[2] take the position that it does. The idea behind the analyses required when preparing an AAP is not to convict the employer of having engaged in unlawful discrimination, but rather to encourage some responsive action if there is, at a very high level, some indication of possible discrimination. At least, that is the position of the OFCCP.

But certainly, the OFCCP will use the analyses performed by the contractor as a jumping off point for investigating as to whether or not unlawful discrimination has occurred. Make no mistake, becoming a federal contractor subject to the requirement of preparing an AAP opens up an employer to an extraordinary amount of scrutiny with respect to its various employment practices.

What Does Affirmative Action Mean?

If an employer's workforce does not mirror the racial and gender makeup of the pool out of which the workforce has been selected, then the employer is required to take "affirmative action" to ensure that the underrepresented groups of individuals have the opportunity to apply for and obtain jobs—but on the same terms as all other applicants. For example, the OFCCP will look for documentation that the employer has participated in minority job fairs or job fairs focused on opportunities for women in an effort to increase the applicant pool in underrepresented groups.

Affirmative action does not require the employer to hire applicants based on their race or gender in order to remedy what appears to be underrepresentation in the workforce. To do so obviously would be an act of unlawful discrimination—failing to hire other applicants because of their race or gender. If an employer's analysis suggest the possibility of discrimination in hiring or terminations, then the employer is called upon to review the processes used in both and determine how to address what has happened—but not to engage in unlawful discrimination in an attempt to remedy such discrimination that occurred previously.

Who Has to Prepare an AAP?

A federal contractor that employs at least 50 employees and has a contract with the federal government of $50,000[3] or more must prepare an AAP. A covered federal subcontractor is an employer with at least 50 employees and a subcontract of at least $50,000 with a federal contractor, *and* the subcontract is to either perform a portion of the prime contractor's federal contract or to provide services or equipment that are necessary for the federal prime contractor to fulfill its federal contract.

What about Medicare/ Medicaid Reimbursement? TRICARE Participation?

In recent years, the OFCCP has sought to expand its jurisdiction to the fullest extent possible. In a 2010 directive, the OFCCP asserted that healthcare entities that provide services to a federal contractor receiving funds under a contract with Medicare Part C or Part D may be considered "federal subcontractors" and, thus, subject to Executive Order 11246. Similarly, the OFCCP has successfully asserted that healthcare entities that contract to provide medical services to beneficiaries under TRICARE or the Federal Employees Health Benefits Program may also be considered federal subcontractors,[4] despite congressional efforts to limit the OFCCP's regulatory scope.[5]

On May 7, 2014, in response to pressure from Congress, the OFCCP issued a five-year enforcement moratorium applicable to healthcare entities that:

- Participate in TRICARE only as subcontractors,
- Participate in TRICARE as subcontractors and as subcontractors under any Medicare program,
- Participate in TRICARE as subcontractors and as subcontractors under the Federal Employees Health Benefits Program, and
- Participate in TRICARE as subcontractors and as subcontractors under any other federal health program.

Note that the moratorium does not extend to healthcare providers who are subcontractors only under Medicare Parts C and D or the Federal Employees Health Benefits Program.

Are All of My Facilities Covered?

Many companies have multiple facilities across the country and it is not uncommon for one (or less than all) of the facilities to have a federal contract in excess of $50,000 while the remaining facilities do not. Is an AAP required for every facility owned by the company? That question is addressed by the "single entity" doctrine. If one facility has a covered contract, then all of the company's facilities may be covered if the corporate headquarters exercises enough control over the individual facilities such that the government can effectively argue that the company is a "single entity" for jurisdictional purposes.

If a company receives an audit notification from the OFCCP that includes facilities that do not themselves have federal contracts in excess of $50,000, then the company must determine whether to contest the reach by the OFCCP to cover all of the facilities. If the company determines to contest that issue, then the employer would simply refuse to participate in audits of those facilities that do not themselves have covered contracts. That would require the OFCCP to file an administrative complaint alleging jurisdiction and there would be an administrative trial regarding whether there is jurisdiction, potentially for each separate facility,[6] within 60 days.

The employer may likely face an uphill battle with respect to that issue before a Department of Labor administrative law judge. Assuming an adverse decision by the judge, the company would then have to file an appeal to the Administrative Review Board, where again the employer may have difficulty in obtaining a decision overturning a finding of jurisdiction. Once the board supports the finding of jurisdiction, the OFCCP would issue an order that the facility

comply with its request to review the AAP for the facility within 30–90 days or the employer will face debarment as a federal contractor. The employer would then have to appeal the issue to a federal district court, and also file a motion for a temporary restraining order seeking to stay the order of the OFCCP regarding compliance and debarment. A loss at the federal district court level would again be followed by an order to comply within 30–90 days with the OFCCP directives regarding preparing an AAP, etc., or face debarment, at which time the employer must determine whether to appeal to a federal court of appeals.

Obviously, an employer must consider carefully whether to take on this jurisdictional issue. Even if the employer believes that it has a decent chance of successfully arguing to the federal district court that the company's corporate headquarters does not exercise sufficient control over the separate facilities to render all of the facilities a "single entity," one can easily imagine the cost of fighting jurisdiction for each of its facilities.

What is in the AAP?

An AAP is designed to require an employer to engage in a process of auditing its hiring, promotion, and firing processes to determine whether there is any indication of potential unlawful discrimination and whether affirmative action is necessary.

An AAP includes an "organizational profile" that is typically a "workforce analysis" in which every position in the facility is listed by department, and then information is provided regarding the gender and race for every employee in that position. For example, part of the workforce analysis might indicate that in the environmental services department, there are two employees in the "environmental attendant II" position, one of which is a white male and the other an Asian female.

The AAP also must include a "job group" analysis in which all of the contractor's positions are organized into large "job groups," such as executive, professional, clerical, technical, etc. with information regarding the race and gender of every employee in each position by job group. The contractor must then determine the "reasonable recruitment area" out of which the employees in each job group were hired or promoted. For example, some entry level jobs may be hired entirely from the immediate county in which the contractor is located. Then, data must be obtained regarding the racial and gender makeup of the qualified individuals within the reasonable recruitment area (often using census data) for each of the employer's job groups. The contractor then compares the racial and gender makeup of the applicant pool against the racial and gender makeup of the incumbents in each job group to determine if any gender or race is underrepresented as compared to the applicant pool. If any minority groups are underrepresented, then the contractor must establish "placement goals" that its workforce will mirror the applicant pool with respect to gender and race.

But, again, the employer *may not* engage in unlawful consideration of race or gender to accomplish such placement goals. Rather, the employer may only engage in the

affirmative action previously described—increasing its recruiting of underrepresented groups in order to give those individuals opportunities to apply for the available positions during the next plan year.

The AAP also must include:

- A "designation of responsibility" that describes who will be responsible for the implementation of the AAP;
- An "identification of problem areas" that is essentially documentation of the employer's analysis of its hiring, firing, promotion, and compensation practices to determine whether there is any indication of unlawful discrimination;
- "Action-oriented programs" designed to correct any problem areas identified; and
- A description of the contractor's "internal audit and reporting program" by which the contractor periodically measures the effectiveness of its AAP.[7]

The OCFFP has a model AAP on its website.[8]

Preparation of such a plan is clearly a significant undertaking, and one can easily understand the risk inherent in an employer preparing the various analyses of employment practices as previously described. Many employers obtain the assistance of any one of a number of experienced vendors in preparing an initial draft of a plan in association with their employment counsel.

What Happens After You Prepare the AAP?

After the AAP is prepared, at least two things of significance occur:

- Employees must be given the opportunity to review the AAP. Employers are required to give employees notice as to where they may review the employer's AAP. Note, however, that an employer is not required to provide to employees the analytical sections of the AAP, but only the narrative portion. But, obviously, an employer should be mindful while preparing the AAP that the plan is not just an internal document.
- The OFCCP may come calling by means of a letter that the OFCCP will be engaging in an audit of the employer's AAP and employment practices. The OFCCP will perform a desk audit in which it reviews the AAP, including the analytical portions regarding the contractor's hiring, firing, termination, and compensation practices, and then has the authority to visit the employer's facilities and access the employer's records—all in an effort to determine whether the OFCCP believes that the employer has engaged in unlawful discrimination.

A visit to the front page of the OFCCP's website will reveal a number of multimillion-dollar settlements reached between the OFCCP and federal contractors as a result of such audits. The access provided by federal contractors to the federal government to review their employment practices is truly unique and should be carefully considered by any company considering the possibility of doing a significant amount of work with the federal government. **CM**

ABOUT THE AUTHOR

ROBERT W. HORTON currently chairs the Labor & Employment practice at Bass Berry & Sims, PLC. He has more than 20 years of experience representing clients in employment issues and defending companies against all manner of employment claims throughout the United States. He can be reached at **rhorton@bassberry.com**.

The opinions expressed in this article are those of the author and do not express the views of his employer. This article is for general information purposes only based upon the author's experiences and is not intended to be and should not be taken as legal advice.

Send comments about this article to cm@ncmahq.org.

ENDNOTES

1. Covered federal contractors also have AAP obligations under Section 503 of the Rehabilitation Act and the Vietnam Era Veteran's Readjustment Assistance Act (VEVRAA).
2. I.e., the government agency responsible for enforcing the "contractual promise of affirmative action and equal employment opportunity required of those who do business with the federal government."
3. Or has government bills of lading that, in any 12-month period, total or can reasonably be expected to total $50,000 or more; serves as a depository of government funds in any amount; or is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.
4. *See UPMC Braddock v. Harris*, 934 F. Supp. 2d 238 (D.D.C. 2013) (upholding DOL Administrative Review Board decision finding hospitals that contract to provide medical services and supplies to HMOs that provide coverage to federal employees in the FEHBP are federal subcontractors for purposes of EO 11246), *appeal docketed*, No. 13-5158 (D.C. Cir., September 22, 2014); *and OFCCP v. Florida Hospital of Orlando*, 2009-OFC-00002, Summary Decision and Order (Dep't of Labor, October 18, 2010) (aff'd on appeal, DOL Administrative Review Board, No. 11-011, July 22, 2013) (holding hospital that subcontracted to provide medical services to TRICARE beneficiaries was a federal subcontractor for purposes of EO 11246).
5. *See, e.g.*, National Defense Authorization Act for Fiscal Year 2012, *Pub. L.* 112-81 §715 ("For the purpose of determining whether network providers under such provider network agreements are subcontractors for purposes of the *Federal Acquisition Regulation* or any other law, a TRICARE managed care support contract that includes the requirement to establish, manage, or maintain a network of providers may not be considered to be a contract for the performance of health care services or supplies on the basis of such a requirement.").
6. Which is really up to the discretion of the OFCCP whether to consolidate the approach.
7. A covered federal contractor is also required to prepare a separate AAP under Section 503 of the Rehabilitation Act and VEVRAA that prohibit discrimination on the basis of disability and veteran status, respectively. The contractor must give employees an opportunity to "self-identify" as either being disabled or a covered veteran. The employer must then assess whether disabled and veteran applicants are being hired in a way that reflects their "availability" with respect to veterans or the "aspirational goal" set by the OFCCP with respect to disabled applicants.
8. *Available at* **www.dol.gov/ofccp/regs/compliance/pdf/sampleaap.pdf**.