

Affirmative Action Plan FAQ

Who Must Complete an Affirmative Action Plan?

Executive Order 11246

Executive Order 11246 applies to businesses with federal contracts and federally assisted construction contracts totaling more than \$10,000. As a condition of these contracts, businesses agree to not discriminate on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin, and to take affirmative actions to ensure equal employment opportunity. Additionally, these federal contractors agree not to take adverse employment actions against applicants and employees who, under certain circumstances, ask about, discuss, or share information about their pay or the pay of their co-workers.

If a company has at least 50 employees and a single contract of \$50,000 or more, then it must also develop an Affirmative Action Program (AAP), as described at 41 CFR 60-2. Companies whose sole coverage comes from construction contracts or federally assisted construction contracts are not required to develop an AAP, but they must comply with 16 specific affirmative actions outlined in the equal opportunity construction contract clause.

Section 503 of the Rehabilitation Act of 1973, as amended (Section 503)

Under Section 503, a business with a federal contract of more than \$10,000 is required to treat qualified individuals with disabilities without discrimination on the basis of their physical or mental disability in all employment practices, and to take affirmative action to employ and advance in employment individuals with disabilities. Though Section 503 itself has not been amended, the jurisdiction threshold amount has been adjusted to \$15,000 for inflation (see below). If the company has at least 50 employees and a single contract of \$50,000 or more, then it must also develop a Section 503 AAP, as described in 41 CFR 60-741, Subpart C. Section 503 applies to businesses with federal construction contracts, but not to businesses with federally assisted construction contracts.

Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA)

Under VEVRAA, a business with a federal contract of \$100,000 or more is required to treat qualified individuals without discrimination based on their status as a protected veteran in all employment practices, and to take affirmative action to employ and advance in employment protected veterans. Though VEVRAA itself has not been amended, the jurisdiction threshold has been adjusted to \$150,000 for inflation (see below). If the company has at least 50 employees and a single contract of \$150,000 or more, then it must also develop a VEVRAA AAP, as described in 41 CFR 60-300, Subpart C. VEVRAA applies to businesses with federal construction contracts, but not to businesses with federally assisted construction contracts.

Who is a Federal Contractor?

Almost all federal prime contractors and subcontractors are required to implement a written AAP within 120 days of receiving a federal prime contract or subcontract award. In general, AAPs are required to track employment actions regarding women and minorities, individuals with disabilities and veterans. Specifically, the following federal contractors and subcontractors must implement AAPs: 1.

Service Contractors

Service contractors (non-construction) and suppliers must implement AAPs to track women and minorities, individuals with disabilities, and veterans when: a. they receive a federal prime contract or lower-tier subcontract for non-construction services or supplies; b. they have more than 50 employees; and c. the contract/subcontract has a value of over \$50,000 (or over \$150,000 for Protected Veteran AAPs).

Construction Contractors

Construction contractors and subcontractors must implement AAPs for individuals with disabilities and veterans when: a. they receive a federal prime contract or lower-tier subcontract for construction services; b. they have more than 50 employees; and c. the contract/subcontract has a value of over \$50,000 (or over \$150,000 for Protected Veteran AAPs).

Construction contractors and subcontractors must also implement specific affirmative action steps (not a formal AAP, but an affirmative action “program”) for women and minorities (regardless of the number of employees), which includes specific record-keeping requirements when: a. they receive a federal prime contract or lower-tier subcontract OR any federally assisted construction contract; or if the contract/subcontract has a value of over \$10,000.

Commercial item contractors are also subject to EEO compliance and written AAP requirements if they meet the criteria above. This guide also recommends that contractors holding Other Transaction Authority (OTA) contracts comply with the EEO and AAP requirements if they meet the criteria above. In general, all federal contractors and subcontractors with prime contracts/subcontracts exceeding \$10,000 must comply with the federal equal employment opportunity (EEO) mandates, which require contractors to take “affirmative action” to ensure equal employment opportunities for employees and potential employees regardless of race, color, religion, sex, sexual orientation, gender identity or national origin. 41 C.F.R. §§60-1.4 and 60-4.3.

In order to promote these equal opportunity mandates, the vast majority of contractors and subcontractors working under a federal prime contract are required to implement a written AAP to monitor and track employment actions. These AAP requirements apply to almost all federal prime contractors and lower-tier subcontractors and suppliers. Specifically, the AAP regulations define a “contract” as “any Government contract or subcontract or any federally assisted construction contract or subcontract;” define a “contractor” as “a prime contractor or subcontractor;” and define a “subcontract” as “any agreement or arrangement between a contractor and any person” for goods or services that are necessary to the performance of a federal contract. 41 C.F.R. §60-1.3. In sum, the AAP regulations treat prime contracts and subcontracts, and prime contractors and subcontractors as essentially the same for the purposes of determining who is

subject to the AAP requirements. Therefore, for the sake of simplicity, any reference to a “contract” in this Guide will refer to both a prime contract and a lower-tier subcontract, and any reference to a “contractor” will refer to both prime contractors and their lower-tier subcontractors. Like many other federal compliance requirements, the affirmative action requirements are based on a complex and convoluted series of regulations that apply differently to contractors based on numerous factors, such as contract type, the value of the contract at issue, the number of contractor employees, the protections applicable to various categories of protected employees and multiple other factors. While many contractors are aware that the federal government requires that they follow general affirmative action practices, an alarming number of contractors do not comply with the applicable regulations because they fail to implement a written AAP to consistently promote affirmative action goals and to track specific affirmative action metrics. Failure to comply with the affirmative action requirements can lead to a number of adverse consequences for contractors at the hands of the federal government, such as mandatory audits of a contractor’s affirmative action compliance, the punitive termination of federal contracts, and/or the suspension or debarment of contractors who fail to comply. As such, contractors must have a working understanding of the affirmative action requirements to ensure compliance with those requirements to avoid the potential adverse consequences that come with failing to comply. This Federal Contractors Guide to Affirmative Action Plans summarizes the applicable affirmative action requirements, when and who those requirements apply to, how to maintain compliance with the requirements, how to avoid unwanted scrutiny from the federal government and sets forth recommended “best practices” for contractors to follow regarding the AAP requirements.