

## EQUAL EMPLOYMENT OPPORTUNITY: WHAT IT MEANS AND HOW IT AFFECTS YOUR BUSINESS

### SUMMARY

Many employers who contract with the government are required by Executive Order to have an Affirmative Action Program - a written document setting forth certain minority hiring goals which the employer is committed to meet.

According to Executive Order 11246, the Office of Federal Contract Compliance has established rules for implementing the equal employment requirements of the civil rights laws by requiring many who contract with the government to have an Affirmative Action Compliance Program which is designed to assure that those contractors comply with equal employment laws.

This BMA provides a set of guidelines to help NTMA members formulate an acceptable Affirmative Action Program so that the requirements for retaining their contracting capability with the federal government will be met.

### WHAT THE REGULATIONS COVER

Detailed regulations have been issued by the Department of Labor detailing the agency review procedure to determine whether an employer is complying with equal opportunity laws. These regulations indicate a contractor's responsibility to develop and maintain a formal, written Affirmative Action Program, and set forth detailed guidelines for the establishment of such a program. They also indicate the criteria for judging whether a good faith effort is being made to transform a program from a paper commitment to actual equal employment opportunity. Each plan should be carefully thought out, both in terms of objectives and possibility of implementation. An unrealistic plan is as bad as no plan at all. Most importantly, because these plans - and your success or failure in achieving results - can be, and have been, admitted into evidence during civil rights litigation, extreme care should be taken in arranging your company's equal employment opportunities procedures.

### WHO THE REGULATIONS COVER

All contractors and subcontractors who deal with the government are covered if they have 50 or more employees and a contract or subcontract of \$50,000 or more. Contractors falling within this category are required to write and implement a program.

### AGENCY ACTION

Government contractors are given certain protections under law. No government contract can be denied, withheld, terminated, or superseded by a government agency under Executive Order 11246 or any other order or law, without giving the employer a full and fair hearing and judicature. If an investigation or compliance review discloses non-compliance with the Equal Employment Opportunity Clause, and the matter cannot be resolved by informal means, the following steps may be taken:

- Cancel, terminate or suspend the contract of the noncomplying contractor;
- Publish the names of noncomplying contractors or unions;
- Blacklist a non-complying contractor from entering into future government contracts until an indication is made that there will be compliance with the Equal Employment Opportunity Clause of the Order;
- Recommend that the Department of Justice file suit to enforce the contract;
- Recommend to the EEOC or the Department of Justice that appropriate proceedings be instituted under Title VII of the Civil Rights Act of 1964;
- Recommend that proceedings be brought by the Department of Justice against anyone furnishing false information under the Order.

In addition, federal agencies can be prohibited from entering into contracts with contractors until after the agency has conducted a pre-award compliance review. Also, the OFCC Director can issue a notice requiring a contractor to show cause within thirty (30) days why monitoring enforcement proceedings or other appropriate action to ensure compliance should be instituted.

Of course, a contractor is entitled to request a hearing before the contract is canceled or before the contractor is declared ineligible for future contracts. Also, a party who is declared ineligible for future contracts may request reinstatement if it can be shown that there is a willingness to comply with the Equal Opportunity Clause.

Application of sanctions under the Executive Order has been limited. Few federal contract agencies have imposed any sanctions, although several contractors have had actions taken against them by the OFCC.

## **WHAT IS REQUIRED OF YOU NOW**

In order to remain eligible to enter into contracts with the federal government, each employer subject to the regulations must promptly formulate and begin to implement a program that will assure compliance with the equal employment requirements of the civil rights laws. In addition to drafting a written plan, this means a good-faith effort to achieve implementation of the objectives outlined in the written plan.

## **ARE MINORITIES UNDERUTILIZED?**

The initial task in preparing an acceptable program is to determine whether minorities or females are represented in your company to the extent they would be if given adequate opportunity.

This requires analyses of all major job categories, with explanations of any underutilization. "Underutilization" is defined as having fewer workers from protected groups in a particular job category than would reasonably be expected by their availability. The following factors are pertinent to a determination of underutilization:

- The minority/female population of the labor area surrounding the facility;
- The number of unemployed minority/female workers in the labor force;
- The percentage of the minority/female work force compared with the total work force in the immediate labor area;
- The general availability of minority/female workers in the area having the required skills;
- The availability of skilled minority/female workers in an area from which you can reasonably recruit;
- The availability of promotable minority/female employees within your work force;
- The anticipated expansion, contraction and turn over of and in the work force;
- The existence of training facilities capable of training minority/female workers in the requisite skills;

- The degree of training you are reasonably able to undertake to make all job classifications available to minority/females.

## **SPECIFIC GOALS AND TIMETABLES**

If your analyses indicates that you are underutilizing protected groups - that is, there are skilled or trainable minorities/females in the labor force you draw from but not in your employ in sufficient numbers - you must establish specific goals and timetables for meeting those goals. On the other hand, if your analyses lead you to the good-faith conclusion that you are not "underutilizing" because there are not skilled or trainable individuals available to you, you need not establish specific goals and timetables as long as you commit yourself to hiring these classes whenever they are available. These goals and timetables, when applicable, together with the supporting data and analyses that led to setting the goals, must be a part of the written plan, and must be maintained at each of your covered establishments.

The goals and timetables should be attainable. You are, therefore, urged to make your plans as realistic and workable as possible. If you establish goals and timetables that are not met, this fact will be considered by the government in evaluating your "good faith efforts" to remedy existing deficiencies. Your "good faith" will be judged by whether you are following your program and attempting to make it work to attain the established goals. It should be understood, however, that failure to meet established goals does NOT automatically result in a violation of federal laws or regulations.

## **BASIC INGREDIENTS OF THE AFFIRMATIVE ACTION PROGRAM**

The basic elements that would seem appropriate for inclusion in the written plans of NTMA members would include the following:

- A statement reaffirming the firm's equal employment opportunity policy in all personnel actions.
- Procedures for formal internal and external dissemination of this equal opportunity policy.
- Written directions establishing responsibilities among company management for implementation of the program.
- A statement concerning identification of deficiencies, if any, by organizational units and job categories in the company
- A statement establishing specific goals and objectives by organizational units and job categories, including time-tables for completion, where applicable.
- A statement outlining plans for the development and execution of training, hiring, upgrading, etc., programs designed to attain equal opportunity goals.
- A statement of procedures for internal audit and reporting systems to measure the program's effectiveness.

- A statement of plans for maintaining or establishing regular contact with public or other agencies or groups through which minority employees might be obtained.

The listed ingredients should not be considered exhaustive. Additional measures to fit specific circumstances may be appropriate.

#### **A WORD OF CAUTION**

While the government has directed its primary concern to the improvement of job opportunities for racial minorities and women, it should be remembered that affirmative action requirements have been imposed by the government and the

courts for the benefit of all persons who have been deprived of opportunities because of race, sex, color, national origin, religion, handicapped status or because of Vietnam-era military service. If there are any questions concerning a plan, its adequacy or its effect, advice of counsel is recommended prior to submission of a plan to the government or its dissemination within the company.

**This BMA was prepared by NTMA Labor Relations Counsel, Alan Berger, Partner; McMahon, Berger, Hanna, Linihan, Cody & McCarthy, St. Louis, MO.**