

EXECUTIVE ORDER 13496 FREQUENTLY ASKED QUESTIONS

I. General

What is Executive Order 13496?

Executive Order 13496 (EO 13496 or Order) was signed by President Obama on January 30, 2009. 74 FR 6407 (February 4, 2009). EO 13496 requires that Federal contractors provide notice to their employees of their rights under Federal labor laws. Specifically, the Order requires that covered contractors provide notice of employee rights under the National Labor Relations Act (NLRA), the law that governs relations between unions and employers in the private sector. The NLRA guarantees the right of employees to organize and to bargain collectively with their employers, to engage in other protected concerted activity with or without a union, or to refrain from all such activity.

When does Executive Order 13496 go into effect?

The Order and its implementing regulations became effective June 21, 2010. The implementing regulations were published in the Federal Register at 75 FR 28368 (May 20, 2010), and will be located in the Code of Federal Regulations at 29 CFR Part 471. The regulations can also be found at <http://www.dol.gov/olms/regs/compliance/EO13496.htm>.

Do companies still have to comply with Executive Order 13201 (the “Beck” Order)?

No. EO 13496 revoked the “Beck” Order and it is no longer in force. Contractors that are not exempt from the NLRA and have contracts, subcontracts or purchase orders subject to EO 13496 must satisfy the requirements of that Order and its implementing regulations at 29 CFR Part 471 to be in compliance with the law.

II. Coverage Issues

Which Federal contractors and subcontractors are covered by EO 13496?

Federal contractors and subcontractors who are “employers” under the NLRA may be subject to the Order. Employers **not** covered by the NLRA, and therefore **not** subject to the Order, are:

- the United States or any wholly owned Government corporation;
- any Federal Reserve Bank;
- any State or political subdivision of a State;
- any person subject to the Railway Labor Act;
- any labor organization (other than when acting as an employer); and
- anyone acting in the capacity of officer or agent of such a labor organization.

Additionally, to be subject to the Order's requirements at least some of the contractor's workers at the establishment or work site must be covered by the NLRA. Employees excluded from NLRA coverage include those employed:

- as agricultural laborers;
- in the domestic service of any family or person at his home;
- by his or her parent or spouse;
- as an independent contractor;
- as a supervisor as defined under the NLRA;
- by an employer subject to the Railway Labor Act; or
- by any other person who is not an employer as defined in the NLRA.

Is a contractor (that is also an employer under the NLRA) subject to the Order if its only Federal contract resulted from a solicitation issued before the Order's June 21, 2010, effective date?

No. EO 13496 applies to prime and subcontracts that result from Federal agency solicitations issued on or after the effective date of the regulations, June 21, 2010. If the amount of such a prime contract meets or exceeds the simplified acquisition threshold (currently \$100,000), the prime contractor must comply with the Order. A contractor with a subcontract associated with a prime contract subject to the Order is also subject to the Order, provided the subcontract is valued at \$10,000 or more.

Example: If a \$100,000 prime contract, effective on June 22, 2010, is the result of a solicitation issued on June 6, 2010, the contract is not covered by EO 13496. If, however, the solicitation is issued on or after June 21, 2010, the resulting \$100,000 contract is a covered contract, and the prime contractor and its subcontractors (with associated subcontracts of \$10,000 or more) are subject to the Order.

Are there contracts that are exempt from the requirements of EO 13496?

Yes. There are specific types of contracts that are exempt from the Order. They are: Federal-sector collective bargaining agreements; contracts for work performed exclusively outside the territorial United States; prime contracts that involve purchases below the simplified acquisition threshold, (currently \$100,000); contracts resulting from solicitations issued prior to the effective date of the regulations (June 21, 2010); and subcontracts below \$10,000.

In addition, the Director of Office of Labor-Management Standards (OLMS), with whom OFCCP shares enforcement authority, has the authority to exempt a contracting agency or group of contracting agencies from the requirements of the Order with respect to a specific contract or class of contracts, when the Director finds that it is necessary or in the national interest to do so.

Is EO 13496 applicable to construction contracts, as well as to supply and service contracts?

Yes. The Order is applicable to non-exempt, covered construction contracts, as well as to supply and service contracts. The Order's requirements are the same for all contractors with covered contracts. However, the Order is not applicable to Federally assisted construction contracts.

Is EO 13496 applicable to a bank or other financial institution if it obtains Federal deposit insurance, acts as an issuing and paying agent for U.S. saving bonds and notes, or is a Federal fund depository?

A bank or other financial institution is a covered contractor if it has an arrangement that meets the definition of a "government contract." In general, OFCCP interprets "government contract" under Executive Order 13496 as it has under Executive Order 11246. Thus, a bank or other financial institution that obtains Federal deposit insurance, acts as an issuing and paying agent for U.S. savings bonds and notes, or is a Federal fund depository is a government contractor for purposes of both EO 11246 and EO 13496. In addition, these entities may be covered contractors if they have any other arrangement that meets the definition of a "government contract" under the regulations. Such entities are subject to EO 13496 to the same extent as are other Federal contractors.

How does OFCCP determine whether an entity (e.g., banks, hospitals, construction company, etc.) is obligated to meet the requirements of EO 13496? What if an entity believes it is not subject to the Order?

Whenever OFCCP is onsite, OFCCP will assess whether the contractor is a non-exempt employer as defined in EO 13496. If OFCCP concludes that the contractor is a non-exempt employer, OFCCP will verify the entity's compliance with EO 13496. If an entity is not in compliance with the Order and believes that it is not subject to EO 13496, it must provide OFCCP with evidence sufficient to support its assertion.

III. EO 13496 Requirements and Verification Procedures

What are the physical posting and contract inclusion requirements of EO 13496?

Contractors and subcontractors subject to the Order are required to post the Department of Labor notice informing their employees about their rights under Federal labor laws. The size, form, and content of the notice are prescribed by the Secretary of Labor and may not be altered by contractors. The poster and related information are located on the OLMS website at <http://www.dol.gov/olms/regs/compliance/EO13496.htm>. Contractors and subcontractors must post the notice conspicuously in and around their establishments, work sites, and offices so that it is prominent and readily seen by employees that are covered by the NLRA and directly or indirectly (e.g., maintenance, repair, personnel or payroll work) engaged in contract-related activity. In particular, contractors and subcontractors must post the notice where other notices to employees about their jobs are posted, e.g., employee bulletin boards.

Additionally, all non-exempt Federal contracts, subcontracts, and purchase orders must include a prescribed contract clause that sets out the text of the employee notice, and outlines the contractor's posting obligation. The employee notice clause may be incorporated by reference, rather than verbatim. To include the clause by reference, the contract or purchase order must cite to "29 CFR Part 471, Appendix A to Subpart A." Appendix A is available at <http://www.dol.gov/olms/regs/compliance/EO13496.htm>.

How can contractors get copies of the poster? Can a company print its own posters?

Contractors may obtain the required poster in several ways. Posters may be requested from OLMS or OFCCP. The contractor may also obtain the poster from the Federal contracting department or agency with which it contracts. In addition, the poster may be downloaded, free of charge, from <http://www.dol.gov/olms/regs/compliance/EO13496.htm>. Contractors may reproduce and use duplicate copies of the Department's official poster. However, the poster may not be altered and duplicates created by a company must be the same size as the Department's official poster.

Must the poster be translated for employees that are not proficient in English?

If a contractor's workforce has a significant number of employees who are not proficient in English, the contractor must provide the employee notice in the language(s) spoken by the employees. OLMS will provide translations of the employee notice that can be used to comply with the physical and electronic posting requirements. Spanish and Mandarin Chinese translations are available at <http://www.dol.gov/olms/regs/compliance/EO13496.htm>. If other translations are needed, the requester should follow the instructions provided by OLMS at http://www.dol.gov/olms/regs/compliance/labor_rights_poster_translation.htm.

Does the poster have to be posted electronically?

If the contractor customarily posts employee notices regarding the terms and conditions of employment electronically, then the contractor must also post the EO 13496 notice electronically. Electronic posting requires the contractor to post a link to OLMS' website containing the employee notice where they customarily place other electronic notices to employees about their employment. This link must be no less prominent than other employee notices and must read "Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employees."

If the contractor posts the poster electronically, does it have to physically post, too?

Yes. Electronic posting cannot be used as a substitute for physical posting.

IV. Filing a Complaint of Non-Compliance with E.O. 13496

I understand that the Order provides for a complaint process. Who may file a complaint?

Employees, including former employees, of a covered contractor or subcontractor may file a complaint if the employee believes that the company has failed to comply with E.O. 13496. Complaints may be filed with OLMS or OFCCP at 200 Constitution Avenue, N.W, Washington, D.C. 20210. A complaint may also be filed with any OLMS field office listed at <http://www.dol.gov/olms/contacts/lmskeyp.htm>, or with any OFCCP field office listed at <http://www.dol.gov/ofccp/contacts/ofnaton2.htm>.

What must be included in a complaint?

The complaint must be written and contain the following information: 1) the employee's name, address, and telephone number; 2) the name and address of the contractor alleged to have violated the Order; 3) an identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred; 4) any other pertinent information that will assist in the investigation and resolution of the complaint; and 5) the signature of the employee filing the complaint.

If the complaint is not complete, the OFCCP Regional Office will contact the complainant to obtain any necessary information. Once the complaint is complete, it will be assigned to a field office to investigate. If a physical inspection is needed to make a compliance determination, an onsite investigation will be conducted.

V. Enforcement of EO 13496

Who enforces compliance with the Order?

OFCCP and the OLMS share enforcement authority. OFCCP will conduct physical inspections of contractor establishments (and, as appropriate, of contractor web sites) to determine whether covered contractors are in compliance with the Order. OFCCP will also inspect covered contractors' subcontracts and purchase orders, and investigate complaints that a covered contractor is not in compliance with the Order.

OLMS is responsible, primarily, for taking any necessary administrative enforcement action and/or imposing any penalties and sanctions for noncompliance with EO 13496.

When will a contractor be subject to a compliance inspection under the Order?

OFCCP will routinely conduct EO 13496 compliance verification during the onsite phase of any compliance evaluation of a covered contractor, including focused reviews addressing only compliance with the Order. OFCCP will also routinely check for compliance with the Order

when it is conducting an onsite investigation of a complaint, whether or not the complaint alleges noncompliance with the Order.

What will OFCCP look for to determine compliance with EO 13496?

When conducting a verification inspection, OFCCP compliance officers will conduct a physical inspection to determine whether the poster is displayed in conspicuous places in and around the contractor's establishment, (e.g., facilities, work sites, plants and offices). Compliance officers will check for the poster in common work areas, break rooms, personnel offices, etc. If there are specific locations where employee notices are commonly posted such as on employee bulletin boards, the required EO 13496 poster must be posted in these locations. The compliance officer will also determine whether the posters comply with the regulations in terms of size, form and content. Compliance with the electronic posting requirement will also be confirmed.

Additionally, during the onsite review, the compliance officer will inspect a sample of covered subcontracts/purchase orders (e.g., those resulting from solicitations issued on or after June 21, 2010) to determine whether they include the required EO 13496 contract clause.

What is considered a violation of the Order?

If OFCCP determines that a covered contractor is not in compliance with the posting requirement or has refused/failed to include the required contract clause in its contracts and purchase orders, a violation of EO 13496 exists and must be corrected. Additionally, a violation may exist if a contractor refuses to cooperate with OFCCP officials during a verification inspection or investigation, or fails to provide access to information needed to verify compliance with the Order. Violations also include a contractor's refusal to take action with respect to a subcontract as directed by the Director of OFCCP or the Director of OLMS as a means of enforcing compliance with the provisions of the Order's implementing regulations and a subcontractor's refusal to adhere to the regulatory requirements regarding employee notice or inclusion of the contract clause in its subcontracts.

If a violation is found, what will happen?

If a violation is identified during a compliance evaluation or complaint investigation, OFCCP will make reasonable efforts to obtain compliance through conciliation, and the contractor must commit in writing that the violation(s) will not be repeated. If possible, OFCCP will facilitate the contractor taking corrective action during the evaluation/investigation. If posters are needed, compliance officers will provide posters and guidance on the proper posting during the onsite inspection. If electronic posting of employee notices is required, compliance officers will also provide guidance regarding this requirement. Additionally, upon review of a sample of contracts and/or purchase orders, if the required contract clause is not found, compliance officers will provide guidance on the amendment of the contracts/purchase orders to include the required contract clause.

If a violation of EO 13496 is not corrected, the Director of OFCCP, or his/her designee, will refer the matter to the Director of OLMS, who may take enforcement action, as appropriate, under 29 CFR 471.13.

VI. Sanctions and Penalties

Are there sanctions or penalties for failing to comply with the Order?

Yes. OLMS is responsible for taking the appropriate enforcement action if a contractor fails or refuses to comply with the regulations. If a contractor is in violation of the regulations and fails or refuses to come into compliance, the contractor may be subject to sanctions, including suspension or cancellation of the contract or debarment. A contractor may only be reinstated upon a finding that the contractor has come into compliance and has shown that it will comply in the future.

Does EO 13496 prohibit contractors from retaliating against employees who file a complaint or assist the Government in its compliance efforts?

Yes. The same sanctions and penalties that may be imposed for non-compliance with the Order may also be imposed by OLMS if the contractor does not take all necessary steps to ensure that no person intimidates, threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participation in a compliance evaluation, complaint investigation, hearing or other activity related to the Order.

U.S. Department of Labor

Employment Standards Administration
Office of Federal Contract
Compliance Programs
District Office



January , 2010

R00.

Sent by email

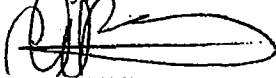
Dear

1. The Office of Federal Contract Compliance Programs (OFCCP) is currently conducting a compliance evaluation of the Affirmative Action Program (AAP) submitted by . As agreed, the onsite phase of the compliance evaluation will be January , 2010. In order to expedite this phase of the review, please be prepared to address the following requests:
 - a. Provide a private room to conduct interviews of management and employees.
 - b. Please have a roster of current employees available showing race and gender and date of hire and we will choose which employees will be interviewed during the onsite (focus will be on individuals with disabilities and covered veterans). Please identify those employees currently in the Job Group (interviews will be conducted with selected employees).
 - c. Provide three copies of actual purchase orders or contracts between and vendors and/or subcontractors if applicable.
 - d. Provide a copy of the 2008 and 2009 submitted Vets-100 reports.
 - e. Provide a list of employees who self-identified as veterans hired from 2008 to the present to include their name, job title, and date of hire.
 - f. Provide a list of the current individuals who have disabilities, indicating the name, job title and accommodation requested and/or made.
 - g. Please be prepared to discuss all elements of Section C, Dissemination of Policy, of your Affirmative Action Plan for Individuals with Disabilities and Veterans and provide

supporting documentation for each item addressed as applicable. This applies to both internal and external dissemination.

- h. Provide documentation of outreach and positive recruitment for covered veterans and individuals with disabilities, in accordance with Section 503 of the Rehabilitation Act of 1973, as amended; and 38 U.S.C. 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA). This should include:
- 1) Documentation of partnerships with local veterans' service organizations to employ or advance covered veterans.
 - 2) Established liaison with the state workforce agency (Local Vets Rep) and the Department of Vocational Rehabilitation to facilitate the posting of all job listings.
 - 3) The number of veterans and individuals with disabilities referred by your outreach sources and hired during the 2008/2009 AAP year.
 - 4) Recruitment efforts at educational institutions to reach potential applicants who are qualified covered veterans and/or individuals with disabilities.
 - 5) Copies of job advertisements in the local community targeting veterans; and targeted recruitment of qualified covered veterans during company career days and/or related activities in the community.
 - 6) Affirmative action steps taken to attract qualified special disabled or disabled veterans through the nearest Veterans Administration job placement program.
 - 7) Documentation showing when you last reviewed the physical and mental job requirements of your positions.
 - 8) A blank copy of a application form and self-identification form for veterans and individuals with disabilities.
 - 9) Provide a copy of an employee handbook/manual, if applicable.
 - 10) Please provide the following for the periods of January 1, 2008 through June 30, 2009: documentation showing job postings with the State Employment Service in accordance with 38 U.S.C. 4212.
- i. Please have available copies of any open complaints filed with City, State or Federal agencies against
- j. We will also be reviewing the Employment Eligibility Verification (Form I-9) for those employees hired in the last three years and any former employees hired prior to the preceding three years (but after November 6, 1986) who terminated within the past year (no copies needed). We need documentation (seniority lists or chronological lists of hires/terminations by name, race, gender, job title, date of hire, and date of termination sufficient to identify all such employees).

Sincerely,



Compliance Officer
OFCCP
District Office

HUSCH BLACKWELL



OFCCP Compliance

Emphasizing a proactive and strategic approach to program compliance and audit defense, our employment attorneys represent federal contractors and subcontractors in a range of industries across the country. Our Office of Federal Contract Compliance Programs (OFCCP) practice is both highly specialized and practical. We begin by examining the threshold question of whether our clients are accurately classified as federal contractors or subcontractors subject to the affirmative action requirements of Executive Order (EO) 11246 and related laws. We have successfully argued against contractor status in numerous circumstances. If contractor status exists, we structure and develop a contractor's initial affirmative action plan (AAP) and we update, monitor, and audit AAPs to assure their full compliance. We also defend our clients with OFCCP audits, and offer training and related services for clients subject to the jurisdiction of the OFCCP.

AAP Preparation and Analysis

We prepare annual affirmative action plans for numerous companies in various industries. Where our clients have multiple locations and/or entities, we apply our significant experience in plan architecture to analyze the business organization and design the AAP accordingly. As a testament to our work product and the positive relationships we have developed, the vast majority of our clients return each year for us to renew and update their affirmative action plans. Our plan format has survived the scrutiny of OFCCP on numerous occasions.

Our OFCCP practice includes identifying, refining and resolving potential problem areas at the time AAPs are developed, drafted, or updated. We encourage clients to review applicant/hire data at least semi-annually to help assess and gauge full compliance at the end of the plan year and to allow adequate time for corrective strategies where needed. Specifically, we draw attention to, and provide legal strategies to resolve, initial areas of potential adverse impact in applicant/hire data, and the race and gender salary comparison studies now emphasized by OFCCP. Attorney involvement in plan design, annual AAP preparation, and mid-year checks help to identify and resolve issues in a confidential manner, likely protecting some or all such information from disclosure under the attorney-client and/or work product privileges.

OFCCP Audit Defense

We represent and defend our clients in OFCCP desk and onsite audits throughout the year. We proactively help clients understand and highlight what their AAP and supporting data reveals, and we work diligently to avoid any suggestion of statistically significant adverse impact. On occasion we are retained mid-way through a client's OFCCP audit, after the government has presented allegations of class-based discrimination and is seeking backpay. We have significant experience in negotiating Conciliation Agreements with OFCCP.

Training Services

We conduct human resource and management training specific to EO 11246 and related laws. On numerous occasions we have trained human resources or compliance representatives in advance of OFCCP onsite audits. We have also trained our clients on the mechanics of careful applicant/hire recordkeeping and effectively capturing all the information needed to prepare an annual AAP or prepare for an OFCCP audit.

Related Services

We can prepare and file the annual EEO-1 and Vets-100/Vets-100A forms for covered employers. We can also assist in proper categorization of employees for these forms, and can help resolve related issues.

About Husch Blackwell LLP

Husch Blackwell LLP is a leading business services and litigation law firm with more than 625 attorneys in 14 offices. We partner with our clients to deliver creative but practical advice and exceptional results. Our clients include national and global companies and entrepreneurial start-ups. We measure our achievements by our clients' success.

For additional information, please visit www.huschblackwell.com or contact any of the OFCCP Compliance attorneys listed below:



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Deena assists clients with affirmative action issues and Department of Labor audits and investigations. She frequently trains management and non-management employees on human resources matters, including general employment law principles, harassment, ADA/FMLA, interviewing and management skills. She also counsels management on day-to-day human resources matters, drafts employment agreements and policies, and conduct audits. Deena has successfully defended employers with agency charges and state/federal court lawsuits in matters involving discrimination, harassment, retaliation, FMLA, wage/hour, and employment contracts.



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Molly focuses her practice on labor and employment law and alternative dispute resolution. She has counseled clients through numerous successful audits and compliance checks by the Office of Federal Contract Compliance Programs and successfully litigated numerous cases alleging discrimination and retaliation under state and federal law.



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John counsels boards of directors, general counsels and CEOs as well as human resource executives on employment matters and traditional labor relations on behalf of management. He has successfully defended Midwestern companies on a national basis in class and collective actions as well as individual discrimination cases, governmental and regulatory actions, and has a depth of experience in collective bargaining negotiations and matters involving the NLRB. He is a Fellow of the American College of Trial Lawyers, the College of Labor and Employment Lawyers and the International Academy of Mediators.



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Jerry has a nationwide litigation practice and regularly advises and defends companies in state and federal courts and before administrative agencies with regard to all types of employment disputes. In addition to his litigation practice, Jerry regularly defends employers in comprehensive employment compliance audits, including discrimination, wage and hour, and affirmative action compliance audits and investigations, among others. As a result, he has also developed and provided comprehensive training to companies, executives, and management teams on a full range of employment topics.



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Stephanie has successfully completed over 400 Affirmative Action Plans during the last 20 years. She has assisted numerous clients with OFCCP Audits which have resulted in No Violation Letters from the OFCCP. Stephanie also assisted a client with statistical analyses in an OFCCP Audit who had a proposed class finding with potential back pay in the millions, which was reduced to a recordkeeping violation.