

PART X

EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION

1. EQUAL EMPLOYMENT LAWS GENERALLY APPLICABLE TO CONSTRUCTION

Title VII of the 1964 Civil Rights Act covers all firms that employ 15 or more employees for each working day during 20 weeks per year. The act prohibits discrimination in employment based on race, color, religion, sex or national origin. In addition, the Age Discrimination in Employment Act prohibits discrimination based upon age. The Americans with Disabilities Act prohibits discrimination against qualified individuals with a disability. The Genetic Information Nondiscrimination Act prohibits discrimination based on genetic information. The Equal Pay Act protects men and women who perform substantially equal work from sex-based wage discrimination. Contractors also should be aware of state and local fair employment laws and regulations, many of which prohibit discrimination even by the smallest employers and add more protected categories, such as sexual orientation, marital status, political affiliation and personal appearance.

These laws only prohibit discrimination and do not require affirmative action. However, employers that perform government contracts may be required to implement an affirmative action program (discussed below).

2. PROHIBITIONS AGAINST SEXUAL AND OTHER HARASSMENT

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of sex. Courts and the Equal Employment Opportunity Commission consider the ban against sex discrimination to include sexual harassment. The principles applicable to sexual harassment have been extended to apply to harassment based on most other protected categories of employment (race, religion, age, disability, etc.).

EEOC GUIDELINES

The EEOC's guidelines on sexual harassment in the workplace define illegal harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- submission to such conduct is made (explicitly or implicitly) a term or condition of an individual's employment;
- submission to or rejection of such conduct by the individual is used as the basis for employment decisions affecting such individual; or

- such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

Courts have recognized two theories of sexual harassment that can establish a violation of Title VII.

- **Quid Pro Quo:** Sexual favors in exchange for job benefits or avoidance of job detriment.
- **Hostile or Offensive Work Environment:** Verbal or physical conduct of a sexual nature that creates a hostile or offensive work environment.

These two forms of sexual harassment are not mutually exclusive. Even if a complaining employee fails to establish the existence of a hostile work environment, the employee may nonetheless establish a quid pro quo sexual harassment.

Additionally, claims of sexual harassment may be asserted by both male and female employees. Moreover, sexual harassment includes acts by males against females, as well as females against males, and same sex advances or other impermissible behavior.

In **Burlington Industries, Inc. v. Ellerth** (1998) and **Faragher v. City of Boca Raton** (1998), the U.S. Supreme Court established an important affirmative defense under which an employer may avoid liability and/or limit damages by showing that the employer exercised reasonable care to prevent and promptly correct any harassing behavior. However, the affirmative defense is unavailable if a supervisor's harassment culminates in a tangible employment action.

Employers should take the following steps to help protect themselves from sexual harassment liability:

- Publish a policy defining and clearly prohibiting sexual harassment.
- Establish a reporting procedure that provides two or more alternative people to whom complaints can be made, to avoid situations where an employee is required to complain to the alleged harasser.
- Encourage employees to report sexual harassment.
- Promptly investigate sexual harassment complaints.
- Take appropriate remedial action in all cases.
- Train all employees, supervisors and non-supervisors to recognize, avoid and report sexual harassment.

HOW TO CONDUCT A CREDIBLE HARASSMENT INVESTIGATION

A prompt and thorough investigation of a sexual harassment complaint is an employer's best defense in a harassment suit. Only by responding promptly and effectively can the employer or individual supervisor ensure relief from liability. In order to provide the opportunity to conduct an investigation, all employers must implement accessible complaint procedures that are readily available to all employees. Such complaint procedures should (1) publicize the individuals designated to take complaints who are unbiased and trained in the area of sexual harassment; (2) maintain confidentiality to the fullest extent possible; and (3) stress the importance of documentation of all aspects of the complaint and investigation process.

Step One: Interview the complainant.

Step Two: Memorialize the complainant's fact statement.

Step Three: Interview the alleged offender.

Step Four: Give the accused the opportunity to submit a written statement summarizing his/her position with respect to the individualized allegations made by complainant and identify all persons who can corroborate his/her version of events.

Step Five: Review the statements of both the complainant and the accused to identify points of agreement and disagreement. Separately list facts in dispute for continuing investigation.

Step Six: Re-interview the complainant to discuss the accused's version of events and to highlight the facts in dispute.

Step Seven: Interview witnesses offered by the complainant and the accused.

Step Eight: Meet with line management, human resources management and legal counsel to review the results of the investigation and determine if further investigation is required; if not, determine how to conclude the investigation.

Step Nine: If the investigation reveals that harassment occurred in violation of company policy, determine what disciplinary action should be imposed.

Step Ten: Communicate the results of the investigation to the parties and to management personnel involved in the parties' chain of command.

3. SAMPLE EEO POLICIES

OUR EQUAL EMPLOYMENT POLICY

Our firm has, on many occasions, expressed support and commitment to the principle of equal employment opportunity. It is our policy to recruit, hire, train and promote individuals, as well as administer any and all personnel actions, without regard to race, color, religion, creed, age, sex, national origin or ancestry, marital status, status as a disabled or Vietnam-era veteran, union affiliation, status as a qualified individual with a disability and other protected categories in accordance with applicable laws. Our firm will not tolerate any unlawful discrimination and any such conduct is prohibited.

Our firm also prohibits any harassment based on the legally protected categories set forth above. Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of these protected attributes, and that (1) has the purpose or effect of creating and intimidating, hostile or offensive working environment as defined by law; (2) has the purpose or effect of unreasonably interfering with an individual's work performance; or (3) otherwise adversely affects an individual's employment opportunities.

All employees, regardless of position or title, will be subject to severe discipline, up to and including discharge, should the firm determine that an employee is engaged in unlawful harassment. The firm will promptly and thoroughly investigate the facts and circumstances of any harassment claim.

If you feel you are being unlawfully harassed, report this to your supervisor immediately, or if you prefer, report the problem to your department head or the personnel director. No one will be subject to, and the firm prohibits, any form of discipline or retaliation for reporting incidents of unlawful harassment or pursuing any such claim.

OUR POLICY AGAINST HARASSMENT

It is illegal and strictly against the firm's policy for any employee, male or female, to harass another employee by: making or subjecting any person to unwelcome sexual advances, unwelcome requests for sexual favors, or to engage in any unwelcome other verbal or physical conduct of a sexual nature, where:

- submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or submission to or rejection of such conduct is used as the basis for an employment decision affecting the individual exposed or subjected to such conduct; or
- where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

The firm will not condone or tolerate the harassment of its employees by their co-workers, supervisors or any individual under our control. All employees, regardless of position or title, will be subject to severe discipline, up to and including discharge, should the firm determine that an employee is engaged in the sexual harassment of another individual. The firm will promptly and thoroughly investigate the facts and circumstances of any claim of sexual harassment.

If you feel that you are being subjected to sexual harassment or any other form of unlawful harassment, you should report this to your supervisor immediately or, if you would prefer to discuss the matter with someone else, report the problem to the supervisor's superior or to the personnel director. No individual will be subject to, and it is the firm's policy to strictly prohibit, any form of discipline or retaliation for reporting incidents of sexual or other harassment or pursuing any claim of sexual or other harassment.

AFFIRMATIVE ACTION (WHERE REQUIRED BY LAW)

The Firm has established a written affirmative action plan with respect to equal employment opportunity. This plan has been prepared in conformity with Executive Order 11246 and the implementing regulations of OFCCP, 41 C.F.R. Part 601 et seq., including Revised Order No. 4, as amended, 41 C.F.R. Part 602. This plan is designed to provide guidance to management with respect to the Firm's commitment to full implementation of its EEO/affirmative action policy. The firm's official policy statement, signed by its president, is included in the plan. The firm's policy includes without limitation, the following commitments:

It will be the policy of the firm, in accordance with all applicable laws, to recruit, hire, train and promote persons in all job titles without regard to race, color, religion, sex, age, disability or national origin, or any other basis prohibited by applicable law.

All employment decisions shall be consistent with the principle of equal employment opportunity, and only valid qualifications will be required.

All personnel actions, such as compensation, benefits, transfers, and social and recreational programs, will be administered without regard to race, color, religion, sex, age, disability or national origin, or any other basis prohibited by applicable law.

To assure compliance with the firm's affirmative action plan, _____, affirmative action officer, has been designated to administer and monitor the plan and make reports to senior management. The plan is available for inspection in accordance with applicable regulations.

4. AFFIRMATIVE ACTION REQUIREMENTS FOR GOVERNMENT CONTRACTORS IN THE CONSTRUCTION INDUSTRY

The following materials are designed to help construction employers establish affirmative action programs for minorities, women, individuals with disabilities and protected veterans in compliance with requirements of the DOL's Office of Federal Contract Compliance Programs (OFCCP). Government contractors and recipients of government financial assistance are required, among other things, to establish detailed Affirmative Action Plans, engage in outreach efforts for minorities, women, individuals with disabilities and protected veterans, as well as follow specific recordkeeping requirements.

OFCCP regulations imposing burdensome new requirements on federal government contractors with regard to their affirmative action plans for disabled workers and protected veterans went into effect on March 24, 2014.

MINORITIES AND WOMEN

Unlike supply and service government contractors, construction contractors are not required to perform the same types of statistical utilization analyses for minorities and women, comparing employment percentages to workforce availability. Instead, construction contractors must set utilization goals for minorities and women based on work hours. Construction contractors must also meet the following specific steps established by the OFCCP:

- a. *Maintain a Harassment Free Workplace:*** Contractors must have copies of memoranda to supervisory staff, or minutes or notes of staff meetings or EEO officer's meetings with supervisors, to inform them of the contractor's obligation to maintain a working environment free of harassment, intimidation and coercion. Have an EEO officer monitor the work environment.
- b. *Minority and Women Recruitment:*** Contractors must have a current list of recruitment sources for minority and women craft professionals. It must have copies of recent letters to community resource groups or agencies specifying the contractor's employment opportunities and the procedures one should follow when seeking employment. It must note the responses received and the results on the bottom or reserve side of the letters or establish a follow-up file for each organization notified.
- c. *Maintain Referral Lists:*** Contractors must have a file of the names, addresses, telephone numbers and crafts of each minority and woman application showing the date of contract and whether the person was hired and (if not) the reason; whether or not the person was sent to a union for referral and what happened; and (c) follow-up contacts when the contractor was hiring.
- d. *Union Relationships and On-the-job Training:*** Contractors must immediately notify OFCCP when the union has not referred a woman or minority individual sent by the contractor. Contractors must develop on-the-job training opportunities or participate in training programs for the job areas which expressly include minorities and women.

Supply copies of letters informing minority and women's recruitment sources of these programs.

- e. *Disseminate EEO:*** Contractors must have written EEO policies that include the name and contact information of the contractor's EEO officer and must (a) include the policy in any company policy

manuals; (b) post a copy of the policy in any company bulletin boards (in the office and on all jobsites); (c) put in records, such as reports or diaries, that each minority and woman employee is aware of the policy, and that it has been discussed regularly at staff meetings; (e) make copies of newsletters and annual reports that include the policy; and (f) make copies of letter to unions and training programs requesting their cooperation in helping the contractor meet its EEO obligations.

- f. Annual EEO Training:** At least once a year, contractors must review EEO policies and affirmative action obligations with all employees responsible for hiring, assignment, layoff, termination or other employment decisions. Contractors must have written records (memoranda, diaries and minutes of meetings) identifying the time and place of meeting, persons attending, subject matter discussed and disposition of subject matter.
- g. Disseminate EEO Policies:** Contractors must have copies of (a) letters sent, at least every six months or at the start of each new major contract, to all recruiting sources (including labor unions and training programs) requiring compliance with the policy; (b) advertising that has the EEO “tagline” on the bottom; and (c) letters to all subcontractors and suppliers, at least at the time the subcontract is signed, requiring compliance with the policy.
- h. Recruitment:** Contractors must have written records of contracts (written communications, telephone calls or personal meetings) with minority and women’s community organizations and recruitment sources, and schools and training organizations, specifying the date(s), individuals contacted, results of the contact and follow up. Contractors must have copies of letters sent to these organizations at least one month prior to acceptance of applications for training (apprenticeship or other) describing the opening, screening procedures and tests to be used in the selection process.
- i. Encourage Referrals:** Contractors must have copies of diaries, telephone logs or memos indicating contacts (written and oral) with minority and women employees requesting their assistance in recruiting other minorities and women and record results. If contractors normally provide after-school, summer and vacation employment, they must have copies of letters to organizations under item “h” describing those opportunities, as well as responses received and results noted on letters or in a follow-up file.
- j. UGESP Compliance:** Contractors must have evidence in the form of correspondence, or certificates that all tests and interview and selection procedures used by the contractor, a craft union or Joint Apprenticeship Committee meet the requirements in the OFCCP testing and selection guidelines.
- k. Promotions:** Contractors must have written records (memo, letters, personnel files, etc.) showing the company makes annual reviews of minority and women personnel for promotional opportunities and notifies these employees of training opportunities (formal or on-the-job) and encourages their participation.
- l. Seniority Practices:** Contractors must have evidence (letters, memos, personnel files, reports) that: (a) the activity under item “k” has been carried out; (b) any collective bargaining agreements have an EEO clause and the provisions do not operate to exclude minorities and women; (c) the EEO officer reviews all monthly workforce reports, hirings, terminations and training provided on the job; (d) the EEO officer’s job description identifies his/her responsibility for monitoring all employment activities for discriminatory effects; and (e) the contractor has initiated corrective action whenever the contractor has identified as possible discriminatory effect.

- m. *Non-segregated Facilities:*** Contractors must incorporate the “Certification of Non-segregated Facilities” for its federally involved contract documents into all subcontracts and purchase orders; have records that announcements of parties, picnics, etc. have been posted and have been available to all employees; have records that all employment benefits have been offered to all employees; and have written copies of contacts (written or verbal) with supervisory staff regarding the provision of adequate toilet and changing facilities to assure privacy between the sexes.
- n. *Minority and Women Subcontractor Solicitations:*** Contractors must have copies of letters or other direct solicitation or bids for subcontracts or joint ventures from minority or women contractors with a record of the specific responses and any follow-up the contractor has done to obtain a price quotation or to assist a minority or female contractor in preparing or reducing a price quotation; have a list of all minority or female subcontracts awarded or joint ventures participated in with dollar amounts; and have copies of solicitations sent to minority or women’s contractor associations or other business associations.
- o. *Supervisor Performance Evaluations:*** Contractors must have copies of memos, letters, reports, minutes of meetings or interviews with supervisors regarding their employment practices as they relate to the contractor’s EEO policy and affirmative action posture.

INDIVIDUALS WITH DISABILITIES AND PROTECTED VETERANS

In addition to the foregoing affirmative action steps for minorities and women, the OFCCP enforces affirmative action requirements for individuals with disabilities and protected veterans.

On Sept. 24, 2013, the OFCCP issued two final rules revising section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) and section 503 of the Rehabilitation Act, which requires federal contractors and subcontractors to maintain affirmative action and nondiscrimination plans. The final rules went into effect on March 24, 2014.

For construction contractors, provisions in the final rules require written documentation and tracking of workforce statistics to determine whether the percentage of disabled and veteran workers meet affirmative action requirements for federal contracts.

Under Section 503 of the Rehabilitation Act of 1973, as amended, (Section 503), and the implementing regulations in 41 CFR Part 60-741, contractors and subcontractors with a covered federal contract or subcontract valued in excess of \$15,000 are required to take affirmative action steps to employ disabled workers. In addition, the regulations implementing Section 503 require that covered contractors and subcontractors with a government contract or subcontract of \$50,000 or more and 50 or more employees develop and maintain a written Section 503 affirmative action program.

The non-discrimination and affirmative action provisions of VEVRAA, prohibits discrimination and requires affirmative action programs in all personnel practices regarding covered protected veterans. As amended, this statute is no longer limited to veterans from the Vietnam era. VEVRAA now applies to disabled veterans, Armed Forces service medal veterans, recently separated veterans and other protected veterans who served during a war or in a campaign or expedition for which a campaign badge has been authorized.

In addition to prohibiting discrimination, these regulations require that covered contractors and subcontractors with a government contract or subcontract of \$150,000 or more and 50 or more employees develop and maintain a written VEVRAA affirmative action program.

Additional information on Section 503 is available at <https://www.dol.gov/ofccp/regs/compliance/section503.htm>.

Additional information on VEVRAA is available at <https://www.dol.gov/ofccp/regs/compliance/vevraa.htm>.

Members are encouraged to consult with counsel on the provisions in Section 503 and VEVRAA.

Government contractors also should be aware of the OFCCP's final rule on "Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors," which prohibits federal contractors and subcontractors from discriminating against employees or applicants on the basis of sexual orientation and gender identity. Under the final rule, contractors must include an updated equal opportunity clause in new or modified contracts, which can be found at <https://www.dol.gov/ofccp/>.

Finally, OFCCP's 2015 rule on pay transparency requires covered government contractors to include a prescribed "pay transparency nondiscrimination provision" in any employee handbooks, as set forth at <https://www.dol.gov/ofccp/PayTransparency.html>.