

OFCCP settles race bias claims against Virginia contractor for \$500K

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A half-million-dollar settlement against a large Virginia employer and recently updated sex discrimination regulations serve to remind all federal contractors in Virginia to be cognizant of the reach of the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP), which regulates the employment practices of government contractors.

Federal contractors and the OFCCP

Virginia is tops in the nation in receiving federal contract dollars, with companies here garnering federal contracts worth more than \$50 billion in fiscal year 2014 alone, far more than any other state. As federal contracting has grown in recent years, the OFCCP has become increasingly active in its enforcement efforts. One Virginia employer, Norfolk Southern Corporation, discovered that the hard way after it agreed to pay \$500,000 to settle an OFCCP investigation into its discriminatory hiring practices.

Also, the OFCCP recently updated its discrimination regulations for the first time since 1970 to address developments in sex discrimination law. The new OFCCP regulations implement the recent amendments to Executive Order (EO) 11246, which prohibits companies with federal contracts and subcontracts from discriminating in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin.

If you are a government contractor, it's critical to understand these developments and the vigorous enforcement role the OFCCP is pursuing in Virginia and the rest of the nation. Ensuring that you have nondiscriminatory hiring processes in place is critical for preventing potential monetary liability.

Norfolk Southern settles race bias claims

Norfolk Southern is one of the nation's oldest transportation companies. Based in Virginia, it operates approximately 20,000 route miles in 22 states and the District of Columbia. Norfolk Southern is a major transporter of coal and automotive and industrial products. It is also a major federal contractor that, in recent years, has had more than \$10 million in contracts with the Federal Highway Administration, the U.S. Department of the Navy, the U.S. Department of the Air Force, and the U.S. Fish and Wildlife Service.

In July, the DOL announced that the company had agreed to pay nearly \$500,000 in back pay and interest to more than 2,000 African-American job applicants to settle allegations of race-based hiring discrimination. The allegations against Norfolk Southern involved Maintenance of Way #34, a business unit in the company's engineering department, which is responsible for the maintenance of rail tracks, highways, roads, and streets throughout the Commonwealth as well as various management and consulting services.

OFCCP's investigation and conciliation agreement

Five years ago, the OFCCP initiated a compliance evaluation of Norfolk Southern's Virginia division. The agency found that Maintenance of Way #34 was not in compliance with EO 11246 and its implementing regulations, which require federal contractors to provide equal employment opportunities to minorities. Specifically, the OFCCP found that from January 1, 2010, through December 31, 2011, Maintenance of Way #34 engaged in discriminatory hiring practices at its Roanoke facility against 2,086 African-American applicants for track laborer and building and bridge laborer positions. The OFCCP notified Norfolk Southern of the initial violations and the corrective action required in a "Notice of Violation" issued on September 21, 2015.

Following almost nine months of discussions and negotiations, Norfolk Southern entered into a conciliation agreement with the OFCCP on July 5, 2016, in the interest of resolving the issue without further legal proceedings. Under the terms of the agreement, the company, which hasn't admitted liability, will pay \$492,000 in back wages and interest to the African-American job applicants and make job offers to seven of them. Additionally, the company will discontinue its use of questionable selection procedures for track laborer and building and bridge laborer positions.

Norfolk Southern also will review and modify its employment practices—including its processes for recruiting, screening, interviewing, selecting, rejecting, and hiring applicants—in order to comply with EO 11246. The agreement resolves all violations found by the OFCCP and puts an end to its investigation.

OFCCP's enforcement activities

The laws and regulations administered by the OFCCP make it illegal for contractors and subcontractors doing business with the federal government to discriminate in employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. In

addition, contractors and subcontractors are prohibited from discriminating against job applicants or employees because they have inquired about, discussed, or disclosed their own compensation or the compensation of others, with certain limitations.

The ultimate sanction for violating the OFCCP's regulatory requirements is debarment—i.e., losing federal contracts. Other forms of relief for victims of discrimination include back pay for lost wages, which was the relief Norfolk Southern provided in settling the OFCCP's notice of violation.

In carrying out its responsibilities, the OFCCP recommends enforcement actions to the solicitor of labor and employs the following enforcement procedures:

- **Evaluation and investigation.** The OFCCP conducts compliance evaluations and investigates complaints about federal contractors' and subcontractors' personnel policies and procedures.
- **Settlement/dispute resolution.** The OFCCP obtains conciliation agreements from contractors and subcontractors that are in violation of regulatory requirements.
- **Agreement compliance.** The OFCCP monitors contractors' and subcontractors' progress in fulfilling the terms of their agreements through periodic compliance reports.
- **Worker recruitment.** The OFCCP forms linkage agreements between contractors and DOL job training programs to help employers identify and recruit qualified workers.

In addition, the OFCCP offers technical assistance, known as "compliance assistance," to help federal contractors and subcontractors understand the regulatory requirements and the review process. The agency's website offers specific compliance assistance information for EO 11246 and the following laws it administers:

- Section 503 of the Rehabilitation Act of 1973;
- The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA); and
- The Americans with Disabilities Act of 1990 (ADA).

OFCCP updates sex discrimination rules

On June 14, 2016, the OFCCP published a final rule in the *Federal Register* setting forth the sex discrimination regulations for federal contractors covered under the provisions of EO 11246. The final rule replaces sex discrimination guidelines that are more than 45 years old with new regulations that align with current law and the realities of today's workplaces. The final rule addresses sex-based barriers to equal employment and fair pay, including:

- Discrimination in compensation;
- Sexual harassment;
- A hostile work environment based on sexual harassment;

- The failure to provide workplace accommodations to pregnant workers; and
- Discrimination based on gender identity and family caregiving responsibilities.

The final rule took effect August 15.

Because the rule generally aligns with the current interpretation of Title VII of the Civil Rights Act of 1964 by courts and the Equal Employment Opportunity Commission (EEOC), most contractors are already subject to many of its provisions. OFCCP Director Patricia A. Shiu notes: "We have made progress as a country in opening career opportunities for women that were, for decades, the province of men. Yet, there is more work that lies ahead to eradicate sex discrimination. This is why it is important that we bring these old guidelines from the *Mad Men* era to the modern era, and align them with the realities of today's workplaces and legal landscape."

Bottom line

If you are a federal contractor, now is a good time to brush up on EO 11246 and the recent changes implemented by the OFCCP. Check out the OFCCP's website and review the agency's updated sex discrimination regulations. If you have any questions, consult with employment counsel experienced in this specialized area of the law. Don't wait until the OFCCP comes calling and initiates a compliance investigation into your company's employment practices. By that time, it may be too late to avoid an OFCCP enforcement action, as Norfolk Southern learned to the tune of almost half a million dollars.

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