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The Promise of Executive Order 11246: "Equality as a Fact and Equality as a Result"

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THE PROMISE OF EXECUTIVE ORDER 11246: "EQUALITY AS A FACT AND EQUALITY AS A RESULT"

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INTRODUCTION

The United States federal government spends approximately half a trillion dollars annually on contracted services and products.[1] Federal agencies are required by law to follow specific policies and procedures in soliciting, negotiating, and awarding federal contracts.[2] Contracts formed between a business and a federal agency also include non-negotiable terms and conditions governed by statutes and executive orders. Many of these non-negotiable terms relate to the employment conditions of people working on federal contracts, including their wages and benefits. The reasons for including these employment-related terms are varied, but stem from an understanding that the federal government should use its contracting power and taxpayer dollars to raise the labor standards for workers across industries.[3]

Beginning in 1941, the U.S. government also began to include non-negotiable terms in federal contracts aimed at advancing the civil rights of groups historically excluded from work on federal contracts and remedying past discrimination.[4] The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") is responsible for enforcing one executive order and two statutes governing the employment practices of federal contractors as they relate to civil rights. All three laws prohibit contractors from discriminating against different classes of workers and require contractors take affirmative steps to ensure equal

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[1] U.S. Treasury, *Data Lab – Contract Spending Analysis*, https://datalab.usaspending.gov/contracts-over-time.html; U.S. Treasury, *Data Lab – Contract Explorer*, https://datalab.usaspending.gov/contract-explorer.html.

[2] Government Services Administration, *Federal Acquisition Regulation (FAR)*, https://www.gsa.gov/policy-regulations/regulations/federal-acquisition-regulation-far.

[3] Public agencies would be incentivized to contract out work if they knew labor costs would be lower on contracts than if the same work were done in house. Furthermore, businesses bidding on contracts would also be incentivized to keep labor costs as low as possible to secure bids. Neil Damron, *Delivering for Taxpayers: Taking On Contractor Fraud and Abuse and Improving Jobs for Millions of America's Workers*, NAT'L EMP'T L. PROJECT 1, 3 (2018), https://s27147.pcdn.co/wp-content/uploads/Delivering-for-Taxpayers-Taking-On-Contractor-Fraud-Abuse-Improving-Jobs.pdf. For a discussion of how federal purchasing power could be used to raise the wages and working conditions of working Americans, see Lew Daly & Robert Hiltonsmith, *Underwriting Good Jobs*, DEMOS 1 (2014), https://www.demos.org/sites/default/files/publications/UnderwritingGoodJobs_2.pdf.; Ann O'Leary, *Making Government Work for Families*, CTR. FOR AM. PROGRESS 1 (2009), https://cdn.americanprogress.org/wp-content/uploads/issues/2009/07/pdf/federal_contracting.pdf. For additional background on federal labor standards, *see* WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL32086, FEDERAL CONTRACT LABOR STANDARDS STATUTES: AN OVERVIEW (2005); WILLIAM G. WHITTAKER, CONG. RESEARCH SERV., RL94-908, DAVIS-BACON: THE ACT AND THE LITERATURE 1 (2007), https://digital.library.unt.edu/ark:/67531/metadc26061/m1/1/high_res_d/94-908_2007Nov13.pdf.

[4] Exec. Order No. 8802, https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-8802.html.

employment opportunities.[5] These laws have resulted in improvements in labor market conditions for protected groups, most notably Black Americans.[6]

This note explores OFCCP's legal authority, enforcement obligations, and how the agency changed under the Obama and Trump Administrations. The note focuses on changes made pursuant to Executive Order 11246 ("EO 11246"), which prohibits discrimination on the basis of race, creed, color, national origin, sex, sexual orientation, and gender identity, but not disability or status as a protected veteran (both of which are addressed in different statutes). The note proceeds in five parts. Part I provides an overview of federal contractors and the Office of Federal Contract Compliance Programs. Part II discusses changes made under the Obama Administration, while part III reviews changes made under the Trump Administration. Part IV discusses the legal opportunities and challenges for civil rights advocates posed by changes made under both Administrations. Part V concludes with a discussion of how OFCCP can update its policies and procedures to more effectively address explicit and systemic discrimination in the federal contracting workforce.

I. THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

This section provides an overview of federal contractors before discussing the Office of Federal Contract Compliance Program's legal authority, mandates, and enforcement procedures.

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[5] U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-750, EQUAL EMPLOYMENT OPPORTUNITY: STRENGTHENING OVERSIGHT COULD IMPROVE FEDERAL CONTRACTOR NONDISCRIMINATION COMPLIANCE 1 (2016), https://www.gao.gov/assets/680/679960.pdf.

[6] *See* Jonathan S. Leonard, "The Impact of Affirmative Action on Employment," 2 J. LAB. ECON. 439 (1984), http://isites.harvard.edu/fs/docs/icb.topic542908.files/Leonard%201984.pdf; Kenneth Y. Chay, *The Impact of Federal Civil Rights Policy on Black Economic Progress*, 51 INDUS. & LAB. REL. REV. 608 (1998), http://isites.harvard.edu/fs/docs/icb.topic185351.files/chay.pdf; Johnathan Leonard, *The Impact of Affirmative Action Regulation and Equal Employment Law on Black Employment*, 4 J. ECON. PERSP., 47 (1990), http://isites.harvard.edu/fs/docs/icb.topic185351.files/leonard2.pdf; Charles Brown, *The Federal Attack on Labor Market Discrimination: The Mouse That Roared?*, NAT'L BUREAU ECON. RES. (1981), http://www.nber.org/papers/w0669.pdf?new_window=1; John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. Econ. Lit., 1603 (1991), http://www2.econ.iastate.edu/classes/econ321/orazem/heckman_donohue.pdf; Robert J. Flanagan, *Actual Versus Potential Impact of Government Antidiscrimination Programs*, 29 INDUS. LAB. REL. REV. 486, 501, 504-05 (1976); Morris Goldstein & Robert S. Smith, *The Estimated Impact of the Antidiscrimination Program Aimed at Federal Contracts*, 29 INDUS. LAB. REL. REV. 523, 531-39, 542-43 (1976).

A. Overview of Federal Contractors

Federal agencies spend approximately $500 billion annually on contracted services and products.[7] In 2017, the Department of Defense ("DOD") spent the lion's share, $329 billion (including awarding $46.5 billion to Lockheed Martin alone), with the Departments of Energy, Veterans Affairs, and Health and Human Services each spending approximately $25 billion.[8] The remaining departments, agencies, and administrations each spent between $16 billion and $3,000.[9] Services accounted for 41% of total DOD contract obligations, while the rest of the federal government spent 71% of its contracting dollars on services and the remainder on products.[10] These services and products cover a wide range of goods and services, from military and agriculture to education and healthcare.

This funding is spread across approximately 200,000 federal contractor and subcontractor establishments.[11] While the government does not track the number of individuals who work on federal contracts,[12] one researcher estimated 3.7 million people worked as contract employees in 2015.[13] This number was roughly equivalent to the combined number of federal employees (2.0 million), active-duty military personnel (1.32 million), and postal service employees (492,000) that same year.[14] As of 2016, approximately 65 million employees worked for establishments that received federal monies, including contractors.[15] And some researchers estimate between 20% to 25% of all U.S. employees work for a federal contractor.[16]

B. History and Legal Authority

The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") is responsible for enforcing one executive order ("EO") and two statutes governing the employment practices of federal contractors and

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[7] U.S. Treasury, *supra* note 1.
[8] *Id.*
[9] *Id.*
[10] MOSHE SCHWARTZ, JOHN F SARGENT JR & CHRISTOPHER T MANN, CONGR. RES. SERV., R44010, DEFENSE ACQUISITIONS: HOW AND WHERE DOD SPENDS ITS CONTRACTING DOLLARS 1 (2018),), https://fas.org/sgp/crs/natsec/R44010.pdf.
[11] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5; Damron, *supra* note 3, at 1.
[12] Douglas W. Elmendorf, CONGR. BUDGET OFF., RE: FEDERAL CONTRACTS AND THE CONTRACTED WORKFORCE 1 (2015), https://www.cbo.gov/publication/49931.
[13] PAUL LIGHT, *The True Size of Government*, VOLCKER ALLIANCE 1, 3 (2017), https://volckeralliance.org/publications/true-size-government.
[14] *Id.* at 3. This research also includes the number of grant employees (1.58 million in 2015), but I do not include those because grant recipients are not covered by the laws discussed in this note.
[15] 41 C.F.R. § 60-20 2016.
[16] DAMRON, *supra* note 3.

subcontractors ("contractors"). All three prohibit approximately 200,000 federal contractor establishments—who are awarded billions of taxpayer dollars annually—from discriminating against different classes of workers.[17] These three provisions also require contractors to maintain and implement affirmative action plans ("AAPs").[18]

The history of non-discrimination and affirmative action requirements in federal contracting goes back earlier than the Civil Rights movement, to the New Deal era. In 1941, President Franklin D. Roosevelt signed EO 8802, which prohibited discrimination on the basis of race, color, creed, or national origin by all defense contractors.[19] This EO was issued in response to a threat by the President of the Brotherhood of Sleeping Car Porters, A. Philip Randolph, to lead a march in Washington, D.C. protesting racial discrimination by defense contractors.[20] Two years later, Roosevelt expanded coverage to all government contractors.[21]

In 1951, President Truman created a committee to oversee compliance with EO 8802, and in 1953, President Eisenhower furthered compliance efforts by creating a presidential committee that subsequently restructured how the government conducted compliance and oversight work.[22] The next EO, 10925, was issued by President Kennedy in 1961. EO 10925 required government contractors to take "affirmative action" to ensure applicants and workers were not discriminated against on the basis of race, color, religion, or national origin and gave federal contracting agencies the authority to debar or sanction non-compliance contractors.[23] Thus, Kennedy became the first President to use the term "affirmative action" in the context of ensuring racial equality and redressing past harms.[24]

Three years later, Congress passed the Civil Rights Act of 1964, which made it illegal for employers with more than 15 employees to discriminate on the basis of "race, color, religion, sex or national origin."[25] However, unlike the requirements imposed on federal contractors, Title VII covered "sex" and did not require employers take affirmative, proactive steps to ensure equal opportunities for

[17] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5.
[18] TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. § 2000E (1964).
[19] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5, at 5.
[20] James E. Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 IOWA L. REV. 901, 906 (1985).
[21] OFFICE OF FED. CONT.T COMPLIANCE PROGRAMS, *History of Executive Order 11246*, U.S. DEP'T LAB., https://www.dol.gov/ofccp/about/50thAnniversaryHistory.html (last visited May 16, 2019).
[22] *Id.*
[23] Exec. Order No. 10925, https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-10925.html.
[24] Jackie Mansky, *The Origins of the Term "Affirmative Action,"* SMITHSONIAN MAG., 2016, https://www.smithsonianmag.com/history/learn-origins-term-affirmative-action-180959531/ (last visited May 16, 2019).
[25] TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, *supra* note 18.

specified classes of applicants and employees.[26] This paved the way for EO 11246, which built on previous EOs relating to non-discrimination in federal contracting. EO 11246 is still enforced today.

1. Executive Order 11246

In 1965, President Johnson issued EO 11246. The Supreme Court observed the authorizing source of EO 11246 is difficult to discern, noting it is not clear "whether [EO 11246] is authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority."[27]

EO 11246 was issued in response to recommendations stemming from then-Vice President Humphrey's comprehensive review of federal agency activities related to civil rights. The recommendations concluded, "…whenever possible operating functions should be performed by departments and agencies with clearly defined responsibilities, as distinguished from interagency committees or other interagency arrangements. That principle is particularly applicable to civil rights programs where it is essential that our objectives be pursued vigorously and without delay that frequently accompanies a proliferation of interagency committees and groups."[28] With that, primary enforcement power was consolidated in the U.S. Department of Labor and the Office of Federal Contract Compliance.

As passed in 1965, EO 11246 covered "race, creed, color, and national origin."[29] It was amended in 1967 to include "sex" (thus becoming coextensive with Title VII) and again in 2014 by President Obama to prevent discrimination on the basis of "sexual orientation" or "gender identity."[30] EO 11246 also requires contractors to take affirmative action to ensure equal opportunity for all employees, requirements discussed in more depth in a later section.[31]

Contractors must also submit survey data annually on the race, ethnicity, sex, and—due to modifications made by the Obama Administration—pay ranges and hours worked of employees by job category to the Equal Employment Opportunity

[26] *Id.*
[27] Chrysler Corp. v. Brown, 441 U.S. 281, 304–06 (1979) (footnotes omitted) (The court did not resolve this question because it was not necessary to do so to resolve the controversy at issue.) For additional discussion of judicial decisions engaging with executive orders and the challenge of identifying authority for Executive Orders, see Erica Newland, *Executive Orders in Court*, 124 YALE L.J. 75 (2015).
[28] History of Executive Order 11246, *supra* note 21.
[29] Exec. Order No. 10925, https://www.eeoc.gov/eeoc/history/35th/thelaw/eo-11246.html.
[30] Exec. Order No. 10925; 41 C.F.R. § 60-20 2016.
[31] 41 C.F.R. § 60-20 2016.

Commission ("EEOC"), which shares this information with OFCCP.[32] These compliance surveys are called EEO-1 Reports and are used to support civil rights enforcement and better understand employment patterns.[33]

The Obama Administration also made two additional updates to EO 11246. First, OFCCP finalized a rule, effective January 2016, revising the regulations implementing EO 11246 to prohibit contractors from firing or discriminating against employees or applicants who discuss, disclose, or ask about compensation.[34] The second change, effective August 2016, updated the EO's sex discrimination guidelines[35] in order to "address present–day workplace practices and issues and to align contractors' obligations with current law."[36] Updates included more protections related to pregnancy and childbirth, required equal fringe benefits for all employees, prohibited sexual harassment, and barred employment decisions made on the basis of sex-based stereotypes, among other changes.[37]

EO 11246 has different requirements for construction and nonconstruction contractors. All construction contracts over $10,000 must comply with both the non-discrimination and affirmative action plan requirements.[38] All nonconstruction contracts over $10,000 must comply with the non-discrimination requirements. However, the affirmative action and EEO-1 reporting requirements only apply to nonconstruction contracts over $50,000 and contractors with more than 50 employees.[39]

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[32] EEO-1: Answers to Filing Questions Often Asked by Employers, , U.S. EQUAL EMP'T OPPORTUNITY COMM'N , https://www.eeoc.gov/employers/eeo1survey/faq.cfm (last visited May 16, 2019); *Press Release: EEOC Announces Proposed Addition of Pay Data to Annual EEO-1 Reports*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2016), https://www.eeoc.gov/eeoc/newsroom/release/1-29-16.cfm (last visited May 16, 2019).

[33] *EEO-1: Answers to Filing Questions Often Asked by Employers*, *supra* note 32.

[34] OFFICE OF FED. CONT. COMPLIANCE PROGRAMS, Executive Order 11246: Pay Transparency Regulations, U.S. DEP'T OF LAB., https://www.dol.gov/ofccp/paytransparency.html (last visited May 16, 2019).; 41 C.F.R. § 60-20 2016.

[35] Discrimination on the Basis of Sex; Final Rule, 81 Fed. Reg. 39107 (June 15, 2016).

[36] OFFICE OF FED. CONT. COMPLIANCE PROGRAMS, Frequently Asked Questions (FAQs) - Discrimination on the Basis of Sex, U.S. DEP'T LAB. (2016), https://www.dol.gov/ofccp/SexDiscrimination/sexdiscrimination_faqs.htm#Q2 (last visited May 16, 2019).

[37] For a side by side comparison of the guidelines, see *OFCCP 1970 Sex Discrimination Guidelines and 2016 Final Rule*, U.S. DEP'T LAB. (2016), https://www.dol.gov/ofccp/SexDiscrimination/SDCrosswalkCRLMfinalESQA508c.pdf.

[38] 41 C.F.R. § 60-4.1

[39] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5, at 39.; 41 C.F.R. § 60-2.1.

2. The Statutes: Section 503 of the Rehabilitation Act of 1973 and the Vietnam Veterans' Readjustment Assistance Act of 1974

Section 503 of the Rehabilitation Act of 1973 ("Section 503") prohibits discrimination against individuals with disabilities and requires employers to take affirmative steps to ensure disabled persons have equal opportunities in all aspects of employment. Section 503 generally applies to contracts over $10,000.

The Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA") outlines the affirmative action and nondiscrimination obligations of contractors regarding veterans, including disabled, recently separated, active duty, and armed forces service medal veterans. VEVRAA generally applies to contracts greater than $150,000.

C. Beyond Title VII Compliance: Creating Affirmative Action Programs

The corresponding regulations for all three legal authorities require contractors to prepare and maintain affirmative action plans and programs ("AAPs").[40] This note focuses on the affirmative action requirements pursuant to EO 11246.[41]

The scope and breadth of the affirmative action requirements as outlined in the Code of Federal Regulations are notable.[42] The regulations explicitly call for action-oriented plans and programs if women and minorities "are not being employed at a rate to be expected given their availability in the relevant labor pool."[43] The contractor must also "institutionaliz[e]…[its] commitment to equality in every aspect of the employment process," including examining employment and compensation decisions.[44] The code reads, "An affirmative action program is, thus, more than a paperwork exercise … Affirmative action, ideally, is a part of the way the contractor regularly conducts its business. OFCCP has found that when an affirmative action program is approached from this perspective, as a powerful management tool, there is a positive correlation between the presence of affirmative action and the absence of discrimination."[45]

To that end, AAPs must include quantitative analyses that feature a detailed breakdown of the organizational profile of the contractor establishment, including the distribution of men and women in different job positions, as well as each individual's race.[46] The contractor must also conduct a job group analysis, which

[40] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5.
[41] The Obama Administration also made a number of significant changes to the requirements under Section 503 and VEVRAA. Those changes are not discussed in this note.
[42] 41 C.F.R. § Part 60.
[43] 41 C.F.R. § Part 60-2.10(a).
[44] 41 C.F.R. § Part 60-2.10(b).
[45] 41 C.F.R. § Part 60-2.10(c).
[46] 41 C.F.R. § Part 60-2.10(b)-(c).

groups job titles within the establishment by job content, wage rates, and opportunities for training or advancement.[47] Once the job groups are established, the contractor must state the percentage of minorities and percentage of women employed in each group (the "incumbency")[48] and determine the availability, through additional data analysis, of the number of qualified women and minorities available for employment in a given job group (the "availability").[49] If, after comparing the incumbency to the availability, the contractor determines the share of women or minorities employed in a job group is below what would be expected given availability, [50] the contractor must develop placement goals for underrepresented groups.[51] A contractor's determination that a placement goal is required is not an admission of discrimination. The goals are not quotas; indeed, quotas are forbidden, as is making any employment decision in a discriminatory manner, creating set-asides for certain groups, or using placement goals to supersede selection on merits.[52]

In addition to the quantitative analyses required in programs, the contractor must designate an individual responsible for implementing the plan, identify any problem areas (including compensation or recruitment), develop action-oriented programs to correct any problem areas, and conduct internal audits and reporting to measure the effectiveness of its AAP.[53]

As discussed in the introduction, fulfilling these requirements is a non-negotiable condition of receiving a federal contract. In an appendix to the requirements, OFCCP also sets forth non-mandatory best practices for employers to follow.[54]

D. OFCCP's Enforcement Procedures and Mechanisms

To enforce these requirements, OFCCP provides compliance assistance to approximately 200,000 federal contractor establishments;[55] conducts compliance evaluations and investigates complaints; secures Conciliation Agreements from contractors who violate the regulations (and monitors the fulfillment of such agreements); and, when necessary, recommends the Solicitor of Labor take

[47] 41 C.F.R. § Part 60-2.12(b)-(c).
[48] 41 C.F.R. § Part 60-2.13.
[49] 41 C.F.R. § Part 60-2.14.
[50] 41 C.F.R. § Part 60-2.15.
[51] 41 C.F.R. § Part 60-2.10(a)-(b).
[52] 41 C.F.R. § Part 60-2.16(e).
[53] 41 C.F.R. § Part 60-2.17(a)-(d).
[54] 41 C.F.R. § Part 60-20.
[55] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5, at 1. This support includes providing sample affirmative action plans, available on OFCCP's website: https://www.dol.gov/ofccp/regs/compliance/aaps/aaps.htm.

enforcement actions.[56] Contractors in violation of regulations may be sanctioned with disbarment or required to provide back pay for lost wages to victims of discrimination.[57] To effect its mission, OFCCP works closely with other agencies within the Department of Labor ("DOL"), the Department of Justice ("DOJ"), and the EEOC.[58]

The rules of practice for administrative proceedings to enforce EO 11246 are detailed in the Code of Federal Regulations.[59] Notably, there is no private right of action to enforce EO 11246.[60] However, in *Legal Aid Society of Alameda County v. Brennan*, the Ninth Circuit held courts may review the government's enforcement effort against the clearly defined standards established under the regulations and require government officials to perform non-discretionary duties imposed by the regulations.[61]

II. EO 11246 Enforcement in the Obama Administration

The following section discusses how the Obama Administration, under the leadership of OFCCP Director Patricia A. Shiu, refocused the agency to more effectively meet its statutory purpose of civil rights enforcement, specifically under EO 11246. According to Shiu, "The overriding priority was to reimagine, rebuild and lead an important enforcement agency designed to realize its goals of worker enforcement and contractor compliance in a fair, professional and consistent manner."[62]

A. Retaining Investigatory Flexibility

In December 2010, OFCCP rescinded a Bush-era Active Case Management directive ("ACM") and issued a new Active Case Enforcement directive ("ACE").[63] ACE required a more comprehensive audit of every case and expanded

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[56] Office of Fed. Cont. Compliance Programs, *About OFCCP*, U.S. Dep't Lab., https://www.dol.gov/ofccp/aboutof.html (last visited May 16, 2019).
[57] *Id.*
[58] *Id.*
[59] 41 C.F.R. § Part 60-30.
[60] Legal Aid Soc. of Alameda Cty. v. Brennan, 608 F.2d 1319, 1332 (9th Cir. 1979); Utley v. Varian Assocs., Inc., 811 F.2d 1279, 1285–86 (9th Cir. 1987); *accord* Farkas v. Texas Instrument, Inc., 375 F.2d 629, 633 (5th Cir. 1967).
[61] Legal Aid Soc. of Alameda Cty., 608 F.2d at 1332. Any argument that sovereign immunity barred the suit also failed because Congress amended the Administrative Procedure Act to remove that defense where only nonmonetary relief is sought.
[62] Telephone Interview with Patricia Shiu, Former Director Office Fed. Cont. Compliance Programs (Apr. 26, 2019).
[63] U.S. Gov't Accountability Off., *supra* note 5, at 14.

the list of indicators of potential discrimination to include more than just statistical and anecdotal evidence of discrimination. However, this also increased the number of proceedings that required onsite investigation, thus decreasing the total number of establishments investigated.

B. Prioritizing Systemic Pay Discrimination, New Enforcement Strategies

During the second term of the Obama Administration, OFCCP prioritized addressing systemic pay discrimination.[64] Because OFCCP does not play a role in the government procurement process [65] and because contractors are seldom disbarred,[66] one of OFCCP's most powerful tools is its ability to seek monetary relief for large classes of contractor employees who have been victims of systemic pay discrimination. While remedying discrimination against individual workers is important and among OFCCP's duties, such violations are not costly for establishments. Thus, the deterrent effect of pursuing conciliation or securing monetary relief for one employee who was discriminated against is minimal.

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[64] Jay-Ann Casuga, *OFCCP Will Continue Focus on Pay Bias, Shiu Says*, BNA, August 4, 2016, https://www.bna.com/ofccp-continue-focus-n73014445810/.

[65] In 2014, President Obama signed Executive Order 13673, the "Fair Pay and Safe Workplaces Order." In part, this E.O. would have required contracting officers to consider past labor or employment violations when awarding contracts over $500,000. However, the final regulations were published in late August, 2016, leaving them vulnerable to repeal by the following administration under the Congressional Review Act (CRA). After being challenged and held up in court, President Trump signed a resolution nullifying the EO 13673 in 2017. 79 FR 45309; Congressional Review Act resolution to block Fair Pay and Safe Workplaces rule: H.J. Res. 37/S.J. Res. 12, ECON. POL'Y INST. (2017), https://www.epi.org/perkins/congressional-review-act-resolution-to-block-fair-pay-safe-workplaces-rule-h-j-res-37-s-j-res-12/ (last visited May 16, 2019).; Associated Builders & Contractors of Se. Texas v. Rung, No. 1:16-CV-425, 2016 WL 8188655, at *1 (E.D. Tex. Oct. 24, 2016).
For additional research on federal contractors who fail to comply with federal law, see BREACH OF CONTRACT: HOW FEDERAL CONTRACTORS FAIL AMERICAN WORKERS ON THE TAXPAYER'S DIME, (2017), https://www.warren.senate.gov/files/documents/2017-3-6_Warren_Contractor_Report.pdf.

[66] Between 2010 and 2015, there was an average of less than one debarment per year. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5, at 16.

Recent Statistics on Monetary Relief for Victims of Systemic Pay Discrimination

- Between 2015 and 2019, OFCCP provided an annual average of $19.5 million dollars in relief to a total of over 100,000 class members. The numbers from 2017, 2018, and 2019 include and reflect cases initiated during the Obama Administration.
- In 2019, the majority of class members reported being discriminated against on the bases of sex (37.4% because they were women) and/or race (36.6% because they were a minority).
- In 2019, 26% of class members reported being discriminated against because they were male and/or white.
- Between 2015 and 2019, less than one percent of class members who received monetary relief were covered by Section 503 or VEVRAA.

Despite being an impactful enforcement strategy, proving systemic pay discrimination is not easy. This is especially true when contractors are permitted to point to a range of factors to explain any apparent disparities in pay. Without ample and granular data, it is difficult to prove that a pay gap is the result of discriminatory employment practices. Furthermore, prior to changes made under the Obama Administration, anecdotal (or non-statistical) evidence of pay discrimination was, essentially, necessary to support the finding of a violation of EO 11246.[67]

So, in 2013, OFCCP issued Directive 2013-03, known as Directive 307.[68] This directive grew out of President's Obama's National Equal Pay Task Force, which brought together three agencies (DOL, EEOC, and DOJ) and the Office of Personnel Management with the goal of addressing pay discrimination through improved collaboration and enforcement coordination.[69] Directive 307 rescinded

[67] As discussed in the following section, this has become the norm against in the Trump Administration: "In determining which cases to pursue, OFCCP will be less likely to pursue a matter where the statistical data are not corroborated by non-statistical evidence of discrimination unless the statistical evidence is exceptionally strong." OFFICE FED. CONT. COMPLIANCE PROGRAMS, *FAQ: Analysis of Contractor Compensation Practices During a Compliance Evaluation*, U.S. DEP'T LAB., https://www.dol.gov/ofccp/regs/compliance/faqs/compguidance_faq.htm#Q19 (last visited May 16, 2019).

[68] OFFICE FED. CONT. COMPLIANCE PROGRAMS, *Directive 307*, U.S. DEP'T LAB. (2013), https://www.dol.gov/ofccp/regs/compliance/directives/dir307.htm (last visited May 16, 2019).

[69] *National Equal Pay Enforcement Task Force* (2010), https://obamawhitehouse.archives.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf; *Directive 307*, *supra* note 69.

two compensation guidance documents issued in 2006 under the Bush Administration.[70]

The first rescinded 2006 guidance document, "Interpreting Nondiscrimination Requirements of Executive Order 11246 with respect to Systemic Compensation Discrimination" ("Standards"), laid out a stringent procedure for how OFCCP would investigate and enforce the prohibition on systemic pay discrimination.[71] The Standards required OFCCP investigators to (1) group employees in specific ways for the purpose of comparing compensation, (2) find anecdotal evidence of pay discrimination, and (3) use multiple regression analyses when comparing groups.[72] Despite the nuanced, fact-specific, and complex nature of pay discrimination cases, investigators were not permitted to deviate from this rigid approach. And because OFCCP could not dive deeper into contractor affirmative action plan analyses themselves, it was difficult for OFCCP to determine whether contractors were complying or gaming the system by relying on calculations that would never result in a showing of underutilization of protected groups.[73] Thus,

[70] Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246; Notice of Proposed Rescission, 76 Fed. Reg. 62 (proposed Jan. 3, 2011).

[71] Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35,124 (June 16, 2006); Voluntary Guidelines for Self-Evaluation of Compensation Practices With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35,114 (June 16, 2006).

[72] Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246, 76 Fed. Reg. at 62.

[73] On February 26, 2020, I attended a symposium titled "Higher Education Compliance Symposium" at University of California Los Angeles (UCLA). The event was co-hosted by UCLA and the Institute for Workplace Equality, a self-described "national nonprofit employer association … [that] trains and educates federal contractors in understanding and complying with their affirmative action and equal employment opportunity obligations." While the event was open only to Institute members, OFCCP Director Craig Leen, who keynoted the event, kindly extended an invitation to some students at UCLA School of Law. The symposium presenters were from defense-side employment law firms and a consulting firm that specializes in contractor compliance and OFCCP audits. Topics covered included recent developments at OFCCP and challenges unique to higher education. Presenters also focused closely on how contractors could act "strategically," whether in developing AAPs, compiling establishment data, or developing strategic pay analysis groups for OFCCP audit submissions. Concrete suggestions included breaking up a university into as many establishments as possible because, according to one presenter, "big numbers lead to bad numbers." In other words, the presenters were advising universities on how to collect, group, and present the data to minimize the risk of OFCCP audits. While the provision of strategic guidance is a fine goal, it is easy to see how a rigid approach to investigations encourages contractors to focus on strategic data collection and presentation, rather than focusing on how to best advance workplace equality and achieve the goals of EO 11246, VEVRAA, or Section 503. The Inst. Workplace Equal. & UCLA, Higher Education Compliance Symposium (West Coast) (Feb. 26, 2020); *see also* Oliver

the Obama Administration found the Standards impeded OFCCP's abilities to adequately investigate and identify systemic compensation discrimination.[74]
The Obama Administration rescinded the second guidance document, "Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with respect to Systemic Compensation Discrimination" ("Voluntary Guidelines"), because contractors rarely used the analytical procedures outlined in the Voluntary Guidelines. [75]

After rescinding the 2006 guidance documents, OFCCP did not issue a new notice in the Federal Register outlining how it would conduct investigations; instead, OFCCP reinstituted the "practice of exercising its discretion to develop compensation discrimination investigation procedures in the same manner it develops other investigation procedures."[76] This would allow OFCCP to retain the flexibility to refine and hone more effective enforcement practices.

However, even with added investigatory flexibility, OFCCP still carried a heavy burden of proving existing pay discrimination was unreasonable or wrong as a matter of law. This was especially challenging without access to additional pay data that would allow OFCCP to compare pay amongst workers while controlling for scope of responsibility and regional variability.[77] Thus, while OFCCP already had access to some data through the EEO-1 form, it worked with the EEOC to update the reporting form to require contractors[78] to report workers' earnings (by pay bands, not by individual) and hours worked, in addition to sex, race, ethnicity, and category of job already being reported.[79] The wages and hours worked data is

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Staley, *This Obscure US Discrimination Watchdog Has Protected Workers since the Civil-Rights Era. Can It Survive Trump?*, QUARTZ (2017), https://qz.com/896066/how-the-trump-deals-with-the-governments-suit-against-palantir-will-tell-us-a-lot-about-how-he-views-business-regulation/ (last visited May 16, 2019).

[74] Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246, 76 Fed. Reg. at 62.

[75] *Id.*

[76] *Id.*

[77] Advancing Pay Equality Through Compensation Data Collection, 79 Fed. Reg. 20751 (April 11, 2014); NATIONAL RESEARCH COUNCIL, COLLECTING COMPENSATION DATA FROM EMPLOYERS, (2012), https://www.nap.edu/read/13496/chapter/1 (last visited May 16, 2019).

[78] As mentioned above, the EEO-1 form only applied to contractors with more than 50 employees and with contracts of over $50,000. Private employers with 100 or more employees also had to submit this data to the EEOC.

[79] For research on its pilot program, see Final Report to the EEOC, *To Conduct a Pilot Study for How Compensation Earning Data Could Be Collected From Employers on EEOC's Survey Collection Systems (EEO-1, EEO-4, and EEO-5 Survey Reports) and Develop Burden Cost Estimates for Both EEOC and Respondents for Each of EEOC Surveys (EEO-1, EEO-4, and EEO-5)*, SAGE COMPUTING (2015), https://www.eeoc.gov/employers/eeo1survey/pay-pilot-study.pdf. 81 FR 5113, Proposed Revision of the Employer Information Report (EEO-1) and Comment Request, 81 Fed. Reg. 5113 (Feb. 1, 2016).

called Component 2 data, while the data already being reported is called Component 1 data.

In September 2017, President Trump's Office of Management and Budget (OMB) decided to stay the collection of EEO-1 Component 2 data on pay and hours worked. However, in a March 2019 decision, U.S. District Court Judge Tanya S. Chutkan vacated OMB's stay of the EEOC's EEO-1 form.[80] Thus, beginning in September 2019, larger contractors (those with over 50 employees and contracts over $500,000) and employers (those with over 100 employees) were to submit 2017 and 2018 Component 2 data to the EEOC.[81] In fall of 2019, the EEOC announced it would not collect Component 2 data for 2019 and future years.[82] However, in October 2019, Judge Chutkan reaffirmed her prior order and directed the EEOC to "take all steps necessary" to finish collecting data from 2017 and 2018 by January 31, 2020.[83] On February 10, 2020, Judge Chutkan issued an order stating that the EEOC had completed the required level of data collection pursuant to the court's earlier orders, and that it had no remaining data collection obligations.[84]

C. Expanding and Modernizing Protections

As noted in the discussion of EO 11246 above, the Obama Administration also oversaw significant changes to what groups and employment practices were covered under EO 11246.

1. Sexual Orientation and Gender Identity

In December 2014, OFCCP issued a final rule modifying EO 11246 to explicitly cover and prevent discrimination on the basis of "sexual orientation" and "gender identity" in any contracts entered into or modified after April 8, 2015.[85] While undoubtedly a significant signal that the text of the order changed, OFCCP had

[80] Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget, 358 F. Supp. 3d 66, 71 (D.D.C. 2019).
[81] *EEO-1 Update: EEOC Requires Employers to Submit Pay Data By September 30, 2019*, NAT'L L. REV., 2019, https://www.natlawreview.com/article/eeo-1-update-eeoc-requires-employers-to-submit-pay-data-september-30-2019 (last visited May 16, 2019).
[82] Lisa Nagele-Piazza, *EEOC Reduces Employee Pay Data Requirements*, SHRM (Sept. 11, 2019), https://www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/employers-should-review-eeo-1-guidance-before-pay-data-reporting-deadline.aspx.
[83] Daniel Wiessner, *IN BRIEF: Judge Says EEOC Must Continue to Collect Detailed Pay Data from Employers*, REUTERS LEGAL (Oct. 30, 2019), https://eeoccomp2.norc.org/.
[84] Order, Nat'l Women's Law Ctr. v. Office of Mgmt. & Budget, No. 17-cv-2458 (TSC) (D.D.C. Feb. 10, 2020).
[85] Exec. Order No. 13672, 70 FR 42971 (Jul. 23, 2014); OFFICE FED. CONT. COMPLIANCE PROGRAMS, *Executive Order 11246*, U.S. DEP'T LAB., https://www.dol.gov/ofccp/LGBT.html (last visited Apr. 16, 2020).

already investigated complaints of discrimination against transgender persons[86] because OFCCP interprets nondiscrimination obligations under EO 11246 in accordance with Title VII. OFCCP also enforces obligations by following the statute and relevant case law principles. Furthermore, OFCCP generally defers to the EEOC's interpretations of Title VII law and the EEOC had already concluded that discrimination against a transgender woman was discrimination on the basis of sex.[87]

2. Pay and Compensation Transparency

In September 2015, OFCCP issued a final rule implementing EO 13665. EO 11365 amended EO 11246 to prohibit discrimination against applicants and employees who discuss, disclose, or ask about pay and compensation. The implementing regulations require contractors to post a pay transparency notice in view of both applicants and employees. Research indicates pay transparency rules help remedy discrimination and close the gender wage gap.[88] An added benefit for contracting agencies is that workers are more motivated when salaries are transparent.[89]

3. Sex Discrimination Guidelines

In June 2016, OFCCP issued a final rule updating its sex discrimination guidelines, the first update since 1970.[90] Effective as of August 2016, the update addressed modern-day workplace practices that were not included in the previous regulation.[91] These changes, summarized below, serve to address significant barriers to fair pay and equal opportunity in the workplace.

Updates include more protections related to pregnancy and childbirth, and a requirement that employers offering fringe benefits—like insurance and leave—offer equal benefits to all employees. The updates generally serve to promote fair pay practices by banning contractors from denying opportunities for overtime or additional training because of a worker's sex and by banning contractors from

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[86] OFFICE FED. CONT. COMPLIANCE PROGRAMS, *Directive 2014-02*, U.S. DEP'T LAB., https://www.dol.gov/ofccp/regs/compliance/directives/dir2014_02.html#ftn.id3 (last visited May 16, 2019).
[87] Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995 (EEOC) (2012).
[88] Kristin Wong, *Want to Close the Pay Gap? Pay Transparency Will Help*, N.Y. TIMES, January 24, 2019, https://www.nytimes.com/2019/01/20/smarter-living/pay-wage-gap-salary-secrecy-transparency.html (last visited Apr 27, 2019).
[89] *Id*.
[90] Discrimination on the Basis of Sex; Final Rule, 81 Fed. Reg. at 39107 (codified at 41 C.F.R. § Part 60).
[91] Frequently Asked Questions (FAQs) - Discrimination on the Basis of Sex, *supra* note 36.

treating men and women differently based on stereotypical assumptions about caregiving responsibilities. For example, contractors may not deny flexible workplace arrangements to fathers when they offer the same to mothers. The rule also explicitly prohibits sexual harassment and prohibits discrimination based on sex stereotypes. The revised regulations also note that the exclusion of healthcare coverage for care related to gender dysphoria or transition is facially discriminatory.

4. Room for Improvement: The 2016 Government Accountability Office Report

In 2015, Republicans in Congress requested a report on changes in OFCCP's enforcement and compliance assistance practices.[92] The report, Equal Employment Opportunity: Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance ("Report"), highlighted weaknesses in OFCCP's process for selecting contractors for compliance evaluations, noting that OFCCP did not find violations in 83% of its evaluations.[93]

The Report also found that nearly 85% of contractors who received a scheduling letter indicating an OFCCP evaluation had been initiated did not provide the requisite Affirmative Action Plan ("AAP") within 30 days.[94] While covered contractors are required to both develop AAPs within 120 days of beginning work on the contract *and* to update plans annually, OFCCP had no process for ensuring these contractors have met this requirement.[95]

Finally, the Report also noted that OFCCP's outreach—to both community groups and contractors—and compliance assistance work had decreased since 2012, in part because the agency was focusing more on its enforcement role and in part due to budget constraints.[96] Contractors interviewed for the report noted they were fearful of asking for compliance assistance because this might make them the target of future OFCCP action; however, that is not OFCCP practice.

OFCCP Director Pat Shiu's response to the Report can be found in Appendix III of the Government Accountability Office's Report. Director Shiu's response highlights OFCCP's successes and acknowledges ongoing challenges, including how to better monitor AAPs, improve compliance assistance, and assess the clarity of existing guidance.[97]

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[92] U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 5, at 1.
[93] *Id.* at 16.
[94] *Id.* at 18.
[95] *Id.* at 18.
[96] *Id.* at 28–29.
[97] *Id.* at 47, 49.

III. EO 11246 IN THE TRUMP ADMINISTRATION

After the 2016 election and change of leadership in January 2017, OFCCP began to walk back from many of the changes it made in the Obama Administration. For instance, the Trump Administration's 2018 budget proposed eliminating OFCCP entirely and transferring its functions to EEOC, despite their distinct missions and functions.[98] OFCCP also began to shift back towards a Bush-era, contractor-friendly approach to enforcement, which deemphasizes in-depth, flexible, and metric-driven investigations. In this section, the note highlights some of the specific changes made in the first three and a half years of the Trump Administration. One of the proposed policies is a program to encourage voluntary contractor compliance with the regulations. This is the first proposal of that kind and because it has yet to be tested, this section includes examples of other, existing voluntary compliance and self-monitoring programs.

A. Trump Administration Directives

OFCCP issued 15 new directives between April 2018 (the first directive issued during the Trump Administration) and November 2019.[99] However, the only directives summarized below are the eight directives implicating investigative procedures under EO 11246 and systemic pay discrimination.[100]

February 27, 2018: *Use of Predetermination Notices (PDN) DIR 2018-01*[101]

This directive directs OFCCP staff to issue Predetermination Notices ("PDNs") in all compliance evaluations where discrimination findings may exist. PDNs are used to alert contractors to OFCCP's preliminary findings of employment discrimination. Previously, PDNs were typically issued only when there were

[98] UNITED STATES DEP'T LAB., FY 2018 Department of Labor Budget in Brief, 1, 3 (2017), https://www.dol.gov/sites/dolgov/files/legacy-files/FY2018BIB_0.pdf.
[99] Directives, U.S. DEPARTMENT OF LABOR OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS , https://www.dol.gov/ofccp/regs/compliance/directives/dirindex.htm.
[100] The directives not discussed are: TRICARE Subcontractor Enforcement Activities, DIR 2018-02; Executive Order 11246 § 204(c), religious exemption DIR 2018-03; Focused reviews of contractor compliance with Executive Order 11246 (E.O.), as amended; Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended; and Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, DIR 2018-04; and OFCCP Ombud Service, DIR 2018–09; Opinion Letters and Help Desk, DIR 2019–03; Contractors' Obligations Regarding Students in Working Relationships with Educational Institutions, DIR 2019-05; and Spouses of Protected Veterans, DIR 2020-01.
[101] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2018-01, U.S. DEP'T LAB. (2018), https://www.dol.gov/ofccp/regs/compliance/directives/DIR_2018_01_Corr1ESQA508c.pdf.

findings of systemic discrimination; OFCCP's leadership allowed regional offices discretion about whether to issue PDNs prior to issuing a Notice of Violation.

August 24, 2018: *Analysis of Contractor Compensation Practices During a Compliance Evaluation*
DIR 2018-05[102]

This directive rescinded and replaced Directive 307[103] with a directive that outlined in greater detail how OFCCP would conduct compliance evaluations. In a significant departure from Obama-era practices, it noted that OFCCP would be "less likely to pursue a matter where the statistical data are not corroborated by non-statistical evidence of discrimination unless the statistical evidence is exceptionally strong." However, OFCCP did retain the practice of developing Pay Analysis Groupings ("PAGs") of "comparable" employees, along with other guidelines indicating it would not revert entirely to the 2006 Bush-era practices.

August 24, 2018: *Contractor Recognition Program*
DIR 2018–06[104]

This directive established a contractor recognition program, with the stated goal of supporting proactive compliance and information sharing regarding the best employment practices.

August 24, 2018: *Affirmative Action Program Verification Initiative*
DIR 2018–07[105]

This directive was drafted in response to a concern highlighted in the 2016 GAO report[106] that OFCCP did not have a systematic way of checking whether contractors had developed and updated AAPs. This directive says that "OFCCP will develop a comprehensive program to verify that federal contractors are complying with AAP obligations," though offers few details about how it will do this. This directive also states that OFCCP will eventually factor in whether a company has an AAP in its methodology for scheduling compliance evaluations, thus decreasing the likelihood a company that reports having an AAP is reviewed.

[102] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2018-05, U.S. DEP'T LAB. (2018), https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf.
[103] See discussion *supra* at Section II.A.
[104] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2018-06, U.S. DEP'T LAB. (2018), https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-06-ESQA508c.pdf.
[105] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2018-07, U.S. DEP'T LAB. (2018), https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-07-ESQA508c.pdf.
[106] See discussion *supra* at II.C.4.

September 19, 2018: *Transparency in OFCCP Compliance Activities*
DIR 2018–08[107]

This directive delays scheduling of reviews until 45 days after scheduling announcement letters are issued and makes public OFCCP's supply and service scheduling methodology. It also outlines additional procedures for OFCCP staff to follow that, generally, emphasize accommodating contractor delays and needs.

November 30, 2018: *Compliance Review Procedures*
(rescinds DIR 2011-01)
DIR 2019–01[108]

This directive rescinded Obama-era ACE procedures,[109] which required full OFCCP desk audits and resulted in more mandatory on-site reviews.

November 30, 2018: *Early Resolution Procedures*
DIR 2019–02[110]

The Early Resolution Procedures (ERPs) changed three procedures. First, if a desk audit revealed non-material violations (e.g. minor technical issues), OFCCP would alert the contractor. Then, so long as the contractor made the required changes and there were no other indicators of potential discrimination, the audit would be resolved. Second, if an establishment was found to have material violations, but *not* of a discriminatory nature (e.g. poor record keeping or failure to conduct self-analysis), OFCCP would seek to remedy it through an Early Resolution Conciliation Agreement with Corporate-Wide Corrective Action ("ERCA"). As suggested by its name, an ERCA would require a contractor to review its other establishments for similar violations and provide OFCCP progress reports. If the contractor agreed to these terms, OFCCP would not schedule a compliance review for that location for a period of five years from the effective date of the ERCA. Finally, if a desk audit found discrimination at one establishment location and the contractor had multiple establishments, OFCCP would also seek to resolve the violations through an ERCA. OFCCP would monitor the implementation of the ERCA through semi-annual progress reports for five years but schedule no additional compliance evaluations during that time.

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[107] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2018-08, U.S. DEP'T LAB. (2018), https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-08-ESQA508c.pdf.
[108] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2019-01, U.S. DEP'T LAB. (2019), https://www.dol.gov/ofccp/regs/compliance/directives/Dir2019-01-Cont508c.pdf.
[109] See discussion *supra* at II.A.
[110] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2019-01, U.S. DEP'T LAB. (2019), https://www.dol.gov/ofccp/regs/compliance/directives/Dir2019-02-Cont508c.pdf.

February 13, 2019: *Voluntary Enterprise-wide Review Program DIR 2019–04*[111]

The Voluntary Enterprise-wide Review Program ("VERP") would establish a program that would exempt from compliance evaluations "high-performing" federal contractors who meet specific criteria:

> The program will recognize two tiers of contractors. The top tier will include top performing contractors with corporate-wide model diversity and inclusion programs. The next tier will consist of OFCCP compliant contractors that will receive individualized compliance assistance to become top performers. Criteria for the top tier will be more stringent. [112]

Tier one contractors would be exempt from scheduled reviews for five years; tier two would be exempt for three years.

B. Examples of the Voluntary Compliance Approach in Other DOL Agencies

One example of a well-established voluntary compliance program is DOL's Occupational Safety and Health Administration's ("OSHA") Voluntary Protection Programs ("VPP").[113] Before being rolled out nationwide in 1982, VPP was tested in California for a period of three years. VPP "sets performance-based criteria for a managed safety and health system, invites sites to apply, and then assesses applicants against these criteria." [114] The verification process includes an application and rigorous onsite evaluation by OSHA experts. If an applicant is represented by a bargaining unit, union support is required. VPP participants are reevaluated every three to five years and exempted from programmed inspections so long as they maintain their VPP status.

At the behest of Democratic lawmakers, GAO evaluated the VPP in June 2009 and found a myriad of problems, including that "some sites with serious safety and health deficiencies that have contributed to fatalities have remained in the program."[115] Furthermore, GAO noted that the expansion of VPP has added to the

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[111] OFFICE FED. CONT. COMPLIANCE PROGRAMS, DIR 2019-04, U.S. DEP'T LAB. (2019), https://www.dol.gov/ofccp/regs/compliance/directives/DIR-2019-04-FINAL_Signed_022619_CONTR508.pdf.
[112] *Id*.
[113] *OSHA Voluntary Protection Programs: All About VPP*, U.S. DEPARTMENT OF LABOR OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, https://www.osha.gov/dcsp/vpp/all_about_vpp.html (last visited May 16, 2019).
[114] *Id.*
[115] U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-395, OSHA'S VOLUNTARY PROTECTION PROGRAMS: IMPROVED OVERSIGHT AND CONTROLS WOULD BETTER ENSURE PROGRAM QUALITY (May 2009), https://www.gao.gov/assets/300/290017.pdf.

responsibilities of staff who oversee the program and reduced resources available to ensure non-VPP sites are OSHA compliant. In 2004, GAO noted the significant time required to conduct a comprehensive on-site review.[116] While the Obama Administration focused on responding to the GAO report by improving, not expanding, the program, the Trump Administration appears to be shifting back towards expansion.[117]

More recently, the Trump Administration's DOL's Wage and Hour Division ("WHD") began a new pilot program, the Payroll Audit Independent Determination program ("PAID").[118] This program's stated goal was to get employees their owed wages faster, avoid the costs of litigation, and allow employers to correct practices going forward. Significantly, so-called "good faith" employers may also become immune from paying liquidated damages or civil money penalties.

However, it was immediately challenged by 11 State Attorneys General ("AG") because "it appears to be an amnesty program allowing employers who violate labor laws to avoid prosecution and penalties in exchange for…paying [wages already owed under law]."[119] Specifically, the AGs voiced concerns that the program could require workers receiving back pay to waive their rights to additional remedies. In August 2018, five Democratic Senators also submitted questions about the program's legality and efficacy.[120] According to a September 2019 WHD report submitted to the Senate Committee on Appropriations, between April 2018 and September 2019, WHD conducted 74 PAID cases and returned a total of over $4.1 million in back wages to 7,429 employees.[121]

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[116] U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-378, WORKPLACE SAFETY AND HEALTH: OSHA'S VOLUNTARY COMPLIANCE STRATEGIES SHOW PROMISING RESULTS, BUT SHOULD BE FULLY EVALUATED BEFORE THEY ARE EXPANDED 1, 23 (2004), https://www.gao.gov/new.items/d04378.pdf.

[117] Jordan Barab, *VPP: An Important Tool or a Waste of Scarce OSHA Resources?*, CONFINED SPACES (2017), http://jordanbarab.com/confinedspace/2017/07/14/1547/ (last visited May 16, 2019).

[118] *PAID*, U.S. DEPARTMENT OF LABOR WAGE AND HOUR DIVISION, https://www.dol.gov/whd/paid/ (last visited May 16, 2019).

[119] Letter from Eric Schneiderman et al., Attorneys General, to Alexander Acosta, Sec'y, U.S. Dep't Lab., (Aug. 11, 2018), https://ag.ny.gov/sites/default/files/program_multistate_letter_to_acosta.pdf.

[120] Letter from Elizabeth Warren et al., U.S. Senators, to Alexander Acosta, Sec'y, U.S. Dep't Lab., (Aug. 21, 2018), https://www.warren.senate.gov/imo/media/doc/2018.08.21%20Letter%20to%20DOL%20on%20WHD%20PAID%20Program.pdf.

[121] NEWS RELEASE: U.S. DEPARTMENT OF LABOR'S PAYROLL AUDIT INDEPENDENT DETERMINATION PROGRAM FINDS MORE THAN $4 MILLION IN BACK WAGES FOR 7,429 EMPLOYEES, U.S. DEP'T LAB. (Sept. 26, 2019), https://www.dol.gov/newsroom/releases/whd/whd20190926-0; PAYROLL AUDIT INDEPENDENT DETERMINATION (PAID) PROGRAM REPORT WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR (2019), https://www.dol.gov/whd/PAID/PAID-programreport.pdf

Outside of DOL, one recent example of voluntary compliance gone awry is the Federal Aviation Administration's self-certification process. This process allowed certain aviation companies to certify the safety of the products they manufactured, as well as any training required to operate new products, with no additional government oversight. It appears that this may have played a role in the recent, and tragic, failures of Boeing's newest airliners.[122]

IV. EO 11246: CHALLENGES AND LIMITATIONS

This section explores ongoing and potential challenges to recognizing the goals of EO 11246, as well as the Executive Order's limitations.

A. Defending the OFCCP

A recent and urgent challenge facing EO 11246 is a whole-sale attack on the OFCCP itself.[123] In 2014, OFCCP audited a facility belonging to Oracle America, Inc. and discovered evidence that Oracle was discriminating against employees and applicants on the basis of both race and gender.[124] OFCCP determined Oracle owed these workers approximately $400 million in wages.[125] In 2017, OFCCP filed an administrative action against the company, and an administrative trial was set to begin on December 5, 2019.[126] Shortly before the trial commenced, Oracle filed a lawsuit attacking the OFCCP proceeding.[127]

Oracle contends that OFCCP lacks the authority "to create an administrative system to bring, prosecute, and adjudicate claims of employment discrimination and affirmative-action violations and to obtain injunctive relief, back pay, and other

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[122] Aaron Davis & Marina Lopes, *How the FAA Allows Jetmakers to 'Self Certify' that Planes Meet U.S. Safety Requirements*, WASH. POST, March 15, 2019, https://www.washingtonpost.com/investigations/how-the-faa-allows-jetmakers-to-self-certify-that-planes-meet-us-safety-requirements/2019/03/15/96d24d4a-46e6-11e9-90f0-0ccfeec87a61_story.html?utm_term=.91b46547eb70 (last visited May 16, 2019).

[123] Pet'r's Compl., Oracle Am., Inc. v. U.S. Dep't of Labor, No. 1:19-cv-03574 (D.D.C. Nov. 27, 2019).

[124] Mem. Law Supp. Proposed Intervenors' Mot. Intervene, Oracle Am., Inc. v. U.S. Dep't of Labor, No. 1:19-cv-03574 (D.D.C. Nov. 27, 2019).

[125] Nitasha Tiku, *Oracle Allegedly Underpaid Women and Minorities by $400 Million. Now the Details are Set to Come Out in Court*, WASH. POST, Dec. 5, 2019, https://www.washingtonpost.com/technology/2019/12/05/oracle-allegedly-underpaid-women-minorities-by-million-now-details-are-set-come-out-court/.

[126] Mem. Law Supp. Proposed Intervenors' Mot. Intervene.

[127] Press Release, Oracle Am., Inc., Oracle Files Lawsuit against Secretary of Labor Eugene Scalia and Department of Labor Plus OFCCP and OFCCP Director Craig Lee Challenging the Unauthorized U.S. Department of Labor Enforcement and Adjudicative Regime (Nov. 27, 2019), https://www.oracle.com/corporate/pressrelease/oracle-files-lawsuit-112719.html.

make-whole relief for employees of government contractors."[128] On March 18, 2020, two unions, the Communications Workers of America and the United Steelworkers, filed a motion to intervene to defend OFCCP's enforcement authority.[129] As noted in the motion to intervene, "if Oracle prevails, OFCCP could face broad restrictions on its authority to redress workplace discrimination with respect to federal contractors, making it easier for companies that do business with the federal government, like Oracle, to accept taxpayer dollars while engaging in discrimination and violating federal law."[130]

B. Are "sexual orientation" and "gender identity" protections permanent?

In late April 2019, the Supreme Court granted certiorari for three cases related to whether Title VII's prohibition on discrimination in employment "because of…sex"[131] encompasses discrimination on the basis of gender identity and sexual orientation. The three cases—*Bostock v. Clayton County*, *Altitude Express, Inc. v. Zarda*, and *R.G. & G.R. Harris Funeral Homes v. EEOC*—were consolidated, and the Supreme Court heard arguments in October 2019.[132] How the Supreme Court will rule in 2020 is unclear,[133] but if the court reads Title VII narrowly, the implications for EO 11246 could be significant.

As discussed, the Obama Administration's EEOC and DOJ understood Title VII to ban discrimination on the basis of both sexual orientation and gender identity.[134] This was one reason OFCCP changed the text of EO 11246 to explicitly include those two categories. The Trump Administration's EEOC and DOJ,

[128] Pet'r's Compl.
[129] The unions are partnering with and represented by non-profit organizations Democracy Forward and the National Women's Law Center. Press Release, Democracy Forward, Communications Workers of America, United Steelworkers Seek to Intervene in Crucial Case to Defend Civil Rights Enforcer (Mar. 18, 2020), https://democracyforward.org/press/communications-workers-of-america-united-steelworkers-seek-to-intervene-in-crucial-case-to-defend-civil-rights-enforcer/.
[130] Mem. Law Supp. Proposed Intervenors' Mot. Intervene.
[131] 42 U.S.C. § 2000e-2(a)(1).
[132] Transcript of Oral Argument, R.G. & G.R. Harris Funeral Homes v. EEOC, 139 S. Ct. 1599 (2019) (No. 18-107); Amy Howe, *Court to Take Up LGBT Rights in the Workplace (Updated)*, SCOTUSBLOG (2019), https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/ (last visited May 16, 2019).
[133] Jared Odesky, *Commentary Roundup for Bostock, Zarda and Harris Cert Grants*, ON LABOR (2019), https://onlabor.org/commentary-roundup-for-bostock-zarda-and-harris-cert-grants/ (last visited May 16, 2019).
[134] Macy v. Holder, Appeal No. 0120120821, 2012 WL 1435995 (EEOC) (2012); Complainant v. Foxx, EEOC DOC 0120133080, 2015 WL 4397641, at *10.

however, are split,[135] with the Solicitor General arguing for a narrow interpretation of Title VII.[136]

Fortunately, 21 states and the District of Columbia have statutes prohibiting discrimination based on gender identity and sexual orientation.[137] And many of the nation's largest unions and employers have policies and practices of nondiscrimination. But 26 states have *no* explicit prohibitions on discrimination against either category, [138] meaning EO 11246 could offer the only legal recourse for individuals who experience discrimination on the basis of their gender identity or sexual orientation. Complicating matters, a narrow holding could raise questions about the legal authority underpinning EO 11246 itself.

In 1979, the Supreme Court observed in *Chrysler Corp. v. Brown* that it is not clear:

> Whether [EO 11246] is authorized by the Federal Property and Administrative Services Act of 1949, Titles VI and VII of the Civil Rights Act of 1964, the Equal Employment Opportunity Act of 1972, or some more general notion that the Executive can impose reasonable contractual requirements in the exercise of its procurement authority.[139]

The Court did not find it necessary to resolve the question of what authorizes EO 11246 in *Chrysler*, and it has not addressed it since.[140] In signing EO 11478, which changed the text of EO 11246 to include "sexual orientation" and "gender identity," President Obama claimed this authority:

> By the authority vested in me as President by the Constitution and the laws of the United States of America, including 40 U.S.C. 121, and in order to provide for a uniform policy for the Federal

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[135] What You Should Know: EEOC and Enforcement Protections for LGBT Workers, , U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited May 16, 2019).

[136] Charlie Savage, *In Shift, Justice Dept. Says Law Doesn't Bar Transgender Discrimination*, N.Y. TIMES, January 20, 2018, https://www.nytimes.com/2017/10/05/us/politics/transgender-civil-rights-act-justice-department-sessions.html (last visited Apr 27, 2019).

[137] Non-Discrimination Laws, MOVEMENT ADVANCEMENT PROJECT (2019), http://www.lgbtmap.org/equality-maps/non_discrimination_laws (last visited May 16, 2019).

[138] *Id.*

[139] Chrysler Corp. v. Brown, 441 U.S. 281, 304–06 (1979) (footnotes omitted).

[140] For a fulsome review of the history and arguments surrounding the jurisdictional basis of the EO 11246 and its predecessors, *see* Christopher Yoo & Steven Calabresi, The Unitary Executive in the Modern Era, 1945-2001, PUB. L. LEG. THEORY PAPERS (2004), https://law.bepress.com/nwwps-plltp/art12. Footnotes 262, 263, 311, and 351 of the article provide additional context, background, and arguments.

> Government to prohibit discrimination and take further steps to promote economy and efficiency in Federal Government procurement by prohibiting discrimination based on sexual orientation and gender identity, it is hereby ordered…[141]

Notably, President Obama relied on the Federal Property and Administrative Services Act of 1949 (40 U.S.C. §121) and what the Supreme Court deemed a "general notion" that the President may impose requirements on contractors.

While Executive Orders similar to 11246 date back to 1941, two not-yet-foreclosed arguments—coupled with a holding that gender identity and sexual orientation are not covered by Title VII—could leave EO 11246 vulnerable. First, EO 11246's legal authority is derived from the Civil Rights Act of 1964. Second, it's derived from the Equal Employment Opportunity Enforcement Act of 1972.

A finding that EO 11246's legal authority is derived from the Civil Rights Act of 1964 could suggest that EO 11246's protected classes should not extend beyond those covered by Title VII. This aligns with the Trump Administration's Directive 2018-05, which states that "OFCCP aligns its compliance evaluation procedures with principles under Title VII." [142] Before "gender identity" and "sexual orientation" were added to the regulations, even progressive groups argued that "OFCCP should follow the EEOC decision in both its determinations of jurisdiction and its interpretation of sex discrimination."[143]

Further indication that EO 11246 may play second fiddle to Title VII is a Fifth Circuit decision holding that a seniority system found lawful under Title VII by virtue of Section 703(h) could not be found unlawful under EO 11246.[144] However, this decision is distinguishable from the hypothetical challenge at issue here. An executive order has the force of law "if it is not in conflict with an express statutory

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[141] Exec. Order No. 13672, Further Amendments to Executive Order 11478, Equal Employment Opportunity in the Federal Government, and Executive Order 11246, Equal Employment Opportunity (2014), https://obamawhitehouse.archives.gov/the-press-office/2014/07/21/executive-order-further-amendments-executive-order-11478-equal-employmen.

[142] OFFICE FED. CONT. COMPLIANCE PROGRAMS, *DIR 2018-05*, U.S. Dep't Lab. (2018), https://www.dol.gov/ofccp/regs/compliance/directives/dir2018_05.html.

[143] NAN D HUNTER, CHRISTY MALLORY, & BRAD SEARS, *The Relationship between the EEOC's Decision that Title VII Prohibits Discrimination Based on Gender Identity and the Enforcement of Executive Order 11246*, WILLIAMS INST. (2012); *Press Release: Extensive Research Supports the Need, Effectiveness, and Stability of an Executive Order Requiring Federal Contractors to Not Discriminate Against LGBT Employees*, WILLIAMS INST. (2012), https://williamsinstitute.law.ucla.edu/press/press-releases/extensive-research-supports-the-need-effectiveness-and-stability-of-an-executive-order-requiring-federal-contractors-to-not-discriminate-against-lgbt-employees/ (last visited May 16, 2019).

[144] United States v. Trucking Mgmt., Inc., 662 F.2d 36, 38 (D.C. Cir. 1981) (*citing* United States v. E. Texas Motor Freight Sys., Inc., 564 F.2d 179, 185 (5th Cir. 1977)).

provision."[145] And, unlike seniority systems, no statutory provision expressly discusses or approves of discrimination on the basis of sexual orientation or gender identity.

In 1979, the Ninth Circuit addressed the Supreme Court's non-discussion of EO 11246's legal authority. In Footnote 14 of *Legal Aid Society of Alameda County v. Brennan*, the Ninth Circuit argued that the essential features of EO 11246's affirmative action program "were effectively ratified by Congress in adopting the Equal Employment Opportunity Enforcement Act of 1972."[146] The court discussed the debate surrounding that Act and concluded, "In rejecting the assault on the OFCC affirmative action approach, Congress approved the exercise of executive authority to issue binding regulations regarding minority utilization."[147] However, the court was contemplating Congress' debate about affirmative action plans, not protected classes. And, as Justice Scalia noted in discussing Title VII protections in 1998, "[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."[148] Thus, Congress' decision not to debate EO 11246's protected classes should not be fatal to its expanded coverage.

If the Supreme Court holds that Title VII protections do not cover gender identity or sexual orientation *and* a subsequent challenge to EO 11246 results in a decision that the EO needs to be co-extensive with Title VII protections, workers employed on federal contracts would arguably have greater protections against discrimination than federal workers themselves.[149]

Furthermore, even if the Supreme Court holds that Title VII does not cover sexual orientation or gender identity but EO 11246 protections stand, individuals employed on federal contracts who experience discrimination on the basis of gender identity or sexual orientation will have limited recourse.[150] This is because EO 11246 does not provide for a private right of action, nor does it afford compensatory or punitive damages.[151] Instead, EO 11246 regulations provide for conciliation and, possibly, lost wages. This is one reason former OFCCP Director Shiu encouraged OFCCP staff to direct complainants to explore legal remedies and

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[145] United States v. New Orleans Pub. Serv., Inc., 553 F.2d 459, 465 (5th Cir. 1977), vacated, 436 U.S. 942, 98 S. Ct. 2841, 56 L. Ed. 2d 783 (1978).
[146] Legal Aid Soc. of Alameda Cty., 608 F.2d at 1330.
[147] *Id.*
[148] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).
[149] Federal Sector Cases Involving Transgender Individuals, , U.S. EQUAL EMP'T OPPORTUNITY COMM'N , https://www.eeoc.gov/federal/reports/lgbt_cases.cfm (last visited May 16, 2019).
[150] This does not include people in states where gender identity and/or sexual orientation are protected classes.
[151] *Legal Aid Soc. of Alameda Cty.*, 608 F.2d at 1332; *Utley*, 811 F.2d at 1285–86; *accord* Farkas v. Texas Instrument, Inc., 375 F.2d 629, 633 (5th Cir. 1967).

options available under state or federal law.[152] It may also explain why the number of complaints against federal contractors on the basis of sexual orientation or gender remains relatively low.[153]

Finally, if OFCCP does not find actionable gender identity or sexual orientation discrimination in the course of its investigation, complainants may have no recourse. Currently, complaints alleging sexual orientation or gender identity discrimination are considered dual filed with both OFCCP and EEOC for the purposes of Title VII. OFCCP has been investigating these complaints, but it does so as an "agent" of EEOC.[154] If OFCCP investigates a complaint and it results in a "not reasonable cause finding under Title VII," OFCCP will "issue a Title VII dismissal and notice of right-to-sue."

Thus, if the Supreme Court finds that Title VII does not prohibit discrimination on the basis of sexual orientation or gender identity and EEOC is thereby no longer authorized to pursue these complaints, OFCCP would no longer dual file complaints. This begs the question of how OFCCP could continue to act as an agent of EEOC *and* issue right to sue notices for individuals alleging discrimination on the basis of sexual orientation or gender identity. Instead, OFCCP would perhaps handle sexual orientation and gender identity claims as it does claims made under VEVRAA, which only OFCCP has the authority to enforce.[155] But this raises the same issue mentioned above—limited remedies OFCCP can achieve for victims of discrimination.

C. Whither Affirmative Action

The affirmative action program requirements laid out in EO 11246 are laudable in their goals and valuable for serving as a model for how an affirmative action plan can withstand a strict scrutiny analysis, per the Supreme Court's holding in *Adarand Constructors, Inc. v. Pena*.[156] While current enforcement strategies can allow bad-faith contractors to avoid compliance,[157] the regulations are detailed and highly process oriented, thus serving as a model for good faith employers.

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[152] Telephone Interview with Patricia Shiu, Former Director Office Fed. Cont. Compliance Programs (Apr. 26, 2019).

[153] Allen Smith, *Sexual Orientation Bias Claims Against Contractors Triple*, SHRM (2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/lgbtq-bias-claims-rise-contractors.aspx (last visited May 16, 2019).

[154] Jacqueline Berrien, *EEOC - OFCCP Memorandum of Understanding on Coordination of Functions*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2011), https://www.eeoc.gov/laws/mous/eeoc_ofccp.cfm (last visited May 16, 2019).

[155] 41 C.F.R. § 60-300.66 2016.

[156] Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995).

[157] See discussion *supra* at Section II.B.

However, affirmative action programs have been consistently challenged across the country since their inception.[158] And while EO 11246 itself has not been facially challenged, supporters of affirmative action have reasons to stay alert. In a 2018 law review article, Professor David M. Driesen notes that while the Third Circuit upheld EO 11246's affirmative action requirements in *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, it did so on the grounds that discrimination in employment in the construction industry was likely to drive up costs.[159] Guided by similar reasoning, the Fourth Circuit invalidated EO 11246 as applied to federal subcontractors underwriting workers compensation insurance because it advanced a social objective without reducing procurement costs.[160] If this line of reasoning holds, it could serve as the underpinning to additional, as-applied challenges to EO 11246 requirements.

D. How Will OFCCP use the EEO-1 Data?

Judge Chutkan's decision to vacate OMB's stay of the EEOC's EEO-1 Component 2 data collection form for 2017 and 2018 was a win for civil rights advocates. However, it remains to be seen how or whether OFCCP will use or deploy that data in investigations or enforcement; in November 2019, OFCCP announced it would no longer request or accept Component 2 data from EEOC.[161] The two agencies have been sharing data since 1966 and a series of MOUs and revisions to the regulations have clarified and codified this data-sharing agreement.[162]

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[158] B. Drummond Ayres Jr., *Conservatives Forge New Strategy To Challenge Affirmative Action*, N.Y. TIMES, Feb. 16, 1995, https://www.nytimes.com/1995/02/16/us/conservatives-forge-new-strategy-to-challenge-affirmative-action.html (last visited Apr 28, 2019); Erica L. Green, Matt Apuzzo & Katie Benner, *Trump Officials Reverse Obama's Policy on Affirmative Action in Schools*, N.Y. TIMES, August 7, 2018, https://www.nytimes.com/2018/07/03/us/politics/trump-affirmative-action-race-schools.html (last visited Apr 28, 2019).

[159] David M. Driesen, *Judicial Review of Executive Orders' Rationality*, 98 B.U.L. Rev. 1013, 1062 (2018) (*citing* Contractors Ass'n of E. Pa. v. Sec'y of Labor, 442 F.2d 159, 173, 177 (3d Cir. 1971)).

[160] *Id.* Driesen notes that *Liberty Mut. Ins. Co.* is in conflict with *Chamber of Commerce v. Napolitano*, which held that the President need not make factual findings regarding costs savings on contracts. Chamber of Commerce v. Napolitano, 648 F. Supp. 2d 726, 738 (D. Md. 2009); Liberty Mut. Ins. Co. v. Friedman, 639 F.2d 164, 171 (4th Cir. 1981)).

[161] Intention Not to Request, Accept, or Use Employer Information Report (EEO-1) Component 2 Data, 84 Fed. Reg. 64932 (Nov. 11, 2019). https://www.federalregister.gov/documents/2019/11/25/2019-25458/intention-not-to-request-accept-or-use-employer-information-report-eeo-1-component-2-data.

[162] *Memorandum of Understanding between The Equal Employment Opportunity Commission and The Office of Federal Contract Compliance*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (2974), https://www.eeoc.gov/eeoc/history/35th/thelaw/mou-ofccp.html (last visited May 16, 2019).; 41

V. THE FUTURE OF EO 11246: OPPORTUNITIES FOR RECOGNIZING ITS POTENTIAL

A. The Message in the Regulations

While the Trump Administration's directives may result in less aggressive and effective enforcement of EO 11246 requirements, some of the most significant changes made in the Obama Administration are here to stay. These changes, including the updates to the sex discrimination regulations, send a clear message to contractors that many of the practices most harmful to achieving equal opportunity in employment are no longer allowed.

B. Do Voluntary Compliance and Self-Monitoring Programs Meet the Requirements of EO 11246?

Taken as a whole, the Trump Administration directives signal to the federal contracting community that OFCCP wants to accommodate their needs. The directives indicate what OFCCP is less likely to follow up on during investigations and gives employers a roadmap for how OFCCP will conduct its audits. It is rendering the enforcement process less adversarial, and likely less effective. However, there may be legal recourse available for organizations who believe OFCCP is not fulfilling basic enforcement duties.

The Ninth Circuit held in *Legal Aid Society of Alameda County v. Brennan* that while EO 11246 did not provide for a private right of action, courts could review the government's enforcement efforts and provide a writ of mandate to the Secretary if the government was not performing its duties.[163] This is because the regulations provide clearly defined standards and require government officials to perform non-discretionary duties.[164]

Arguably, some of the Directives issued by OFCCP under President Trump could violate its obligation to perform specified, non-discretionary duties set forth in the regulations. For instance, under Directive 2019-04, VERP, OFCCP staff and investigators will be required to spend their time certifying companies who claim to be model contractors. Given OFCCP's already tight budget, it is reasonable to anticipate an outcome similar to what happened under OSHA's VPP, where fewer

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C.F.R. § 60–1.7(a); Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, 81 Fed. Reg. 5113 (February 1, 2016).

[163] *Legal Aid Soc. of Alameda Cty.*, 608 F.2d at 1332. Any argument that sovereign immunity barred the suit also failed because Congress amended the Administrative Procedure Act to remove that defense where only nonmonetary relief is sought. *See also* Lewis v. W. Airlines, Inc., 379 F. Supp. 684, 689 (N.D. Cal. 1974), overruled on other grounds by Utley v. Varian Assocs., Inc., 811 F.2d 1279 (9th Cir. 1987).

[164] *Legal Aid Soc. of Alameda Cty.*, 608 F.2d at 1332.

inspectors were available to inspect non-VPP establishments because they were occupied certifying supposedly compliant sites. Furthermore, unlike in the OSHA context, where workplace hazards often result in obvious physical harm to employees, there may be no such red flags for ongoing workplace discrimination at supposedly model employers. Finally, VERP establishments are not absolved of Title VII compliance, even if they are VERP-approved. A challenger to VERP could thus ask, "Is OFCCP, in establishing a VERP, shirking its non-discretionary duty to investigate and monitor compliance?"[165]

If OFCCP fails to analyze and utilize the EEO-1 Component 1 or Component 2 data, this could also be grounds for challenging OFCCP for not performing non-discretionary duties. As mentioned above, this data collection is a central requirement of EO 11246 and both memorandums of understanding with EEOC and revisions to the regulations have clarified and codified this data-collecting requirement.[166] According to the EEOC webpage, "The agencies also use the EEO-1 Report data to support civil rights enforcement and to analyze employment patterns, such as the representation of women and minorities within companies, industries or regions."[167]

Finally, one last potential legal challenge to non-enforcement could be brought by a third-party beneficiary to a federal contract. While this was not successful under Section 503, it has not been tried under EO 11246 and it could carry additional force when challenging new Trump Administration directives.[168] This also poses a larger question: if the Trump Administration allows federal contractors to operate like any other employer, is it striking any real bargain for taxpayer dollars?

C. Suggestions for Modernization

OFCCP grew out of a series of executive orders intended to address patterns and practices of employment discrimination by federal contractors. The underlying principle was to further the civil rights of individuals employed on those contracts. In a 1965 address to graduates of Howard University, President Lyndon B. Johnson highlighted his vision for a "Great Society," saying, "This is the next the more

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[165] The Supreme Court's recent decision in *Kisor v. Wilkie* impacts the potential success or failure of any challenges to agency interpretation of its own regulations. 139 S. Ct. 2400 (2019).

[166] *Memorandum of Understanding between The Equal Employment Opportunity Commission and The Office of Federal Contract Compliance*, *supra* note 151; 41 C.F.R. § 60–1.7(a); Agency Information Collection Activities: Revision of the Employer Information Report (EEO–1) and Comment Request, 81 Fed. Reg. at 5113.

[167] EEO-1: Answers to Filing Questions Often Asked by Employers, *supra* note 33.

[168] Robert S. Adelson, *Third Party Beneficiary and Implied Right of Action Analysis: The Fiction of One Governmental Intent*, 94 YALE L.J. (1985), https://digitalcommons.law.yale.edu/ylj/vol94/iss4/3.

profound stage of the battle for civil rights. We seek not just freedom but opportunity. We seek not just legal equity but human ability, not just equality as a right and a theory but equality as a fact and equality as a result."[169] This was also the driving force behind Johnson's decision to sign EO 11246. While the nature of discrimination in employment has changed,[170] the principle underlying EO 11246 has not. This overarching principle should guide future policy changes and enforcement efforts, much as it did during the Obama Administration.

Additional changes might include shifting compliance burdens from being imposed separately on 200,000 contractor establishments to a more manageable number of contracting companies, 12,000.[171] This would allow the agency to gather a broader picture of contractor compliance, and hold larger companies responsible for any problematic, company-wide practices. It would reflect the changing nature of work, which is oftentimes conducted remotely,[172] and it would also reduce compliance costs for contractors. Notably, two recent Trump Administration Directives—2019-02 (Early Resolution Procedures) and 2019-04 (Voluntary Enterprise-wide Review Program)—do shift towards a company-wide enforcement and evaluation approach. Requiring companies to implement uniform policies across establishments would have the added benefit of keeping companies accountable if they were challenged for employment discrimination in a class action lawsuit. Plaintiffs who can point to specific, company-wide employment practices are be more likely to satisfy the commonality requirement necessary to certify a class action.[173]

Another change might send a different, but important, signal. Currently, EO 11246 implementing regulations rely on the term "minority" and "nonminority." Critiques of these terms are widespread, in part because their use risks oversimplifying a complex picture.[174] Furthermore, while the United States is projected to become majority non-white by 2045,[175] explicit and systemic discrimination on the basis of race will no doubt persist. While this is not a revision

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[169] *History of Executive Order 11246*, *supra* note 21; Lyndon B Johnson, *Commencement Address at Howard University* (1965).
[170] This is in part because of the successes of laws like the Civil Rights Act of 1964.
[171] BREACH OF CONTRACT: HOW FEDERAL CONTRACTORS FAIL AMERICAN WORKERS ON THE TAXPAYER'S DIME, *supra* note 65.
[172] Hailley Griffis, *State of Remote Work 2018 Report: What It's Like to be a Remote Worker in 2018*, OPEN (2018), https://open.buffer.com/state-remote-work-2018/ (last visited Apr 29, 2019).
[173] *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 357 (2011) ("A regional pay disparity, for example, may be attributable to only a small set of Wal–Mart stores, and cannot by itself establish the uniform, store-by-store disparity upon which the plaintiffs' theory of commonality depends.").
[174] DON LEPAN, LAURA BUZZARD & MAUREEN OKUN, HOW TO BE GOOD WITH WORDS 109–111 (2017).
[175] William H. Frey, *The US Will Become 'Minority White' in 2045, Census Projects*, BROOKINGS (2018), https://www.brookings.edu/blog/the-avenue/2018/03/14/the-us-will-become-minority-white-in-2045-census-projects/ (last visited Apr 29, 2019).

the Trump Administration is likely to make, it could be added to a list of goals for a future Administration.

CONCLUSION

While advocates of equal employment opportunity and affirmative action might be in a defensive crouch for the remainder of the Trump Administration, they should also be thinking critically about the future of OFCCP. The nature of work is changing, as are the demographics of this country and its workforce. These changes will require updates to OFCCP policies and regulations in order to be responsive to the needs of marginalized groups, and to fulfill the original purpose of EO 11246. EO 11246 can continue to be a powerful tool in the toolbox of equal employment and civil rights advocates, but it needs to be modernized and deployed effectively to fully recognize its promise.

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