OFCCP Exempts New Federal Contracts Entered Into to Provide COVID-19 Relief From Certain Equal Employment Opportunity Requirements (US)

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On March 17, 2020, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) issued a temporary, three-month exemption from certain equal employment opportunity requirements for new supply and services and construction contracts “entered into specifically to provide Coronavirus relief.” In the National Interest Exemption Memorandum (NIE Memorandum), the OFCCP provided modified equal opportunity clause language that federal contractors may use in covered contracts and exempts such contracts from all affirmative action obligations, posting requirements, solicitation/advertisement requirements, and mandatory job listing requirements under the following laws administered by the OFCCP:

- Executive Order 11246 (which prohibits federal contractors from discriminating against employees based on race, color, sex, sexual orientation, gender identity, religion, disability, veteran status, or national origin);
- Section 503 of the Rehabilitation Act of 1973 (which prohibits discrimination against workers with disabilities); and
• Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) (which prohibits discrimination in employment against veterans).

The NIE Memorandum applies to covered contracts entered into between March 17, 2020, to June 17, 2020 specifically related to coronavirus relief efforts. The OFCCP may extend the NIE Memorandum beyond the allotted three-month time period if special circumstances in the national interest so mandate.

The NIE Memorandum does not define what constitutes a contract “specifically to provide Coronavirus relief.” However, OFCCP guidance explains that because federal contracting officers know the terms and conditions of the contracts they execute, they are in the best position to determine what constitutes a supply and service or construction contract specifically to provide relief related to the novel coronavirus outbreak. For example, new contracts to provide medical supplies (such as masks, ventilators and respirators) or medical research services are likely to fall under this exemption. It is important to note that the exemption only applies to new supply and service and construction contracts solely for the specific purpose of providing coronavirus relief. Therefore, contractors that hold other contracts unrelated to coronavirus relief, and thus were already required to comply with the affirmative action requirements of laws enforced by OFCCP, must continue to do so. Further, contracts entered into during the relevant timeframe for providing both materials related to coronavirus relief and materials not related to coronavirus relief efforts are not exempt under the NIE Memorandum.

It is also important to understand that although the NIE Memorandum exempts qualifying federal contracts from certain equal opportunity obligations under the three laws addressed above, such as affirmative action responsibilities, it does not exempt them from all obligations under federal, state, and local civil rights laws. For example, contractors that qualify for relief under the NIE Memorandum must continue to follow the non-discrimination and non-retaliation obligations under the OFCCP’s own regulations, meaning they must not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or protected veteran status. Further, contractors cannot discriminate against applicants or employees because they inquire about or discuss wage concerns and may not retaliate against applicants or employees for engaging in protected activities.

Federal contractors with additional questions regarding the NIE Memorandum should visit the OFCCP’s Coronavirus National Interest Exemption Frequently Asked Questions webpage and consult with counsel to determine whether this exemption applies to their contract.

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