OFCCP FAQ Provides Guidance Regarding Non-Binary Employees and Applicants

Article By
Guy Brenner
Caroline L. Guensberg
Proskauer Rose LLP
Government Contractor Compliance & Regulatory Update Blog

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The Office of Federal Contract Compliance Programs (“OFCCP”) recently released a FAQ addressing how contractors should “handle counting employees and/or applicants who identify as a gender other than male or female such as Gender X as recognized in California[.]”

In response to this question, the FAQ provides “[i]f an employee or applicant chooses to self-identify as non-binary, or as a gender other than male or female, the contractor must still include the individual in its AAP submission[,]” but “the contractor may exclude that individual’s data from the gender-based analyses required by OFCCP’s regulations.” The FAQ further provides that “a contractor may not ask applicants or employees for documentation to prove their gender identity or transgender status.”

Employers are increasingly providing employees and applicants the opportunity to self-identify as a gender other than male or female, and until now federal government contractors have had no guidance regarding how to account for individuals who self-identified as non-binary or as a gender other than male or female in their affirmative action programs and analyses. This FAQ, gives some clarity to the agency’s position on some of the issues that arise from the intersection of OFCCP regulations and gender non-binary employees and applicants.