Chapter 3

Policy and Legal Compliance
Today, racial and ethnic diversity in the workplace is no longer optional; it is a fact of life. Diversity will continue to grow, influencing both the workplace and the marketplace. Many companies have made strides toward diversifying their workplaces. However, little progress has been made at senior levels.

The American workplace and marketplace have changed rapidly and significantly in terms of the diversity of employees and customers in the past fifty years. What was once exclusively an arena for white males, the U.S. workforce, has evolved to encompass individuals from all walks of life. And with the U.S. Census Bureau estimating that our country will have a “majority minority” population by 2050, marketplace demands will continue to shift accordingly.

Given the rapid shifts in our cultural landscape both in the United States and abroad, many corporations have moved the diversity and inclusion needle beyond compliance to systematic integration. After all, as discussed in previous chapters, diversity and inclusion benefits an organization across all areas and functions—from recruitment, retention, and advancement to sales, marketing, and community relations. Yet, before an organization can fully realize the power of D&I on its growth and bottom line, it must first build a strong foundation for D&I through legal compliance.

In this chapter, we will explore the following questions:

- How are Equal Employment Opportunity (EEO) and affirmative action different, and what are the major components of each?

- What are the legal ramifications of EEO, affirmative action, and other federal mandates on the workplace?

- What are the different types of compliance reviews?

- What are some corporate examples of EEO and affirmative action statements?
EEO and Affirmative Action: Understanding the Difference

Equal Employment Opportunity represents a body of law that prohibits discrimination on the basis of race, color, national origin, gender, religion, age, and disability. Enforced by the U.S. Equal Employment Opportunity Commission (EEOC), there are seven federal laws that are at the core of EEO law.

- **Title VII of the Civil Rights Act of 1964** was enacted by Congress to prohibit employment discrimination based on race, sex, color, religion, and national origin. Title VII applies to private employers, labor unions, and employment agencies. The Act prohibits discrimination in recruitment, hiring, wages, assignment, promotions, benefits, discipline, discharge, layoffs, and almost every aspect of employment. Title VII of the Civil Rights Act became a very powerful legislative tool which enabled much of the diversity present in today’s workforce.

- **The Equal Pay Act of 1963** prohibits discrimination in the payment of wages on the basis of gender. The legislation recognized the disparity in pay between men and women doing the same or similar jobs.

- **The Age Discrimination in Employment Act of 1967** prohibits discrimination against persons who are 40 years of age or older. Prior to 1967, Congress found clear evidence of older workers being discriminated against in trying to obtain employment or being disproportionately affected by layoffs and downsizing.

- **The Americans with Disabilities Act of 1990 (ADA)**, Titles I and V, as amended by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), prohibits private employers, state and local governments, employment agencies, and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. Prior to the ADA, people with disabilities had no legal recourse with which to combat discrimination. The ADAAA, meanwhile, is intended to overturn a series of Supreme Court decisions that interpreted the Americans with Disabilities Act of 1990 in a way that made it difficult to prove that an impairment is a “disability.” The ADAAA makes significant changes to the ADA's definition of “disability” that broadens the scope of coverage under both the ADA and Section 503 of the Rehabilitation Act.

- **The Rehabilitation Act of 1973**, in Sections 501 and 505, prohibits the Federal Government as an employer from discriminating against qualified individuals with disabilities.

- **The Civil Rights Act of 1991** was enacted to “strengthen and improve Federal civil rights laws, to provide for damages in cases of intentional employment discrimination, to clarify provisions regarding disparate impact actions and other purposes.” Congress enacted the legislation in response to several Supreme Court decisions rendered in the
late 1980s that had made it more difficult for plaintiffs to prevail in their employment discrimination suits and to recover fees and costs when they won their lawsuits.

- **The Genetic Information Nondiscrimination Act of 2008 (GINA)**, Title II, prohibits employment discrimination based on genetic information about an applicant, employee, or former employee.

EEOC enforces all of these laws and provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies. Other federal laws, not enforced by EEOC, also prohibit discrimination and reprisal against federal employees and applicants. For example, the Civil Service Reform Act of 1978 (CSRA) contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. The CSRA prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the bases of race, color, national origin, religion, sex, age or disability. It also provides that certain personnel actions cannot be based on attributes or conduct that do not adversely affect employee performance, such as marital status and political affiliation. The Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on conduct to include discrimination based on sexual orientation. The CSRA also prohibits reprisal against federal employees or applicants for whistle-blowing, or for exercising an appeal, complaint, or grievance right. The CSRA is enforced by both the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

**Affirmative Action**

Affirmative Action was established by then-President Lyndon B. Johnson’s Executive Order 11246 in 1965 as a way to remedy historic and continuing discrimination. Through the order, Johnson’s goal was to create “not just equality as a right and a theory, but equality as a fact and as a result.”

Executive Order 11246 required employers to analyze their organization’s workforce composition and prepare written plans to eliminate underrepresentation of minorities and women if it existed in the workplace. These plans often set goals and timetables for increasing diversity within the organization, and to achieve the goals, recruitment, set-asides, and preference were often used.

Affirmative Action generates strong emotions and opinions both for and against the policy. Those who support the policy point to continuing disparities in pay and promotion for minorities and women in the workplace, while opponents argue that the policy runs counter to its very purpose by allowing so-called “reverse discrimination.” Whatever one’s opinion, few would deny that affirmative action policies have played a significant role in increasing the number of women and minorities in the workplace.

EEO laws and Affirmative Action policies were both intended to “level the playing field” in the workplace. They both help to increase diversity within organizations; however, they have
limited impact on changing the culture of those organizations. Building upon the numerical
gains made possible by EEO and Affirmative Action, today's diversity and inclusion
initiatives focus on building inclusive workplace cultures so that all employees are able to
fully contribute their skills and talents toward organizational goals.

**Major differences between EEO/Affirmative Action and D&I Initiatives include:**

<table>
<thead>
<tr>
<th>EEO/Affirmative Action</th>
<th>Diversity and Inclusion Initiatives</th>
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<tr>
<td>Focus on compliance with legal mandates</td>
<td>Focus on organizationally-driven goals and strategies</td>
</tr>
<tr>
<td>Deficit-based approach to change</td>
<td>Strength-based approach to change</td>
</tr>
<tr>
<td>Focus on quantitative change</td>
<td>Focus on quantitative and qualitative transformation</td>
</tr>
<tr>
<td>Responsibility and accountability not vested in all leaders</td>
<td>Organization-wide responsibility and accountability</td>
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<tr>
<td>Seeks to improve employee demographics</td>
<td>Seeks to build competitive advantage</td>
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Affirmative Action is a commitment to ensure equality. It provides legal remedies to address
the historic discrimination that disadvantaged groups and individuals have faced. The
recordkeeping, analysis, and auditing disciplines that are cornerstones of Affirmative Action
compliance are also critical tools for building diversity and inclusion policies. These tools can
be used to hold management accountable.

Equal Employment Opportunity ensures protection from discrimination. EEO laws prohibit
discrimination based on sex, race, religion, national origin, and/or disability/ physical ability.
Legal compliance is still an issue; however, some lawsuits have led to the establishment of
some strong diversity and inclusion programs with high-level chief diversity officers. Today,
it is common for corporate diversity and inclusion policies go beyond EEO requirements.
Exceeding the government's requirements of EEO and Affirmative Action is fundamental to
the diversity and inclusion mission. Most organizations profiled in this Primer go far beyond
federal agencies' requirements and set high compliance goals.

The following questions may help you to evaluate your company’s compliance with EEO
standards:

- What is your data system for compliance?
- How does the system work with your own EEO and compliance data?
- How do you review your numbers?
- How do you follow the new initiatives at the EEO Commission?
- What are your internal legal redress or arbitration efforts?
Legal Issues and Diversity

Working with legal counsel in a positive way is a critical part of diversity and inclusion. The general counsel will typically help design and approve procedures and redress mechanisms. All effective diversity and inclusion programs work in partnership with the general counsel office.

A legal background in the diversity and inclusion office is essential. Many diversity and inclusion officers are lawyers by training or have legal backgrounds. They know the importance of developing a positive relationship with the legal department as well as understanding policies and programs.

Roles and issues for legal and general counsel to take on with diversity and inclusion include (but are not limited to):

- EEO program, policies, and procedures
- Development and support of work/life policies and programs
- Policy development concerning LGBT to age discrimination and disability rights
- Complaint and resolution frameworks
- Legal issues (e.g. such as investigations in the workplace)
- Personnel fairness issues from discrimination suits to misconduct
- Preventive action on claims and suits
- Legal redress mechanisms
- Non-legal mechanisms for resolution
- Educational policies on how claims and systems work
- Investigation and resolution of claims (e.g. age discrimination to racial discrimination or religious and disability discrimination)
- Matrix use for representation
- Special work (e.g. immigration issues and policies)
- Application of legal issues to the global framework
- Active support of affirmative action and other key issues requiring legal action (e.g. signing amicus briefs)
- Working with the government on diversity and inclusion issues
- Development and use of supplier diversity programs and procedures
- Program support with policies and procedures
Analyzing EEO

Seyfarth Shaw, a New York-based law firm well-known for its labor and employment practice, provided the following matrix of key criteria for evaluating representation. These criteria point to tools your organization may already be using to meet its compliance obligations. With some re-orientation, these tools may aid diversity and inclusion management.

<table>
<thead>
<tr>
<th>Analyze</th>
<th>Affirmative Action Tool</th>
<th>Diversity Tool</th>
</tr>
</thead>
<tbody>
<tr>
<td>What is the race/gender composition of each of our functions or departments?</td>
<td>Work Force Analysis</td>
<td>Functional Composition Analysis</td>
</tr>
<tr>
<td>Is there diverse representation within each of our significantly-sized job classifications?</td>
<td>Job Group Analysis</td>
<td>Job Classification Composition Analysis</td>
</tr>
<tr>
<td>What is the availability of minorities and females in our internal and external talent pools?</td>
<td>Availability Analysis</td>
<td>Demographic Studies, Use of Economic Census Data, and Talent Pool Composition Analysis</td>
</tr>
<tr>
<td>What are our key internal and external talent pools?</td>
<td>Feeder Pool Identification</td>
<td>Talent Pool Identification</td>
</tr>
<tr>
<td>Are there important internal or external talent pools we are not maximizing?</td>
<td>Analysis of Recruitment Sources</td>
<td>Expansion of Talent Identification</td>
</tr>
<tr>
<td>Are our internal and external applicant pools diverse?</td>
<td>Review of Applicant Flow</td>
<td>Talent Pool Composition Analysis</td>
</tr>
<tr>
<td>If our applicant pools have diverse race/gender representation, are our placements (hires and promotions) proportionally diverse?</td>
<td>Separate Impact Ratio Analyses for Hiring and Promotion</td>
<td>Combined Adverse Impact Analysis for all Placements</td>
</tr>
<tr>
<td>Are we challenging ourselves with goals for diverse representation?</td>
<td>Goal-Setting at Compliance, Minimum of Two Standard Deviations from Availability</td>
<td>Stretch Goals at Level of Availability, Talent Pool Composition, or Other</td>
</tr>
<tr>
<td>If our workforce has diverse representation, are our reductions in force and other terminations proportionate?</td>
<td>Impact Ratio Analysis for Terminations</td>
<td>Separate Adverse Impact Analyses for RIFs, Other Involuntary Terminations, and Voluntary Terminations</td>
</tr>
</tbody>
</table>

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Important New Legal Trends

Color Discrimination

Discrimination based on race is illegal and is comprehensively covered by law. An increasing problem, however, is the rise in discrimination based on color. Color discrimination refers to discrimination within racial groups based on skin color, such as African Americans discriminating against other African Americans or Hispanics against other Hispanics based
on their origins or skin shade. These color-discrimination complaints pit minorities and others against members of their own races or ethnic groups. While color discrimination filings have risen within the EEOC, these filings do not indicate that they are necessarily racially-based.

This “appearance discrimination” could become a bigger problem as America’s demographics change and more individuals classify themselves as multi-racial. Lawyers and the EEOC say that “appearance discrimination” will seriously affect employment in America if the issue is not addressed promptly.

Anti-discrimination training is expanding everywhere, especially for service workers. Policies are also changing as color discrimination is increasingly added to corporate harassment and discrimination policies.

Offerings of Law Firms in Diversity
The past decade has seen a dramatic increase in employment law and comprehensive legal diversity support.

• **Governance, hiring, and career development.** Like corporate America, law firms have developed their own plans and programs to move women and minorities “in and up.” Now, 50% of law school graduates are women; however, representation of women in partnership ranks remains much lower. Still, law firms are learning how to meet the needs of women partners with work/life benefits. Meanwhile, recruiting more minorities is a top goal and retention areas remain a concern.

• **More law firms are building diversity counseling practices.** Some of the largest firms have recognized diversity practice groups and many more are naming practices. Workplace compliance, EEO, and Affirmative Action are keeping major law firms busy. Employment lawyers counsel clients on ensuring compliance with federal, state, and local EEO laws. They work with the Office of Federal Contract Compliance Programs (OFCCP) to support compliance. They assist with audits and litigation and “litigation avoidance.” Compliance, reporting, monitoring, and, where necessary, negotiation or litigation is legal support’s primary responsibilities.

Employment lawyers and law firm associates also conduct training on issues such as LGBT policies, disability policies, and older worker policies. They train in-house counsel, management, and those responsible for HR, diversity and inclusion, and recruitment functions. Also important to consider:

• **Legal support is important in government contract work.** Lawyers help to support regulatory, administrative, and compliance work as well as procurement compliance, which is a growing area. This may involve helping a company identify government contract opportunities. Law firms also assist companies with small business contract and sub-contract planning, implementation, and reporting.
• **Litigation and litigation avoidance or alternative dispute resolutions.** Law firms tackle litigation when it is essential, but lawyers are also spending far more time in litigation avoidance or alternative dispute resolution.

• **Immigration and global rights.** Immigration law and global rights are important in today’s multinational companies. Special expertise is often required.

• **Audit assistance.** Outside legal help is recommended on a periodic basis.

## Federal Requirements Regarding Affirmative Action

*Provided by Seyfarth Shaw LLP:*

Federal government contractors and subcontractors are required to act affirmatively in employing and promoting employees who are in protected groups based on race, color, religion, sex, national origin, mental or physical disability, and veteran status.

### Employers Covered

Affirmative action laws and regulations are applicable to employers who have federal contracts. The following definitions are contained in Office of Federal Contract Compliance Programs (OFCCP) regulations:

### Government Contracts

A government contract is any agreement between any governmental agency and any person to furnish supplies or services, or for the use of real or personal property, including lease arrangements. The term “services” includes:

- Utilities
- Construction
- Transportation
- Research
- Insurance
- Fund depository services.

Government contracts do not include agreements covering an employer/employee relationship. Federally-assisted construction contracts are separately defined.
Contractors

“Contractor” includes any prime contractor or subcontractor. A “prime contractor” means any “person” holding a contract with a federal contracting agency. A “subcontractor” is defined as any person entering into an agreement or arrangement with a contractor to furnish supplies or services or for the use of real or personal property, including lease arrangements:

- Which are necessary to the performance of any government contract or
- Under which any part of the contractor's obligation under a government contract is performed.

Additionally, an organization having no federal contracts or subcontracts itself nevertheless may be considered a federal contractor or subcontractor if it is closely related to an entity that is a contractor or subcontractor (for example a parent/subsidiary). The OFCCP considers the following factors to determine whether two organizations are a single entity or independently operated corporate affiliates:

- Common ownership
- Common directors/officers
- Exercise of control by one over the other
- Unity of personnel policies emanating from a common source
- Interdependency of operations

Under the OFCCP regulations, contractors and subcontractors may request a waiver from affirmative action requirements with respect to certain facilities that are in all respects separate and distinct from the activities of the entity with the federal contract.

Executive Order 11246

Executive Order 11246 (E.O. 11246) prohibits federal government contractors and subcontractors from discriminating in employment on the basis of race, color, religion, national origin, or sex, and requires affirmative action with respect to minorities and females to ensure nondiscrimination.

Rehabilitation Act of 1973

Section 503 of the Rehabilitation Act prohibits federal government contractors and subcontractors from discriminating against applicants or employees with mental or physical disabilities, and requires affirmative action to ensure nondiscrimination in employment decisions regarding such individuals.
Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA)

Section 402 of VEVRAA, as amended by the Veterans Employment Opportunities Act of 1998, prohibits federal government contractors and subcontractors from discriminating against veterans with disabilities, veterans of the Vietnam Era, and other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, and requires affirmative action to ensure non-discrimination in employment decisions regarding such individuals.

Enforcement

Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and Section 402 of VEVRAA are administered by the Office of Federal Contract Compliance Programs (OFCCP), an agency of the United States Department of Labor. The OFCCP publishes regulations implementing these laws and conducts periodic compliance evaluations of federal government contractors and subcontractors. Additionally, the OFCCP investigates and handles complaints of discrimination.

Equal Opportunity Clause

Under E.O. 11246, Section 503 of the Rehabilitation Act, and Section 402 of VEVRAA, a contractor or subcontractor with a government contract or contracts exceeding $10,000 must include in its contracts an Equal Opportunity Clause. Contracts and subcontracts for indefinite quantities that are reasonably believed to exceed $10,000 are also subject to this requirement. In the Equal Opportunity Clause, the contractor must agree:

- Not to discriminate and to take affirmative action to ensure that applicants and employees are treated without regard to their race, color, religion, sex, or national origin, and to inform employees and applicants of this non-discrimination by posting notices
- To state in its solicitations and advertisements that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin
- To send a notice to any collective bargaining representative of its employees regarding the contractor’s commitments under E.O. 11246
- To comply with the provisions of E.O. 11246 and the rules, regulations, and relevant orders of the secretary of labor
- To furnish all information and reports required and to permit access to records by the secretary of labor for purposes of determining compliance
- That in the event of non-compliance with the rules and regulations, the contract may be canceled, suspended, terminated, the contractor may be declared ineligible for future
contracts, and such other sanctions may be imposed as provided by the order, rules and regulations, or by law

- To include the provisions of the Equal Opportunity Clause in contracts and purchase orders so that it will be binding upon subcontractors and vendors, and to consent to OFCCP action against subcontractors

Federal Rules for Contractors and Subcontractors

Listing Job Openings

Under VEVRAA, contractors and subcontractors have an additional requirement to list all employment openings with the local state job service (which could be the unemployment office) except executive and top management positions, positions that will be filled from within the contractor's organization, and positions lasting three days or less.

Recordkeeping

Federal contractors are also required to keep personnel or employment records for at least two years from the making of the record or from the personnel action involved, whichever date is later, except:

- Contractors with fewer than 150 employees, or
- Contractors without a government contract of at least $150,000 who need only keep employment and personnel records for one year

Records that need to be retained include records made or kept on or after December 22, 1997 that pertain to:

- Hiring and assignment
- Demotion, transfer, lay off, and termination
- Rates of pay and other terms of compensation
- Selection for training or apprenticeship
- Records having to do with requests for reasonable accommodation
- Results of any physical examinations
- Job advertisements and postings
- Applications and resumes
• Tests and test results
• Interview notes

Failure to keep such records amounts to non-compliance by the contractor and may lead to a presumption that the contractor has failed to keep or retain such records because the information would have been unfavorable to the contractor.

Affirmative Action Plan Development

Every contractor or subcontractor who has 50 or more employees and meets one or more of the criteria listed below is required to develop a written Affirmative Action Program (AAP) covering employment of minorities and females for each of its establishments. Each AAP must be updated annually.

The contractor either:

• Has a contract for $50,000 or more;
• Has government bills of lading which in any 12-month period, total or can reasonably be expected to total $50,000 or more; or
• Serves as a depository for government funds in any amount; or
• Is a financial institution that is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

Each physically separate facility is considered an “establishment” and must have its own AAP, with limited exceptions, as follows:

• “Functional AAPs” include an entire business function or line of business, without regard to the geographic locations of the establishments or employees in the function or line. However, any contractor who wishes to develop functional AAPs must gain approval from the OFCCP.
• If there are less than 50 employees at the establishment, the contractor can choose from three options:
  - That establishment, though small, can have its own AAP;
  - The employees can be placed in the AAP of the establishment where their human resources function resides; or
  - The employees can be placed in the AAP of the establishment where their manager is located.
AAP Contents

The OFCCP regulations set forth the required contents of an AAP. An AAP must include the following quantitative analyses:

- Organizational profile
- Job group analysis
- Placement of incumbents in job groups
- Determining availability
- Comparing incumbency to availability
- Placement goals

In addition, an AAP must include the following components:

- Designation of responsibility for implementation
- Identification of problem areas
- Action-oriented programs
- Periodic internal audits

The following is a brief description of these AAP requirements:

Quantitative AAP Requirements

An organizational profile is a depiction of the staffing pattern within an establishment. The profile provides an overview of the workforce at the establishment that may assist in identifying organizational units where women or minorities are underrepresented or concentrated. The contractor must use either the organizational display or the workforce analysis as its organizational profile:

- Organizational display. An organizational display is a detailed graphical or tabular chart, text, spreadsheet, or similar presentation of the contractor's organizational structure. The organizational display must identify each organizational unit in the establishment, and show the relationship of each organizational unit to the other organizational units in the establishment. For each organizational unit, the organizational display must indicate the following:
  - The name of the unit
  - The job, title, gender, race, and ethnicity of the unit supervisor (if the unit has a supervisor)
  - The total number of male and female incumbents
The total number of male and female incumbents in each of the following groups: African Americans, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives.

Workforce analysis. A workforce analysis is a listing of each job title, ranked from the lowest paid to the highest paid within each department or other similar organizational unit. The list must include departmental or unit supervision.

If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or line, including unit supervisors.

Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

For each job title, the number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: African Americans, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives. The wage rate or salary range for each job title must be listed.

Job Group Analysis

A job group analysis is the first step in the contractor’s comparison of the representation of minorities and women in its workforce with the estimated availability of minorities and women qualified to be employed.

In the job group analysis, jobs at the establishment with similar content, wage rates, and opportunities must be combined to form job groups. The job group analysis must include a list of the job titles that comprise each job group. The contractor must separately state the percentage of minorities and the percentage of women it employs in each job group.

All jobs located at an establishment must be reported in the job group analysis of that establishment, unless:

- There is an approved functional AAP.
- The establishment has less than 50 employees.
- Employees who work at a different establishment than their manager must be included in the AAP of their manager.
- “Corporate initiative” employees must be included in the AAP for the establishment where their selection was made.

Annotations must be added, as follows:

- If the job group analysis contains jobs that are located at another establishment, the job group analysis must be annotated to identify the actual location of those jobs.
• If the establishment at which the jobs actually are located maintains an AAP, the job group analysis of that AAP must be annotated to identify the AAP in which the jobs are included.

• If a contractor has a total workforce of fewer than 150 employees, the contractor may prepare a job group analysis using EEO-1 categories as job groups.

Determining Availability

Availability is an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified persons available for employment in the job group. The contractor must separately determine the availability of minorities and women for each job group.

In determining availability, a contractor must consider at least the following factors:

• **External availability.** The percentage of minorities or women with requisite skills in the reasonable recruitment area. The reasonable recruitment area is defined as the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question. In most instances, for external availability, contractors use U.S. census data to reflect the pool of minorities and females in the labor market. In order to produce a meaningful AAP with realistic goals, it is critical that contractors use census data for geographical areas (for example, county, primary metropolitan statistical area and state) from which their employees are actually recruited and hired. Contractors should select occupational data most similar to the jobs identified in each job group.

• **Internal availability.** The percentage of minorities or women among those promotable, transferable, and trainable within the contractor’s organization. For internal availability, to calculate the pool of minorities and women available within the contractor’s organization, the contractor should analyze the minority and female composition of job titles or job groups in their own workforce that are the source of promotions and transfers into each job group. Where promotions and transfers occur from many areas, the contractor may calculate a weighted percentage from the combined areas or groups.

The final steps in the availability analysis are to weight each of these factors according to its importance in filling openings in the job group, multiply the assigned weight by the minority and female availability data, and then total these numbers to reach a final availability for minorities and females for each job group. These availability figures (which vary by job group) form the basis for the comparison with the existing minority and female employment to determine whether minorities and women are underutilized for a given job group and whether goals must be established.
Comparing Incumbency to Availability

This step, often referred to as the “utilization analysis,” reflects a comparison of the percentages of minority and female incumbents in each job group to the final availability percentages for each job group to determine whether any job group is underutilized. The OFCCP accepts several different methods for determining underutilization, including:

- The 80% rule: whether the incumbent percentage is less than 80% of availability for each job group
- The “any difference” rule: whether there is any difference between the percentages of incumbent minorities and females and availability percentages
- The two standard deviation rule: whether the difference exceeds two standard deviations
- The “one person” rule: whether the difference exceeds one person

If, upon using one of these methods, minority or female underutilization is found in any job group, the contractor must establish a placement goal.

Placement Goals

Placement goals serve as objectives or targets that can be attained by applying good faith efforts. Placement goals also are used to measure progress toward achieving equal employment opportunity.

A contractor’s determination that a placement goal is required constitutes neither a finding nor an admission of discrimination.

Where a contractor is required to establish a placement goal for a job group, it must establish a percentage annual placement goal equal to the availability figure derived for women or minorities for that job group.

Contractors should establish a single goal for all minorities. In the event of a substantial disparity in the utilization of a particular minority group, a contractor may be required by the OFCCP to establish separate goals.

In establishing placement goals, the following principles also apply:

- Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.
- In all employment decisions, the contractor must make selections in a non-discriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely
affect an individual’s employment status on the basis of that person’s race, color, religion, sex, or national origin.

• Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

• Placement goals may not be used to supersede merit selection principles. AAPs do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

The contractor must provide for the implementation of equal employment opportunity and the AAP by assigning responsibility and accountability to an official of the organization. Depending upon the size of the contractor, this may be the official’s sole responsibility. He or she must have the authority, resources, support of, and access to top management to ensure the effective implementation of the AAP.

Identification of Problem Areas

The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum, the contractor must evaluate:

• The workforce by organizational unit and job group to determine whether there are problems of minority or female utilization (e.g. employment in the unit or group), or of minority or female distribution (e.g. placement in the different jobs within the unit or group)

• Personnel activity (e.g. applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities

• Compensation system(s) to determine whether there are gender, race, or ethnicity-based disparities

• Selection, recruitment, referral, and other personnel procedures to determine whether they result in disparities in the employment or advancement of minorities or women

• Any other areas that might impact the success of the affirmative action program

Action-Oriented Programs

The contractor must develop and execute action-oriented programs designed to correct any problem areas identified and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures, which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.
Internal Audit and Reporting System

The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful AAP:

- Monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the non-discriminatory policy is carried out.
- Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained.
- Review report results with all levels of management.
- Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

Achievement of Prior Year’s Goals

As part of maintaining and updating the AAP annually, the contractor must prepare a report stating the prior year’s goals and the extent to which they have been achieved through minority and female hires and promotions. In instances where a goal has not been achieved, it is important that the contractor discuss the good faith efforts which have been made in attempting to achieve the goal.

Affirmative Action for Individuals with a Disability and Veterans

Contractors and subcontractors are required to take affirmative action to employ and to advance in employment qualified disabled individuals, veterans with disabilities, veterans of the Vietnam era, and other covered veterans.

Definitions

The ADAAA defines a disability as:

- a physical or mental impairment that substantially limits a major life activity; or
- a record of a physical or mental impairment that substantially limited a major life activity; or
- when an entity (e.g., an employer) takes an action prohibited by the ADA based on an actual or perceived impairment.
A “disabled veteran” is a person:

- Entitled to disability compensation under laws administered by the Veterans Administration for disability rated at 30% or more of total disability
- Whose discharge or release from active duty was the result of a disability incurred or aggravated in the line of duty

A “special disabled veteran” is a veteran who:

- Is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Veterans Administration for a disability rated at 30% or more, or rated at 10 or 20% in the case of a veteran who has been determined under section 1506 of Title 38, U.S.C., to have a serious employment disability
- A person who was discharged or released from active duty because of a service-related disability

A “qualified disabled veteran” is a disabled veteran who is capable of performing the essential functions of his/her particular job, with or without a reasonable accommodation.

Pursuant to the Veterans Employment Opportunities Act of 1998, “other covered veterans” means other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.

**AAPs for Individuals with Disabilities and Veterans**

Contractors are required to develop AAPs for individuals with disabilities and veterans if they have 50 employees and a federal contract or subcontract of $50,000. Typically, contractors consolidate the separate AAPs for the disabled and covered veterans into a single AAP.

AAP obligations for individuals and veterans with disabilities are enforced by the OFCCP. Unlike E.O. 11246, the OFCCP regulations covering disabled and veterans AAPs do not require statistical analyses. Instead, these regulations provide detailed requirements that reflect the contractor’s efforts to recruit and hire qualified disabled individuals and covered veterans.

**OFCCP Review and Enforcement**

The OFCCP has established a two-part enforcement process. Compliance reviews and enforcement serve to reveal and correct violations of affirmative action requirements.

**OFCCP Compliance Reviews**

The purpose of any compliance review is to determine a contractor’s compliance with its affirmative action and equal opportunity obligations at a particular establishment. In
conducting a compliance review, the OFCCP seeks to determine whether the contractor’s AAP is in compliance with applicable regulations, and whether the contractor has engaged in good faith efforts during the last year to meet its affirmative action goals.

**Standard Compliance Review**

In the typical compliance review, the OFCCP examines whether, and to what extent, areas of potential discrimination exist at the contractor’s workplace. To determine potential discrimination, the OFCCP uses adverse impact analyses in an attempt to determine whether statistically significant differences exist with respect to the contractor’s selection of minorities and women for hire, promotion, transfer, demotion, layoff, recall, and/or termination, indicating a pattern or practice of discrimination. A statistically significant difference, generally, is a less than 80% selection of (or more than two standard deviation differences between) minorities or women compared to the non-minority or male group.

**Desk Audit**

The compliance review begins when the contractor receives a standard letter from the OFCCP containing notice of the review and a request for the contractor’s AAP and supporting data such as logs of applicants, hires, transfers, promotions, terminations EEO-1 reports, organizational charts, workforce analysis, utilization analysis, and goals for underutilized areas. After receiving these materials, the OFCCP compliance officer will review the data for completeness and accuracy, and determine whether the contractor has complied with the regulations.

Additionally, the compliance officer will review past goal achievement, identify areas exhibiting concentration or under-representation of minorities and females, and attempt to identify affected classes. An impact ratio analysis (IRA) is conducted at this stage to identify areas needing further investigation. If an impact ratio analysis indicates a less favorable selection rate of women and minorities, it is used as a preliminary indicator of potential discrimination. The OFCCP also reviews the contractor’s compensation analyses and conducts its own analysis to determine whether evidence of individual or class wide disparate treatment against women or minorities is present.

The compliance officer also may contact other agencies to review discrimination complaints against the contractor and to determine the contractor’s reputation for nondiscrimination in the community. For this purpose, the compliance officer may contact community agencies, recruiting sources, and referral sources, including state employment services.

**On-site Audit**

Many compliance reviews include an on-site audit that involves a visit by the compliance officer to the contractor’s facility to investigate problem areas revealed during the desk audit. The on-site audit typically includes the following:
• An entrance conference in which the compliance officer meets with the chief executive officer or designee

• A review of employment policies and procedures

• A review of personnel records, including computerized records, focusing on personnel practices having an adverse impact or causing concentrations or under-representation

• A tour of the facility to survey general working conditions, accommodations to disabled applicants and employees, and the presence of required postings

• Interviews with women and minority employees regarding their opportunities for advancement. Interviews may also be conducted with minorities or women who have current EEOC complaints, have information concerning some area of substantive deficiency, have been refused a promotion, work in entry-level jobs, or appear to be members of a potentially affected class

• Interviews with managers and supervisors in work units with concentrations or under-representations of women and/or minorities or other substantial deficiencies (the employer's representative or attorney may be present)

• A review of training and educational programs, compensation practices, grievance, disciplinary and termination procedures, and technical requirements such as inclusion of the EEO caption on recruiting material, inclusion of the Equal Opportunity Clause in purchase orders and contracts, submission of the EEO-1 report, and notification to vendors and subcontractors of equal employment requirements

• Review of I-9 compliance

• An exit conference with the CEO or designee that the employer should use to obtain a thorough understanding of the OFCCP findings, including problem areas and areas requiring further off-site analysis

Off-Site Review

An off-site review of records is intended to provide an analysis and evaluation of the affirmative action plan and supporting documents to determine whether the contractor is in compliance with affirmative action requirements.

Focused Review

A focused review is an on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

Compliance Check

A compliance check is an alternative, expedited means of screening records to ensure that a contractor is in compliance with recordkeeping and retention requirements. The compliance check begins with a scheduling letter that usually provides the contractor a short (often as little as a few days) notice period before the check. The actual check consists of an inspection
of the contractor’s documents to ensure that the contractor is maintaining required documents regarding:

- Achievement of goals set in the prior year’s AAP
- A listing of accommodations provided to disabled applicants and employees’
- Examples of employment advertising including the “equal opportunity employer” M/F/D/V tag line
- Documentation of the listing of job openings with the local employment office.

After the compliance officer has completed the investigation portion of the compliance check, the contractor will receive a closure letter.

**Glass Ceiling or Corporate Management Reviews**

The term “glass ceiling” refers to invisible barriers blocking women and minorities from advancing up the corporate ladder to management- and executive-level positions. These barriers may include stereotyping or bias, poor internal employment-related data collection and analysis, insufficient outreach and recruitment practices, lack of mentoring and management training, as well as lack of opportunities for career development.

To correct the noted absence of women and minorities in upper level management positions, the OFCCP conducts Corporate Management Reviews (also referred to as “glass ceiling” reviews). The reviews focus on corporate headquarters and include an evaluation of whether women or minorities suffer disparate treatment in selection, advancement, compensation, or other employment-related matters, especially at senior levels and in the positions that constitute the “pipeline” for the senior positions. The OFCCP may choose to extend the scope of the review beyond corporate headquarters. During such “glass ceiling” reviews, the OFCCP usually conducts the following seven processes and procedures:

1. An entrance conference with the CEO
2. A review of jobs by both management title and by salary level
3. An assessment of each functional area in the company and the concentration of women and minorities in each area. Particularly important is whether women and minorities are in staff positions within each area that lead to management promotions and executive positions
4. A review of internal recruiting pools to determine whether such pools are materially different in composition from higher-level jobs, and, if so, whether women and minorities are concentrated in job areas that do not feed into management positions
5. A review of external recruitment and hiring processes, including a review of announcements or advertisements, applicant flow, and dissemination of the affirmative action policy, particularly if an external recruiting firm is screening applicants for the employer or if word of mouth recruiting is used for senior positions
6. A review of related employment matters, such as exposure to senior management and compensation packages for women and minorities as compared to others at the same level, and

7. On-site investigations and interviews, including interviews of the CEO, senior executives, and the most highly compensated women and minorities; a review of compensation; structure and administration; management succession plans; and applicant resumes. An employer is entitled to have an attorney or representative present if a review officer interviews management or supervisory employees, but not if the review officer interviews other employees.

The review will conclude with an exit conference with the CEO to discuss violations and options.

Violations

If a compliance officer finds a violation in any type of compliance review, the following steps may be taken depending upon the contractor’s willingness to cooperate with the OFCCP:

- Negotiation of a conciliation agreement wherein the contractor agrees to correct major violations by precise actions or a precise time table with reporting obligations and including, where appropriate, remedies such as back pay and retroactive seniority or
- Referral for consideration of formal enforcement

Where a conciliation agreement is violated the following steps may be taken:

- The OFCCP sends written notice to the contractor of the violation and supporting evidence
- The contractor has 15 days to respond unless affected employees or applicants would suffer irreparable injury in that time
- The contractor attempts to “show cause” that it has not violated the agreement. (Note, the OFCCP may bring an enforcement action on the conciliation agreement without presenting proof of underlying violations resolved by the agreement) and
- Enforcement proceedings

Enforcement Proceedings

At any time during the course of the compliance review, if the OFCCP has reasonable cause to believe that a contractor has violated the law, it may issue a “show-cause” notice requiring the contractor to explain, within 30 days, why monitoring, enforcement proceedings, or other appropriate action by the OFCCP to ensure compliance should not be instituted. Enforcement proceedings, which are similar to a trial, will be initiated where the contractor:

- Fails to submit an affirmative action program and/or to establish and maintain records and information related to an affirmative action program, or
• Refuses to supply records or other requested information, or
• Refuses to allow an on-site compliance review to be conducted, or
• Fails to substantially comply with a conciliation agreement, or
• Fails to correct the alleged violation of regulations, or
• Fails to correct violations based on a complaint investigation

Enforcement proceedings may be stopped at any point if the contractor is willing to accept the OFCCP’s proposed resolution or if the parties are able to negotiate a settlement.

The determination of whether to bring an enforcement action rests with an attorney within the Department of Labor, upon referral by the OFCCP. No economic sanctions can be taken against a contractor without the contractor being given an opportunity to present evidence at a hearing before an administrative law judge. Depending on the nature of the violation, the sanction sought against the contractor may include back pay and/or reinstatement or being banned from working on federal contracts, in addition to other possible penalties.

After a hearing, the administrative law judge will issue recommended findings, conclusions, and a decision. Each party may submit to the secretary of labor exceptions to the recommendation, and the secretary of labor will issue a final administrative order. The contractor may appeal an adverse decision to the appropriate federal court.

Penalties

Failure to comply with a final administrative order issued by the secretary of labor at the conclusion of the enforcement proceedings will result in sanctions against the contractor. Specifically, the secretary of labor may:

• Award back pay and interest, as well as prospective relief to an affected individual or class
• Withhold payments due under a contract until the violation is corrected
• Cancel or terminate the contract
• Bar the contractor from receiving future contracts for a fixed or indefinite period of six months to three years
• Notify all federal contracting agencies of this bar
• Seek to prevent others from entering into contracts with the contractor
• Recommend that the EEOC or Department of Justice institute appropriate proceedings under Title VII
Conclusion

In this chapter, we:

- Reviewed the difference between Equal Employment Opportunity (EEO) and affirmative action and the major components of each.

- Discussed the legal ramifications of EEO, affirmative action, and other federal mandates on the workplace.

- Explored different types of compliance reviews.

- Shared corporate examples of EEO and affirmative action statements.

Over the last half century, compliance and affirmative action have risen to diversity and inclusion, and companies that have made a deep and steady commitment to D&I, particularly throughout the current global economic situation, have proven to be true industry leaders and community visionaries and have seen their bottom lines grow as a result.

Although compliance may not be considered a "hot" topic these days in the D&I world, high profile discrimination lawsuits continuously remind us of the importance of legal considerations when it comes to diversity and inclusion and of the severe ramifications when one does not follow the law. Moreover, while EEO and affirmative action policies were both originally created to allow for equal access to opportunity and advancement for underrepresented groups, especially for minorities and women, compliance alone does little to create an inclusive workplace where all feel valued. However, when human differences are combined in a common vision and toward a concerted effort, the benefits cannot be understated. Diversity and inclusion is the vehicle in which 21st century organizations are realizing their potential for growth, yet before D&I can be leveraged for maximum effectiveness, companies must have a strong foundation of legal compliance.
Corporate Examples: EEO and Affirmative Action Statements

The Boeing Company

Boeing’s policy on equal employment opportunity prohibits discrimination based on race, color, religion, national origin, gender, sexual orientation, gender identity, age, physical or mental disability, or veteran status. This policy applies to recruiting, hiring, transfers, promotions, terminations, compensation and benefits, and also states that retaliation against any employee who files a complaint regarding possible violations of this policy will not be tolerated.

Boeing is committed to taking affirmative steps to promote the employment and advancement of minorities, women, persons with disabilities, and covered veterans. Every year, Boeing develops affirmative action programs to support its commitment to equal employment opportunity, consistent with company policy and the company’s obligations as a contractor to the United States government.

Booz Allen Hamilton

As one of our firm’s Core Values, diversity is reflected in our policies. Our fundamental Equal Employment policy is “to identify, attract, retain, and advance the most qualified persons, without regard to their race, color, religion, sex, national origin, age, marital status, sexual orientation, gender identity and expression, disability, veterans status, genetic information, or any other status protected by law.” In addition, we have implemented policies on Acquired Immune Deficiency Syndrome, Flexible Work Arrangements, Persons with Disabilities, US Domestic Partner Benefits, Sexual Harassment, and Workplace Harassment, among others.

Intel Corporation

At Intel, diversity is respected, valued and welcomed in the workforce, as well as in our customers, our suppliers, and the global marketplace. Our policy is to provide equal employment opportunities for all applicants and employees.

We do not discriminate on the basis of race, color, religion, sex, national origin, ancestry, age, disability, veteran status, marital status, gender identity or sexual orientation. This policy applies to all aspects and stages of employment from recruitment through retirement. It prohibits harassment of any individual or group.
KPMG

KPMG reaffirms its long-standing policy of providing equal opportunity for all applicants and employees, regardless of their race, color, creed, religion, age, gender, national origin, citizenship status, marital status, sexual orientation, gender identity, disability, pregnancy, veteran status, or other legally protected status.

This policy applies to recruiting, hiring, rates of pay and other compensation, benefits, promotions, transfers, demotions, terminations, reductions in force, disciplinary actions, and all other terms, conditions, or privileges of employment.

The New York Times Company

The New York Times Company’s continuing success depends on its ability to hire qualified people and to provide our staff with a stimulating and challenging environment in which to work. Therefore, we provide equal employment opportunity for all regardless of race, color, citizenship, religion, national origin, sex, sexual orientation, gender identity or expression, age, disability, veteran or reservist status or any other category protected by federal, state or local law.

The policy of equal employment opportunity affects all employment practices including recruiting, employment assignments, training, compensation, advancement, transfers, terminations, layoffs, recalls, working conditions and benefits.

OfficeMax Inc.

OfficeMax is committed to a workplace free of discrimination and harassment based on race, color, religion, gender, national origin, age, sexual orientation, disability, veteran status, or any other protected status under federal, state or local law.
Case Study: WellPoint, Inc.

WellPoint recruits, hires, trains, and promotes persons in all job titles without regard to age, color, disability, gender (including gender identity), marital status, national origin, race, religion, sex, sexual orientation, veteran status, or other status protected by applicable law. In addition, all personnel actions such as compensation, promotion, demotion, benefits, transfers, staff reductions, terminations, reinstatement and rehire, company-sponsored training, education and tuition assistance, and social and recreational programs will be administered in accordance with the principles of equal employment opportunity.

In keeping with these principles, WellPoint is committed to providing all associates with a work environment that is free from all forms of harassment based on age, color, disability, gender, marital status, national origin, race, religion, sex, sexual orientation, veteran status, or any other characteristic protected by applicable law. WellPoint is committed to providing reasonable accommodations to qualified individuals with disabilities who can perform the essential functions of the job they hold or desire, with or without a reasonable accommodation.

WellPoint takes affirmative action to ensure equal employment opportunity for females, minorities, individuals with disabilities, and covered veterans. Each facility has an EEO coordinator who is responsible for compliance with applicable regulations regarding affirmative action. In addition, WellPoint's Equal Employment Opportunity program consultant and affirmative action consultant have primary responsibilities for coordinating and managing the success of the affirmative action program.

All associates are responsible for compliance with this policy to ensure a working environment free from discrimination and harassment. Members of management have a responsibility to prevent conducts inconsistent with this policy, to properly handle any known or reported violations, and to implement affirmative action programs within their areas of responsibility. Our policy statement embraces our core values: Customer First, Integrity, Personal Accountability for Excellence, Lead through Innovation, and One Company-One Team.

EEO Compliance Training

In December 2008, WellPoint rolled out a mandatory EEO compliance training to all managers. This comprehensive program covered all aspects of equal opportunity that are an inherent part of all management decisions that affect its associates, including hiring, promoting, compensation, transfers, staff reductions, termination, reinstatement, coaching, and feedback.

By the end of May 2009, this online course had been completed by 99 percent of its managers, ensuring that WellPoint’s leaders are educated on the regulatory guidelines
that govern its decision-making process and are accountable for compliance. The online training of managers was conducted in addition to the ongoing mandatory training for associates who are designated EEO coordinators and who are responsible for educating key business leaders on the importance of EEO compliance.

Procedure

The Chief Human Resources Officer has overall responsibility for implementing the Company’s Affirmative Action Plan and for ensuring that all personnel actions are administered in accordance with this policy and with federal and state law.

All associates, including members of management, are equally responsible for administering and implementing affirmative action programs within their areas of responsibility and for ensuring compliance with this policy as well as federal and state statutes regulating equal employment opportunity and affirmative action.

Any associate or job applicant who believes that he or she has been subject to unlawful discrimination or discriminatory harassment on the basis of race, color, religion, sex, ancestry, age, national origin, marital status, veteran status, medical condition, disability, sexual orientation, or sexual harassment is encouraged and expected to immediately notify a local Human Resources representative. WellPoint encourages associates to take every step possible to make sure that Human Resources is informed of their concern.

There can be no threat of retaliation against the associate by the Company or another associate (including management) for reporting a discrimination or discriminatory harassment complaint.

Associates who have had a complaint of discrimination or discriminatory harassment addressed under this policy must immediately notify a local Human Resources representative if the discrimination or discriminatory harassment resumes, or the associate believes that retaliation is occurring.

All complaints involving equal employment opportunity, discrimination, or discriminatory harassment will be thoroughly investigated by Human Resources and promptly resolved. The investigation and resolution of the alleged incidents will proceed confidentially to the extent that it is reasonable and practical.

The Company will assure that the investigation is thorough, involves the appropriate management, is documented, and that the associate reporting discrimination is informed in writing at the conclusion of the investigation.

The Company shall take any and all appropriate steps, up to and including termination of employment, against associates who violate this policy.

Source: WellPoint, Inc.