



# Managing State and Local Affirmative Action Requirements

**A Presentation for the 2017 ILG National Conference  
By Bill Osterndorf of HR Analytical Services**



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# Presenter Bio



## HR Analytical Services

For 25 years, HR Analytical Services has provided a complete range of affirmative action services to companies throughout the nation. The firm helps companies comply with laws enforced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) and other regulatory agencies. HR Analytical Services closely tracks trends and new developments at OFCCP and provides innovative and practical solutions for clients before and during regulatory reviews.

## Bill Osterndorf – President, HR Analytical Services

A leader in helping companies that must deal with the many complexities in the federal affirmative action realm, Bill Osterndorf has been involved in the affirmative action/equal opportunity field for more than 30 years. He has extensive knowledge of the affirmative action laws and how these laws are being implemented and followed. As part of his work on affirmative action issues, Bill has acquired a specialization in dealing with data and HR information systems. He was the chief architect for the Society for Human Resource Management's position statement on applicants and co-author of SHRM responses on a variety of OFCCP proposals. Bill is a former president of the southeastern Wisconsin SHRM chapter and current chairman of the Milwaukee Industry Liaison Group.





# Summary: State and Local Affirmative Action Requirements

# SUMMARY

- 1. State and local affirmative action requirements are often very different than the federal affirmative action requirements**
- 2. Review and understand the state and local requirements that apply to your organization**
  - Read the applicable statutes, ordinances, and administrative code
- 3. Provide what is required by the relevant state and local unit of government**
  - Understand which employees must be included in statistical information and what data must be provided
  - Know what specific policies and other documents must be submitted
  - Limit information provided whenever possible
- 4. Communicate regularly with sales representatives and others involved with sales to state and local units of government and determine what is required when:**
  - A bid occurs
  - A sale is actually made
  - Work continues on a contract

# Growing Burdens from State and Local Governments

- **Some state and local governments are strengthening affirmative action requirements**
  - For example, there are increasing requests for compensation information from state and local governments
  - Some state and local governments are more closely monitoring information submitted
- **The increase in state and local affirmative action requirements comes at a time when OFCCP is conducting fewer compliance reviews**
- **One example of a non-federal unit of government with increasing affirmative action burdens is the State of Minnesota**



# Overview on State and Local Affirmative Action Requirements

# Contracting with Units of Government

- **Various units of government may have affirmative action requirements**
  - States (including state agencies and universities)
  - Counties
  - Cities
  - School districts and other local units of government
- **Local affirmative action requirements typically apply only to contractors with the relevant unit of government**
  - Requirements often don't apply to subcontractors
- **There is extensive variance in requirements between state and local units of government**
  - Some units of government require a policy statement; some require extensive affirmative action plans and additional reporting



# Where Do State Agencies Derive Their Authority?

- **State statutes passed by the legislature**
  - **Example: Minnesota States Chapter 363A (\*2)**
- **Administrative code sections adopted by a state agency**
  - **Example: Minnesota Administrative Code Chapter 5000 (\*3)**
- **Forms and other documents developed by a state agency**
  - **Example: Minnesota Department of Human Rights annual compliance report (\*8)**
    - **Note: forms and other documents do not necessarily have the full force of law**

*Note: Numbers with asterisks refer to documents that associated with this presentation*

# Where Do Local Agencies Derive Their Authority?

- **City and County ordinances**
  - **Example: Milwaukee County, Wisconsin Ordinance 56.17 (\*4)**
  - **Example: Chapter 39 of the City of Madison, Wisconsin Ordinances (\*5)**
  - **Example: City of Los Angeles Administrative Code, Division 10, Chapter 1, Article 1, Sections 10.8-10.13 (\*6)**
- **Administrative rules, forms, and other documents developed by a local unit of government**
  - **Example: City of Madison model affirmative action plan (\*9)**
    - **Note: forms and other documents do not necessarily have the full force of law**



# Finding Information on State and Local Requirements

- Documents provided by state and local government agencies to sales personnel may contain requirements
- State statutes are generally available on whatever part of a state's website has information about laws and legislation
- Certain city and county ordinances can be found at Municode (<https://www.municode.com/>) or at American Legal Publishing Corporation (<http://www.amlegal.com/>)
  - Check to see when information was most recently updated
- Affirmative action requirements for contractors are likely to be part of the contract compliance section of websites
  - Other possible areas within the website of a state or local government to search for affirmative action requirements are the human resource department and the civil rights compliance department

# Internal Affirmative Action Requirements for Government Units

- **Affirmative action requirements for state and local contractors should not be confused with affirmative action requirements that apply to agencies within the relevant unit of government**
  - **Example: a state may have affirmative action requirements for its agencies and public universities and have separate affirmative action requirements for its contractors**
- **Some units of government have the same requirements for agencies and contractors**
  - **When told that requirements for internal agencies and contractors are the same, contractors should verify this is accurate**





# Comparison: State and Local Requirements and Federal Laws

# Are State and Local Contractors Also Federal Contractors?

- **Contracts with state or local units of government do NOT necessarily subject organizations to the federal affirmative action laws**
  - **Organizations only need to comply with the federal affirmative action laws if they are covered by these laws**
    - **Example: sales of products to local government are unlikely to subject contractors to federal affirmative action requirements**
    - **Example: state road-building contracts may subject contractors to federal affirmative action requirements**
- **Corollary: organizations required to comply with the federal affirmative action laws do NOT necessarily need to comply with state and local affirmative action requirements**
  - **Organizations only need to comply with state and local affirmative action laws when they have covered contracts with these units of government**

# Affirmative Action in the State and Local Realm vs. the Federal Realm

- **State and local units of government may have different requirements than the federal government in regard to record-keeping and reporting**
- **State and local agencies may not accept AAPs and other documents produced for federal purposes**
- **State and local units of government may require submission of affirmative action information prior to the awarding of a contract**
  - **The federal government rarely requests information or conducts a compliance review before a contract is awarded**
- **State and local units of government typically have far fewer resources to enforce their affirmative action requirements than the federal government**
  - **These units of government rarely conduct in-depth compliance reviews**

# Protected Classes

- **State and local affirmative action requirements typically include an equal opportunity component and an affirmative action component**
- **Protected classes covered by non-discrimination provisions may vary from protected classes covered by affirmative action provisions**
- **Most state and local affirmative action requirements are focused on minorities and females**
  - **Some jurisdictions include individuals with disabilities**
  - **Veterans are often not covered**
  - **Other classes may be covered**



# Sanctions

- **Some sanctions for non-compliance are the same for all units of government**
  - **Units of government can typically cancel government contracts for non-compliance with the relevant affirmative action requirements**
  - **Units of government may withhold payments for failure to comply with affirmative action requirements**
  - **Units of government, including the federal government, typically do NOT have the authority to issue fines for failure to comply**
- **Only OFCCP routinely collects backpay awards on behalf of alleged victims of discrimination following compliance reviews**
  - **State and local units of government generally have neither the authority nor the resources to begin discrimination investigations**



# **Covered Organizations, Affirmative Action Plans, and Requests for Supplemental Information**

# Affirmative Action Requirements Apply to Contractors

- **State and local affirmative action requirements typically apply only to organizations that are contractors**
  - **Size and scope of contracts that trigger affirmative action requirements vary**
  - **State and local units of government may limit requirements based on the number of persons employed by the contractor**
- **State and local affirmative action requirements may apply only to contractor facilities and employees within the geographical boundary of the unit of government**



# Construction Contractors

- **Construction contractors may face different requirements than supply and service contractors**
  - This would parallel the way that the federal government approaches contractors subject to Executive Order 11246
  - However, some state and local units of government may have the same requirements for all types of contractors
- **Provisions that may apply only to construction contractors**
  - Requirements regarding work on specific job sites
  - Requirements to provide information on construction trade positions
  - Specific numerical targets for minorities and females

# Affirmative Action Plans

- Requirements regarding affirmative action plans (AAPs) vary greatly for state and local units of government
  - Examples
    - State of Ohio requires very limited information (\*7)
    - Milwaukee County requests a federal affirmative action plan
    - State of Minnesota requires elements of federal AAPs with certain supplements and changes
    - City of Madison requires highly specialized reports (\*8)
      - 7.44% goal for minorities and 41.52% goal for females in all groups!
  - Some units of government accept federal AAPs or recent federal notices of compliance in lieu of local AAPs and materials
  - Frequency for submission depends on state and local requirements
    - One-time submission, annual submission, submission at the end of defined certification period are all possibilities

# Requests for Supplemental Information

- **Organizations may be asked to provide additional information when AAPs or other documents submitted do not meet state or local requirements**
- **State and local units of government may require annual reports (\*9)**
  - **Statistical data and/or other information may be requested**
- **While state and local units of government typically do not conduct compliance reviews, there are exceptions to this rule (\*10)**
  - **The nature of these compliance reviews must be authorized by the law governing the reviewing agency**
- **Organizations should raise questions about unreasonable requests for additional information**
  - **State and local units of government do not necessarily have the expertise to understand data or other information that is submitted**





# Responding to State and Local Units of Government

# Submissions Should Depend on State and Local Requirements

- **Contractors should provide state and local units of government only with information associated with authorized requests**
  - **State and local governments have the right to request different information than the federal government**
  - **State and local governments do NOT have the right to request information other than what is authorized by statute or ordinance**
- **Affirmative action plans and other documents should be tailored to specific state and local requirements**
  - **Federal AAPs should not be submitted unless requested**
    - **Federal AAPs contain extensive statistical and other information and thus should be treated as confidential documents**
  - **Organizations need to be aware of the protected classes that are covered at the state and local level**





# Examples of Limitations on Information to Submit

- **Limitations based on number of employees**
  - Smaller organizations may have different requirements than larger organizations
- **Limitations based on geography**
  - Organizations with multiple sites may only be required to submit information on the site with the government contract
  - Organizations with multiple sites may only be required to submit information on the site that is located within the geographical boundaries of the unit of government requesting affirmative action information
- **Limitations based on contract status**
  - Organizations may be required to submit limited information at the bid stage of contract negotiations
  - Organizations at the end of a contract may not be required to submit annual reports or other information that had previously been routinely submitted



# Substitutions for Requested Information

- **Possible substitutions for information requested:**
  - **Some units of government will accept EEO/AA policy statements and/or EEO-1 reports in lieu of other requested information**
  - **Some units of government will accept portions of federal affirmative action plans**
  - **Some units of government will accept Notices of Compliance from OFCCP compliance reviews in lieu of AAPs or other documents**
    - **Notice of Compliance should be for the relevant geographic area**
- **HOWEVER, some units of government will demand that information submitted match exactly what has been requested**





# **Internal Communications and Action Steps Regarding State and Local Affirmative Action Requirements**

# Communicating with Sales Personnel

- **HR representatives must communicate with sales representatives and other personnel about pending and awarded contracts with state and local units of government**
  - **HR representatives frequently are not told about bidding on a contract with a state or local unit of government until a government agency requests affirmative action-related information**
- **There is often no effective way for HR representatives to learn about pending or awarded state or local contracts from the relevant unit of government**

# Action Steps Regarding State and Local Contracts

- **For sales representatives**
  - Know when a contract involves a state or local unit of government
  - Inform HR as soon as possible about pending and current contracts with state and local units of government
  - Provide copies of bid documents and contracts to HR so that HR is aware of information that may be required
- **For HR representatives**
  - Make sales representatives and management aware of the potential issues associated with bids and contracts for state and local units of government
  - Determine what affirmative action-related information is required in bids and contracts with state and local units of government
  - Learn how long a contract will run and when information must be submitted
- **For management**
  - Recognize that affirmative action requirements by state and local units of government are a contract issue and can result in significant financial consequences including cancelled contracts or withheld payments
  - Ensure that information is properly flowing between all parties

# Consequences of the Failure to Communicate

- **Sales representatives and other personnel involved with contracts need to understand the significance of affirmative action requirements in contracts**
- **Failure to meet affirmative action obligations can lead to loss of contracts or payments being withheld**





# Summary (Again!)

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# Presenter Contact Information



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