AFFIRMATIVE ACTION UPDATE

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THE FUTURE OF THE OFCCP, THE EXECUTIVE ORDER, AND AFFIRMATIVE ACTION AS A LEGAL PRINCIPLE: "THE ENVELOPE PLEASE!"

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It is with some trepidation that I even bring up this topic. However, as a practitioner of close to 40 years in the areas of affirmative action and EEO, I find myself more uncertain than ever before about the future of the Office of Federal Contract Compliance Programs (OFCCP), Executive Order (EO) 11246, and the legal principles behind affirmative action.

Ever since the election of Donald Trump, the future of affirmative action and the OFCCP has been a topic of discussion and conjecture in the legal, HR, and various stakeholder communities. To the extent that commentators have been willing to weigh-in on the topic, most predictions have come down on the side that both the OFCCP and affirmative action as a legal principle are for the most part, "safe." However, just how "safe" things really are is far from certain.

On March 13, 2017, President Trump signed a new Executive Order directing the head of the Office of Management and Budget (OMB) to review every executive branch agency to identify "where money can be saved and services improved." OMB is to consider "… (ii) whether some or all of the functions of an agency, a component, or a program are redundant, including with those of another agency, component, or program…" and "… (iii) whether certain administrative capabilities necessary for operating an agency, a component, or a program are redundant with those of another agency, component, or program…"

Then, on March 16, 2017, President Trump's 2017 budget was released. The budget proposes a 21% reduction in funds for the Department of Labor (DOL). There is nothing that indicates that the reductions will be spread evenly throughout the Department. Some agencies and programs could experience larger reductions than others.

Six days later on March 22, 2017, Alexander Acosta, the nominee for Secretary of Labor, had his Senate confirmation hearing. During the hearing, there was no discussion regarding his take on the future of the OFCCP. However, in response to questioning, Acosta responded that he would follow the March 13, 2017 executive order.

Setting the stage for the above sequence of events, Steve Bannon, chief strategist in the Trump administration, appeared at the Conservative Political Action Conference (CPAC) on February 23, 2017. During his remarks, he referred to the philosophical agenda of the Trump administration as falling into three buckets. The third bucket is the one of interest to those wondering about the future of the OFCCP. Bannon's statements regarding the third bucket are:

> *"The third, broadly, line of work is **deconstruction of the administrative state**…if you look at these Cabinet appointees, they were selected for a reason and that is the deconstruction, the way the progressive left runs, is if they can't get it passed, they're just gonna put in some sort of regulation in - in an agency. That's all gonna be deconstructed and I think that that's why this regulatory thing is so important."*

We have already seen the willingness of the Congress and the Trump administration to repeal or revoke regulations imposed under the former administration viewed as anti-business or unduly burdensome. On March 27, 2017, President Trump signed legislation from Congress undoing the "blacklisting" executive order applying to federal contractors and subcontractors that had been put in place over the strenuous objections of the business community. In addition, we have already seen other actions to address/rollback/repeal regulations regarding waterways, coal mining, fossil fuel emissions, internet privacy rules, Dodd-Frank and other rules not favored by the business community.

So, why are these events potentially so critical to the future of the OFCCP? Because in June 2016, the Heritage Foundation, a conservative think-tank, published a paper titled "Blueprint for a New Administration." In the section discussing the U.S. Department of Labor, the recommendation was made to eliminate the OFCCP because its function is seen as redundant with the function of the EEOC.

At the bottom of the section, a number of articles published by the Heritage Foundation were cited. The author or contributing author of most of the articles was an individual named James Sherk. Sherk has since left the Heritage Foundation and taken a role within the Trump administration. In early February, he was named to the White House Domestic Policy Council as the labor and employment advisor. The connection here is that the Heritage Foundation has already identified the OFCCP as being redundant. A former Heritage Foundation Fellow is named the labor and employment advisor to the White House Domestic Policy Council. Finally, the new executive order calls for OMB to identify redundant executive branch agencies and recommend legislation to implement OMB's findings.

Then, Geoff Burr, lobbyist for the Associated Builders and Contractors (ABC) was appointed acting Chief of Staff at the DOL. ABC is the organization that lead the lawsuit challenging the goals portion of the new Section 503 regulations. Is it unreasonable to think that the OMB's review might include undoing the goals provision of 503?

These events, taken together, strongly indicate that the White House, the Congress, the DOL, and the business community are not fans of the prior administration's regulatory expansion. It is probably safe to assume there is currently not much love for the OFCCP up on The Hill.

Regarding the future of affirmative action as a legal principle, the future is anything but clear. On the topic, President Trump has pronounced:

> *"…I'm fine with it, but we have it, it's there. But it's coming to a time when maybe we don't need it. That would be a wonderful thing. I don't think we need it so much anymore. It has served its place, and it served its time. Some people have loved it and some people don't like it at all. But I think there will be a time when you don't need it."* (*Fox News Sunday,* Oct. 15, 2015).

Attorney General Jeff Sessions, in testimony before the Senate Judiciary Committee in 1997, said:

> *"I think it has, in fact, been a cause of irritation and perhaps has delayed the kind of movement to racial harmony we ought to be going forward [with] today. I think it makes people unhappy if they lost a contract or a right to go to a school or a privilege to attend a university simply because of their race."*

Let's not forget that the genesis of affirmative action was through an executive order. This administration does not require the approval of Congress to take action to repeal or roll back EO 11246.

And lastly, the composition of the Supreme Court is going to return to a five person, mostly conservative majority. While there are no cases challenging the legality of affirmative action currently in the pipeline, if the right case comes along, the future of affirmative action as a legal principle could become very dim. In 2003, Justice O'Conner in *Grutter v. Bollinger* opined that affirmative action had a limited lifespan of probably twenty-five years after which time, it would no longer be needed. We are now fourteen years into that time frame. If the Court takes a case challenging the constitutionality of affirmative action, then a Roberts/Thomas/Alito/Kennedy and Gorsuch or some other conservative justice could end its time as a legal principle.

As such, it is not apparent that either the OFCCP, EO 11246, or affirmative action have a clear path to the future. While I hope that my current level of uncertainty is misplaced, given what has been said and who is in place, this practitioner will not be surprised if the OFCCP is on the OMB's list. While it is a long way between being put on the list and having the list acted upon, it would not be imprudent to start thinking about how your organization will respond if the future envisioned by the Heritage Foundation comes to pass.

Which brings us back to initial question of what happens if the OFCCP and the concept of affirmative action are significantly curtailed or go away in their entirety?

Regarding outcomes, possibilities include:

1. Even if nothing happens to the OFCCP, funds are not significantly reduced, and EO 11246 is unaffected, the change in leadership will undoubtedly have an impact. With a new Secretary of Labor, a new Director of the OFCCP, and a new Solicitor of Labor (SOL), the focus of the OFCCP and the aggressiveness with which it pursues its mission may be dramatically different. Under previous Republican administrations, the Agency chose to conduct more frequent, but less in-depth reviews. The SOL also became much less willing to undertake enforcement actions referred to it by the OFCCP. In addition, the Administrative Law Judges as well as the Administrative Review Board became much more conservative in their rulings. There has already been a rejection, as overly burdensome, of an action filed under the outgoing administration to compel Google to collect and provide a voluminous amount of compensation data on close to 20,000 employees.

2. If the OFCCP is not eliminated but its budget is significantly reduced, the Agency could find itself logistically incapable of doing anything other than a basic check to verify contractors are in compliance. The recent in-depth reviews would either cease or would

be significantly curtailed. However, the current compliance obligations, such as preparing AAPs, would remain.

3. If the OFCCP is found to be redundant, this is where things could get interesting. Assuming the EO remains along with the compliance obligations on contractors/subcontractors, then the question becomes who would enforce the EO/503/4212 regulations? One scenario involves responsibility for enforcing and monitoring compliance going to the EEOC. Victoria Lipnic, Acting Chair of the EEOC, is the former head of the Employment Standards Administration into which the OFCCP used to report. Lipnic is completely familiar with the OFCCP's mission, so having its functions transferred to the EEOC would be a natural fit. However, since cutting the administrative burden is an objective, transferring headcount and budget to the EEOC seems unlikely. In this event, the EEOC would likely conduct fewer and less in-depth audits to verify compliance. Or, the EEOC could choose to monitor compliance only in the event a charge of discrimination of the type covered under the EO is filed against a government contractor or subcontractor. Any transfer of duties would have to address how to make this happen between an executive branch and an independent agency.

4. As far as the EO is concerned, if Trump undoes the EO but leaves 503/4212 alone, or the Supreme Court holds government sanctioned affirmative action of any kind to be unconstitutional, then contractors would have to decide what, if anything, they will do to maintain diversity and EEO efforts.

Will contractors/subcontractors simply stop the efforts and programs developed, implemented, and currently in place? Would they choose to implement voluntary efforts centered primarily on outreach? Would they continue to monitor workplace participation metrics? Would they continue to conduct adverse impact analyses of personnel practices and evaluate pay practices? What will their employees, shareholders, and public constituencies expect even if compliance is no longer a requirement of doing business with the government?

And what will happen if they are doing business with state or local governmental entities that have affirmative action obligations in place? Even if the EO is eliminated, state and local requirements may remain. However, if the Supreme Court rules against affirmative action, then state and local requirements would also cease. It would remain to be seen just how wide or limited a Court ruling against the legal concept of affirmative action would be.

As the ancient curse goes, "May you live in interesting times." There is little doubt that these days are about as interesting as we have seen in recent history. At this point, we are all just going to have to watch and wait as the OMB conducts its analysis. The report and recommendations produced will definitely be attracting much attention. As they say:

"Stop! Don't touch that dial . . . Stay tuned for further developments!"
