

Enhancing Diversity and Inclusion in Federal Workforce

By Weldon H. Latham

Law360, New York (November 04, 2011) -- New Executive Order (“E.O.”) 13583—“Establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce”—takes another step to enhance employment equality and diversity. The Presidential directive requires the development of a government-wide strategic diversity plan, followed by creation and execution of Department/Agency specific plans. By establishing the Federal government, the nation’s largest employer, as a model for the private sector, as well as for state and local governments, the Executive Order’s impact is likely to extend well beyond Federal departments and agencies.

Issued by the President on August 18, 2011, E.O. 13583 reinforces the Obama Administration’s emphasis on equality of opportunity in the workplace. It follows in the wake of the *Lilly Ledbetter Fair Pay Act*¹, the diversity requirements of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*, E.O. 13548 (increasing Federal employment of individuals with disabilities), reinforced by increasing budgets and the appointment of a diverse group of key civil rights enforcement officials at the Department of Justice, Equal Employment Opportunity Commission (“EEOC”), and Department of Labor and its Office of Federal Contract Compliance Programs (“OFCCP”). Seeking “to promote the Federal workplace as a model of equal opportunity, diversity, and inclusion,” the Executive Order recognizes that the Federal government has often failed to keep pace with the best of Corporate America in eliminating employment discrimination, breaking glass ceilings, and encouraging a diverse and inclusive workplace.

The Federal Government as a “Model” Diverse Employer

The notion that the Federal government should serve as a model workplace is not new. The evolution of diversity in the workplace can be traced to early Federal government efforts. In 1948, President Harry Truman signed E.O. 9981, requiring equality of treatment and opportunity in the armed services, an

¹ On January 27, 2009, President Obama signed the Lilly Ledbetter Fair Pay Act (the first Bill he signed into law) which extends the time for claimants to file pay discrimination claims.

Order which historians generally regard as the beginning of modern day diversity initiatives.² The most sweeping equal employment opportunity mandates were enacted or decreed in response to the Civil Rights Movement culminating in historic legislation in the 1960s. In 1963, Congress passed the Equal Pay Act, prohibiting wage discrimination based on sex. In 1964, the Civil Rights Act created the EEOC and prohibited discrimination in employment (Title VII), public accommodation (Title II), and government programs (Title VI), among others, on the basis of race, color, religion, sex, and national origin. In 1965, E.O. 11246 was issued which requires government contractors (a large sector of the nation's employers) to take "affirmative action" to recruit, retain, and promote qualified females and minorities.³ This series of Federal initiatives is the foundation of modern workplace equal opportunity, leading to the development of workplace diversity programs, both public and private. (For example, PepsiCo appointed the first *Fortune 500* African American Vice President in 1962, and General Motors founded its Minority Dealer Development Program in the early 1970s, which was intended to establish minority dealerships where there had been none.) These laws provided the foundation not only for prohibiting discrimination, but also for requiring employers, led by the Federal government, to take affirmative actions to help assure equality and equity in the workplace.

Corporate leadership in diversity began a rapid expansion in the 1980s and 1990s. It developed from recognition of (1) a compelling *business case* for diversity (*i.e.* the need to respond to minorities and women as consumers and essential employees), and (2) increasing exposure to claims of systemic discrimination, rather than political pressures. This most recent Executive Order demonstrates President Obama's recognition of the need for the government to re-assert its role as a leader in fairness, diversity, and inclusion in the workplace.

Requirements of Executive Order 13583

The Executive Order establishes a coordinated, government-wide initiative to promote diversity and inclusion in the Federal workplace in three ways: (1) coordination/consolidation of resources; (2) creation of a government-wide strategic diversity plan; and (3) creation of Department/Agency-specific plans.

First, the Executive Order requires that: "Wherever possible, the Federal Government *must* seek to consolidate compliance efforts established through related or overlapping statutory mandates, directions from Executive Orders, and regulatory requirements."

² Executive Order 9981 states in relevant part:

"It is hereby declared to be the policy of the President that there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin."

³ Similar legislation covering individuals with disabilities and covered veterans was passed in 1973 and 1974, respectively (Section 503 of the Rehabilitation Act *as amended* and the Vietnam Era Veterans' Readjustment Assistance Act *as amended*).

Second, the Executive Order requires the Director of the Office of Personnel Management (“OPM”) and the Deputy Director for Management of the Office of Management and Budget (“OMB”), in coordination with the President’s Management Council and the Chair of the EEOC, *within 90 days* to:

1. Develop and issue a Government-wide Diversity and Inclusion Strategic Plan (“Plan”) focusing on workforce diversity, workplace inclusion, and *agency accountability* and leadership, as well as strategies to remove barriers to equal employment opportunity in recruitment, hiring, promotion, retention, professional development, and training; and
2. Provide guidance to agencies concerning formulation of agency specific diversity and inclusion strategic plans.

Currently, Federal agencies are required to create and file with the EEOC annual Management Directive 715 (“MD 715”) reports, which highlight workforce demographic statistics along with affirmative programs the agencies employ to effectuate equal employment opportunity.

One Federal Department stands out in this regard. The U.S. Department of Agriculture (“USDA”)⁴—led by Secretary Tom Vilsack—engaged the Jackson Lewis Corporate Diversity Counseling Group two years *before* issuance of E.O. 13583 to assess the effectiveness of anti-discrimination, pro-diversity measures in providing services to an increasingly diverse American customer base, through an increasingly diverse labor pool. Jackson Lewis made a dramatic 234 recommendations—among them were several designed to establish a Diversity and Inclusion (“D&I”) infrastructure and improve the collection, analysis, and remedial measures dictated by workforce data—and the much more effective utilization of MD 715 reports. The Government-wide Diversity and Inclusion Strategic Plan called for by E.O. 13583 will likely draw upon information contained in each Department’s/Agency’s MD 715 reports and, we are hopeful, will take advantage of the extensive analysis and recommendations for USDA.

Third, Federal Departments/Agencies are required to (1) implement the Plan; (2) within 120 days of issuance of the Plan, prepare and issue Agency-specific Diversity and Inclusion Strategic Plans; and (3) implement the Agency-specific Plans. Each Department/agency must designate a Chief Human Capital Officer responsible for implementation and reporting.

Implications for Major Private Employers and the Future

While the Executive Order does not contain specific requirements (*e.g.*, diverse promotion pools or quantitative goals), it will require the development of individualized plans. It will also shine a spotlight on Departments and Agencies that fail to improve: the Government-wide Diversity and Inclusion

⁴ USDA has for many years been commonly referred to by critical observers as “The Last Plantation.” Secretary Vilsack’s efforts on behalf of the Obama Administration thus far have been a valiant attempt to overcome this history and make USDA the diversity leader in the Federal government.

Strategic Plan will address specific agency deficiencies and recommend strategies to address barriers to truly equal employment opportunity.

Sources to be used in the development of the Plan are not specified in the Executive Order, but Government Departments/Agencies would be well-advised to adopt many highly regarded, reliable corporate “best practices” used by Chief Human Resources and Diversity Officers from the nation’s leading companies for diversity. Our recent experience assessing diversity at USDA certainly bears out this advice. Following our comprehensive assessment of USDA service to diverse customers and management of internal employment practices, many of our 234 recommendations utilized “diversity best practices” we have successfully developed to aid *Fortune 500* companies in overcoming diversity challenges.

Although the Executive Order only applies directly to the Federal workforce, U.S. businesses should still expect to be affected. The Executive Order requires coordination and consolidation of existing statutory and regulatory compliance requirements, so the EEOC and OFCCP will likely be emboldened in their private sector enforcement efforts. In addition, as Federal agencies implement private sector best practices in their own workforces, they may well require a broader cross-section of businesses to implement those same practices. Equal employment opportunity regulatory changes may be expected to emerge from this process and new Federal experience.

This Executive Order should remind all employers that the Federal government regards workplace diversity as a top priority.

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