

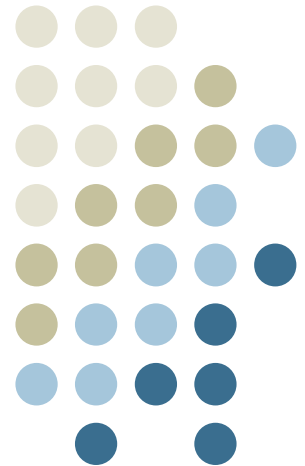
# The Good, The Bad & The Ugly Affirmative Action in Employment – What are your obligations as a Contractor?

---

Heather A. Bailey, Esq.  
Partner with SmithAmundsen LLC

July 30, 2018

Webinar for the Indiana Council of  
Community Mental Health Centers, Inc.



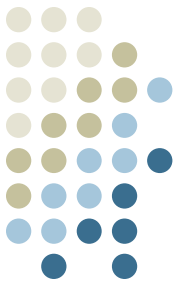
# Affirmative Action Plans Webinar Agenda



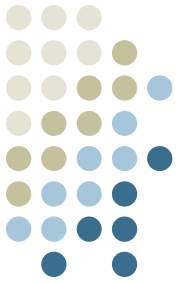
- **Importance**
- **Applicability**
- **Drafting**
- **Audit Issues**
- **Best Practices**

# The Real Scoop...

- The Good: All Persons Treated Equally
- The Bad: Gov't requires AAPs = killing trees
- The Ugly: Gov't employees get to second guess virtually all of your employment practices



# Who Is Responsible?



## Non-Construction:

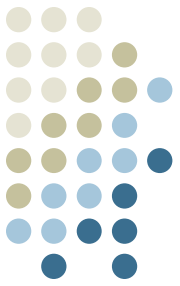
- Contractor/Sub must develop and maintain a written affirmative action program for each of its establishments if it has 50 or more employees (TOTAL) and:
  - (i) Has a contract of \$50,000 or more; or
  - (ii) Has Government bills of lading which in any 12-month period, total or can reasonably be expected to total \$50,000 or more; or
  - (iii) Serves as a depository of Government funds in any amount; or
  - (iv) Is a financial institution which is an issuing and paying agent for U.S. savings bonds and savings notes in any amount.

## Construction:

- This part applies to all contractors and subcontractors which hold any Federal or federally assisted construction contract in excess of \$10,000.
- Within 120 Days – updated annually



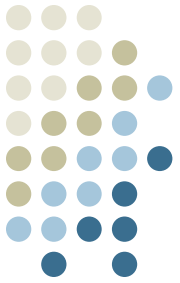
# Substance of Affirmative Action Plans (Non-Construction)



- Narrative
- Organizational Profile
- Job Group Analysis
- Availability Analysis
- Utilization Analysis
- Goals
- Employee Activity Analysis
- Other requirements (*e.g.*, coordinator designation, areas of concern, action-oriented programs, app survey, EEO Policy, compensation review, internal audits)



# Substance of Affirmative Action Plans (Construction)



- Ensure and maintain a **working environment free of harassment**, intimidation, and coercion at all sites,
- Establish and maintain a current list of minority and female **recruitment sources**, provide written notification,
- Maintain a current file of the names, addresses and telephone numbers of each minority and female **off-the-street applicant** and minority or female referral from a union, a recruitment source or community organization,
- Provide immediate **written notification to the Director** when the union or unions with which the Contractor has a **collective bargaining agreement** has not referred to the Contractor a minority person or woman,
- Develop **on-the-job training opportunities** and/or participate in training programs for the area which expressly include minorities and women,
- **Disseminate the Contractor's EEO policy** internally and externally,
- Review, at least annually, the **company's EEO policy and affirmative action obligations** under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions,
- Direct **its recruitment efforts**, both oral and written, to minority, female and community organizations



# Construction Obligations (cont.)



- Encourage present minority and female **employees to recruit** other minority persons and women,
- **Validate all tests** and other selection requirements,
- Conduct, at least annually, an **inventory and evaluation** at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities,
- Ensure that **seniority practices**, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities,
- Ensure that all facilities and company activities are **non-segregated** except that separate or single-user toilet and necessary changing facilities,
- Document and maintain a record of all **solicitations of offers for subcontracts** from minority and female construction contractors and suppliers, and
- Conduct a review, at least annually, of all **supervisors' adherence** to and performance under the Contractor's EEO policies and affirmative action obligations.



# Healthcare Industry Applicability

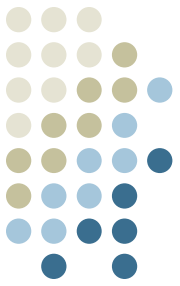


- Grants ≠ federal contract
- Medicare Parts A & B & Medicaid ≠ federal contract
- TRICARE network providers – moratorium extended to 5/7/21 and now covers Veteran Affairs Health Benefits Program providers
- Certain HMO's = federal civilian employees are beneficiaries through the Federal Employee Health Benefit Plan
- Services used by: Department of Veterans' Affairs, Federal Bureau of Prisons, Department of Defense, Department of Health and Human Services and the Centers for Medicare and Medicaid Services





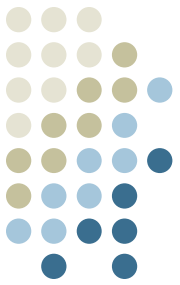
# Affirmative Action Narrative



- Employer describes its commitment to the Affirmative Action process and EEO
- Description of locations included in the Plan
- Reports on the results of its analysis of the past year's employment transactions
- Identifies problem areas to take action in the future
- Confidentiality Statement

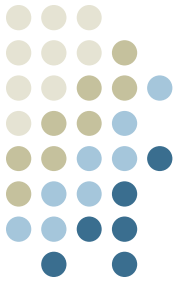


# Organizational Profile



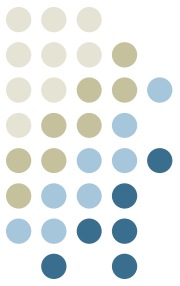
- Requires the company to show the number of females and minorities in each of the departments in the company
- Must follow company's organizational chart
- List all positions in each department ranked by compensation
- Number and percentages of females and minorities in each department

# Organizational Profile Example



Department:	Human Resources																			
						Female							Male							
Job Title	EEO	Wage Range	Total	Total Min.	Total	White	Black or AA	Hisp or Latino	Asian	NHaw or PlsId	Amln or AlaNat	2 or more races	Total	White	Black or AA	Hisp or Latino	Asian	NHaw or PlsId	Amln or AlaNat	2 or more races
Human Resources Coordinator	5360	\$30,000	1	1	1				1											
Human Resources Generalist	0630	\$45,000 - \$60,000	4	2	2	2							2		2					
VP Human Resources	0010	\$100,000	1	0	1	1														
		Department Total	6	3	4	3	0	0	1	0	0	0	2	0	2	0	0	0	0	0
		% of Total		50.00%	66.67%	50.00%	0.00%	0.00%	16.67%	0.00%	0.00%	0.00%	33.33%	0.00%	33.33%	0.00%	0.00%	0.00%	0.00%	0.00%

# Job Group Analysis



- This section groups each job group listing the job titles, gender and minority make-up within the company
- Job groups according to commonality of duties and compensation
  - Small specific job group (different than broad job categories)
  - <http://www.census.gov/people/eetabulation/data/eetables20062010.html> **USE 2006-2010 DATA!**



# Job Group Analysis Example



Job Group: 5000 Office/Admin			Total	Female	Minority
Job Title					
5140	Payroll Coordinator		1	1	1
			1	1	1
				100.00%	100.00%
5240	Customer Service Rep		1	0	1
			1	0	1
				0.00%	100.00%
5360	Human Resources Coordinator		1	1	1
			1	1	1
				100.00%	100.00%
5700	Executive Assistant		4	3	2
			4	3	2
				75.00%	50.00%
5810	Data Entry Keyers Data Entry Specialists		2	1	2
			3	2	
			5	3	2
				60.00%	40.00%
Job Group Total			12	8	7
% of Total				66.67%	58.33%



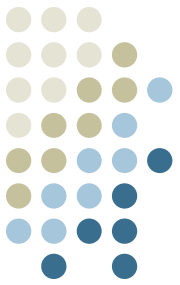
# Availability Analysis



- Calculates how many female and minority employees *should* be in each job group
- How to calculate percentage of eligible employees in workforce
- Feeder Groups – those current employees available for possible promotions

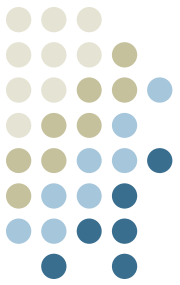


# Availability Analysis Example



Job Group: 0010 Chief Executives						
	Raw Statistics			Weighted Factor		
Factor	Female	Total Min	Value Weight	Female	Total Min	Source of Data Rationale for Selection of Recruitment
1. Percentage of Minorities and Women Among Those Having Requisite Skills in the Reasonable Recruitment Area	21.10	13.40	30.00	6.33	4.02	2006-2010 Census of Population, EEO ACS File Chicago, IL MSA
2. Percentage of Minorities and Women Among Those Promotable, Transferable and Trainable within the Contractor's Organization	38.29	10.10	70.00	26.80	7.07	Feeder Job Groups: Gen & Ops Managers (0020); Marketing & Sales Managers (0050); Financial Managers (0120); Purchasing Managers (0150)
			100.00			
Job Group Final Availabilities (%)				33.13	11.09	

# Utilization Analysis



- Performs 80/20 analysis for company's workforce
- Compares actual number of females and minorities in each job group with the number expected
- Based on availability calculated in the Availability Analysis

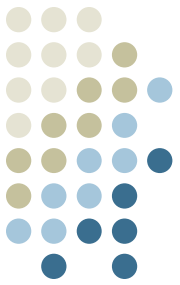


# Utilization Analysis Example



Job Group	Total Incumbents (#)	Category	Incumbents (#)	Incumbency (%)	Availability (%)	Expected Incumbents (#)	Difference (#) Expt. Minus Incumbency	80% Ratio	Less than 80%?
0000 Officials/Managers	95	Female	22	23.16	43.90	41.71	-19.71	52.75	Yes
		Minority	25	26.32	22.17	21.06	3.94	118.71	
1000 Computer Scientists/Sys Analysts	6	Female	1	16.67	22.90	1.37	-0.37	72.77	Yes
		Minority	2	33.33	38.31	2.30	-0.30	87.02	
2000 Professionals	4	Female	2	50.00	33.50	1.34	0.66	149.25	
		Minority	1	25.00	13.20	0.53	0.47	189.39	
5000 Office/Admin. Assistants	12	Female	6	50.00	78.56	9.43	-3.43	63.65	Yes
		Minority	2	16.67	32.19	3.86	-1.86	51.78	Yes
9000 Transportation Workers	35	Female	10	28.57	78.56	27.50	-17.50	36.37	Yes
		Minority	30	85.71	32.19	11.27	18.73	266.29	

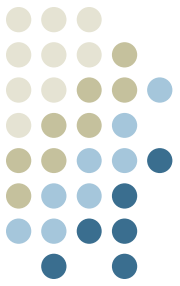
# Now You Need Goals For the Year, Not Quotas



Job Group	Placement Goals (%)	
	Female	Minority
0000 Officers and Managers	43.90	--
1000 Computer Scientists & Analysts	22.90	--
2000 Counselors	--	--
5000 Office/Admin. Assistants	78.56	32.19
7000 Transportation Workers	78.56	--



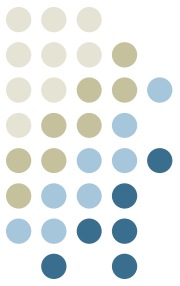
# Employee Activity Analysis



- Analyzes the company's employment transactions for the Plan year in several areas including:
  - Terminations
  - Promotions
  - Applicants
  - New hires

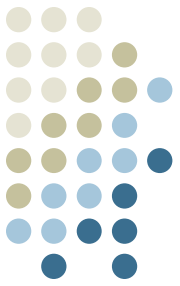


# Other Known Requirements



- Required to list all non-management positions with the State Job Service/Unemployment Office
- Post an invitation for persons with disabilities or Veterans to self-identify (**now need to perform AA analysis now!**)
- Complete and submit EEO-1 and **VETS-4212 form** listing its employees with Veteran status (formally VETS-100 and 100A)

# Other Known Requirements (cont.)



- Post DOL Employee Rights Notice – NLRA rights to join, form and assist unions, examples of unlawful conduct
- Provide notice on all of its purchase orders that it is an employer that meets Affirmative Action requirements
- Compensation analysis by job groups/titles
- EEO-Add **sexual orientation and gender identity** as Protected classes.
- Tag Lines: **TOP of Ad**: EOE Minorities/Females/Protected Veterans/Disabled (recommendation)



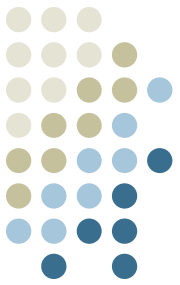
# Other Known Requirements (cont.)



- Must notify all recruitment agencies it utilizes that it is an Affirmative Action employer
- Search out other recruitment efforts!
- Must notify all unions representing employees that it is an Affirmative Action employer
- Compliance Officer will examine the company's Immigration (I-9) as a favor for the INS 1/22/17  
<https://laborandemploymentlawupdate.com/2016/11/17/uscis-has-released-the-new-form-i-9/>



# New Disabled/Veteran AAP Obligations



## Disabled:

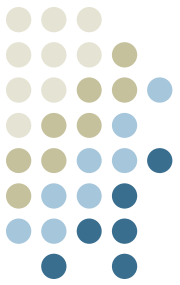
- Effective 3/24/14
- \$15,000 or more (was 10)
- 7% Utilization Goal
  - Large employer per job group
  - Small employer (100 or less) entire workforce
- Full AAP now
  - 50 or more employees

## Veterans:

- Effective 3/24/14
- \$150,000 or more (was 100)
- 6.4% Hiring Benchmark 3/31/18)
  - Can create own benchmarks – but do you want to?
- Entire workforce
- Full AAP now
  - 50 or more employees



# ALERT!!!!!!



SmithAmundsen





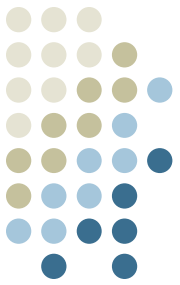
# UPDATE: Disabled & Veterans



- Can't ask about disability prior to job offer – NOT ANYMORE!
- Self-Identify Pre & Post Offer and Every 5 years (along with current ee's)
  - [http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary%20Self-Identification%20of%20Disability%20CC-305%20Final\\_QA\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary%20Self-Identification%20of%20Disability%20CC-305%20Final_QA_508c.pdf)
- Need anti-discrimination policy & complaint process
- Need to show reasonable accommodation efforts – qualification of hires



# New Disabled/Veteran AAP Obligations (cont.)



- Track openings, applicants, hires, etc.
- “Here is what we did”
  - Successes
  - Failures
- Change language in plans to “Qualified Protected Veterans”
- Self-Identify remains
  - Initial and every 5 years
- All disabled and disabled veterans information must be in its OWN separate file
- Include EO Clauses in ALL contracts and subcontracts in BOLD
- Request priority referrals
- **LISTING vs. POSTING**



## Voluntary Self-Identification of Disability

Form CC-305  
OMB Control Number 1250-0005  
Expires 1/31/2020  
Page 1 of 2

### Why are you being asked to complete this form?

Because we do business with the government, we must reach out to, hire, and provide equal opportunity to qualified people with disabilities.<sup>1</sup> To help us measure how well we are doing, we are asking you to tell us if you have a disability or if you ever had a disability. Completing this form is voluntary, but we hope that you will choose to fill it out. If you are applying for a job, any answer you give will be kept private and will not be used against you in any way.

If you already work for us, your answer will not be used against you in any way. Because a person may become disabled at any time, we are required to ask all of our employees to update their information every five years. You may voluntarily self-identify as having a disability on this form without fear of any punishment because you did not identify as having a disability earlier.

### How do I know if I have a disability?

You are considered to have a disability if you have a physical or mental impairment or medical condition that substantially limits a major life activity, or if you have a history or record of such an impairment or medical condition.

Disabilities include, but are not limited to:

- Blindness
- Autism
- Bipolar disorder
- Post-traumatic stress disorder (PTSD)
- Deafness
- Cerebral palsy
- Major depression
- Obsessive compulsive disorder
- Cancer
- HIV/AIDS
- Multiple sclerosis (MS)
- Impairments requiring the use of a wheelchair
- Diabetes
- Schizophrenia
- Missing limbs or partially missing limbs
- Intellectual disability (previously called mental retardation)
- Epilepsy
- Muscular dystrophy

Please check one of the boxes below:

- ☐ YES, I HAVE A DISABILITY (or previously had a disability)
- ☐ NO, I DON'T HAVE A DISABILITY
- ☐ I DON'T WISH TO ANSWER

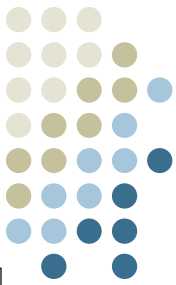
\_\_\_\_\_  
Your Name

\_\_\_\_\_  
Today's Date



SmithAmundsen





## Voluntary Self-Identification of Disability

Form CC-305  
OMB Control Number 1250-0005  
Expires 1/31/2020  
Page 2 of 2

### Reasonable Accommodation Notice

Federal law requires employers to provide reasonable accommodation to qualified individuals with disabilities. Please tell us if you require a reasonable accommodation to apply for a job or to perform your job. Examples of reasonable accommodation include making a change to the application process or work procedures, providing documents in an alternate format, using a sign language interpreter, or using specialized equipment.

---

<sup>i</sup> Section 503 of the Rehabilitation Act of 1973, as amended. For more information about this form or the equal employment obligations of Federal contractors, visit the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) website at [www.dol.gov/ofccp](http://www.dol.gov/ofccp).

**PUBLIC BURDEN STATEMENT:** According to the Paperwork Reduction Act of 1995 no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. This survey should take about 5 minutes to complete.



SmithAmundsen



# Veterans

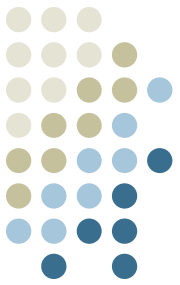


- Disabled Vets (service-connected)
- “Protected veteran” has been added to provide a comprehensive term to refer to any veteran that is protected under the VEVRAA regulations
- “Other protected veteran” has been replaced with the more accurate and specific term “active duty wartime or campaign badge veteran”
- “Pre-JVA veteran” has been added
- Self-ID – Pre only can ask if a protected vet or not; Post in the specific categories but only if you choose to
- Recently Separated Vets
- Plan: Affirm no discrimination, take affirmative action, efforts to recruit, postings, notify others, **VETS-4212**.





# Disabled Analysis Now...



Individuals with a Disability	2016	2017	2018
# of applicants who self-identify as individuals with a disability pre-hire			
# of job openings			
# of applicants for all jobs filled			
# of applicants with a disability hired			
# of applicants hired			
# of Current employees who have self-identified as an individual with a disability			





# Veteran Analysis Now...

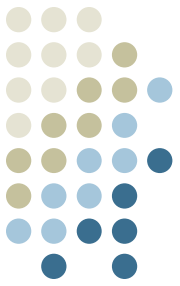


Protected Veterans	2016	2017	2018
# of Applicants who self-identify as protected veterans pre-hire			
# of job openings			
# of applicants for all jobs filled			
# of protected veteran applicants hired			
# of applicants hired			
# of Current employees who have self-identified as a protected veteran			





# Understanding the OFCCP Compliance Review Process



- The EO Survey
  - Requires the federal contractor/subcontractor to report the makeup of its current workforce
  - Asks for information concerning compensation of groups in workforce
- Compliance Check
  - An Compliance Officer will come to the Company and look at certain documents
  - Verify Company has an AAP and ask if any employee has self-identified themselves

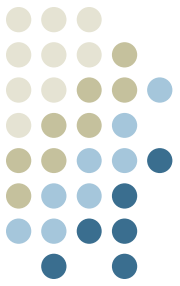
# Compliance Review



- Desk Audit
  - Submit Affirmation Action Plans
  - Submit copies of reports (*i.e.*, compensation)
  - Submit efforts of AA outreach
- On-Site Review (**only AFTER desk audit**)
  - Present in the workplace
  - If they find something, will ask for personnel files or applications of involved employees
  - Check postings & I-9s

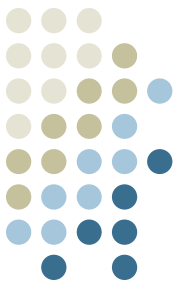


# Audit 411's!



- Outreach and Recruitment – easiest target
  - Use correct forms
  - Conduct self-audit (quarterly to determine effectiveness)
  - Have 3 separate plans starting with 2015
  - ATS/Hires – include those you made offers to as well or why not hired (only)
  - Consistency with disposition codes
- It helps when you appear cooperative and the Compliance Officer likes you!!





# What To Do Next?

- Determine first if your healthcare facility is considered a federal contractor.
- How will you respond if the OFCCP audits you?
- Determine if it's worth being a contractor and having to comply with AA obligations. Is the contract lucrative vs. AA compliance?
- Speak with your legal counsel.

# Preventative Maintenance



- Prepare any required affirmative action plans (Audits may go back 3 years)
- Take any actions required to come into compliance
- Begin collecting/documenting efforts
- Start working with IT Group NOW!
- Maintain analysis for 3 years
- EEO-1 Reporting Sept. 30
- Tag Lines
- Not “Good Faith Efforts” Anymore



SmithAmundsen



# Questions?



**Heather A. Bailey, *Partner***

SmithAmundsen LLC

(312) 894-3266 – Direct 24/7

[hbailey@salawus.com](mailto:hbailey@salawus.com)

**BLOG: [www.laborandemploymentlawupdate.com](http://www.laborandemploymentlawupdate.com)**

## FRONTLINE MANAGEMENT SIDE LABOR & EMPLOYMENT COUNSEL

Chicago, St. Charles, Rockford, Woodstock, Waukegan, Milwaukee,  
St. Louis, and Indianapolis.

USLAWNetwork Member



SmithAmundsen

