

# Attention Federal Contractors

## Are Your Remote Workers Counted in the Correct Establishment?

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**E**mployers who enter into contracts and subcontracts with the federal government are subject to regulations and requirements as a result of these contracting relationships. One of these requirements is that contractors who have a certain number of employees, and contracts of a certain value, develop and maintain a written affirmative action program.

Specifically, federal supply and service contractors and subcontractors who have 50 or more employees and a government contract valued at \$50,000 or more are required by Executive Order 11246 and the Rehabilitation Act of 1973 (Section 503) to develop and maintain a written affirmative action program for each of their establishments or functional business units. Federal supply and service contractors and subcontractors who have 50 or more employees and a federal contract of \$150,000 or more are required to develop and maintain a written affirmative action program that complies with the requirements of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) for each of their establishments or functional business units.

As all employers continue to navigate uncertainties brought on by COVID-19, it has become clear that telework and remote working arrangements may be here to stay. For federal contractors, one question this raises is whether a contractor is correctly including its employees in its affirmative action plans. One aspect of affirmative action plans is that they analyze a contractor's workforce demographics so as to see how the groups protected by Executive Order 11246, Section 503, and VEVRAA are represented in the contractor's workforce. This assessment is only meaningful if a contractor correctly includes its employees in its plans.

The laws and guidance governing affirmative action plans require that covered contractors maintain a plan for each of their establishments or functional business units. Establishment-based affirmative action plans are tied to the contractor's work location(s). Functional affirmative action plans allow a contractor to base its affirmative action plan around the contractor's business functions.

The regulations from the Office of Federal Contract Compliance Programs (OFCCP) do not specifically address how remote or teleworking employees should be included in a contractor's affirmative action plan(s). However, the OFCCP has issued a helpful FAQ on this topic.

If a contractor maintains their affirmative action plans by establishment, and only maintains one establishment, the analysis is simple. All remote and teleworking employees must be included in the affirmative action plan for the contractor's establishment.

However, many contractors have multiple establishments. Multi-establishment contractors who maintain their affirmative action plans by establishment must determine which establishment's plan includes which remote workers. This is because a remote worker is not an establishment in and of themselves —



that worker will need to be associated with one of the contractor's establishments. An employee should only be counted as belonging to one of a contractor's establishments.

For making this decision, the OFCCP provides the following guidance:

- Include remote or teleworking employees in affirmative action plans according to the management that they report to. For example, a teleworking employee who lives and works in Seattle, Washington, but who reports to a manager who works at the contractor's Portland, Oregon establishment would be included in the contractor's affirmative action plan for the Portland establishment.
- Include remote or teleworking employees in the affirmative action plan that corresponds to the establishment in which the decision to hire the employee was made. For example, a teleworking employee who was selected by the contractor's San Francisco, California establishment would be included in the affirmative action plan for the San Francisco establishment.
- Include remote or teleworking employees in the affirmative action plan that corresponds to the establishment that houses the personnel function that supports the employees. For example, if a supervisor works from home in Missoula, Montana and manages employees who work from home in various locations, but they are all supported by the functions of the contractor's Bend, Oregon office, then these remote employees can be included in the affirmative action plan for the Bend establishment.

Alternatively, if a contractor maintains a functional affirmative action program, the contractor must include remote or teleworking employees in the affirmative action plan of the functional or business unit under which they work.

If an employee could be included in more than one affirmative action plan, the OFCCP FAQ provides that the employer may choose which affirmative action plan that the employee should be included in. Notwithstanding the above, contractors should note that the actual location from which their remote or teleworking employees work will be specified in the organizational profile and job group analysis sections of the affirmative action plan that includes that employee.

To conclude, remote and teleworking arrangements create new challenges and opportunities for employers. However, for federal contractors and their affirmative action plan compliance, one important thing to remember is that each of a contractor's remote or teleworking employees are included in the contractor's affirmative action plans — regardless of the employee's location.

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