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COMMISSIONER, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
before the
SECTIONS OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES
AND PUBLIC CONTRACT LAW AND THE YOUNG LAWYERS DIVISION
OF
THE AMERICAN BAR ASSOCIATION
WASHINGTON, D.C.

MAY 22, 1980

OUTLINE OF AFFIRMATIVE ACTION
IN THE FEDERAL SECTOR

A

FEORP - FEDERAL EQUAL OPPORTUNITY RECRUITMENT PROGRAM

I. Background

- A. Title VII of the Civil Rights Act of 1964 - applies only to employees in the private sector.
- B. 1972 Congress amended Title VII to include coverage of Federal employees.

Congress stated the exclusion of minorities and women in government resulted from overt and systemic discriminatory practices.
- C. Civil Service Reform Act of 1978 (Garcia Amendment) --
"it is the policy of the United States...to provide...a Federal workforce reflective of the nation's diversity."
The Act directs agencies to recruit their employees from "all segments of society."

- D. The Civil Service Reform Act directs EEOC to develop guidelines to provide a framework for development of recruitment program regulations by the Office of Personnel Management (OPM). EEOC is also to identify for agencies where underrepresentations of minorities and women exist in their workforce.

II. OPM's Regulations and EEOC's Guidelines Appear 44 Fed. Reg. 22029 (April 13, 1979)

A. General Observations

1. FEORP is only a recruitment program not a hiring directive. Theory -- if the pool of minorities and women is increased than agencies will hire them. (If they don't, then Uniform Guidelines on Employee Selection may come into play.)
2. Does not apply to Senior Executive Service (SES) positions formerly GS 16-18 -- but the Commission does require affirmative action for SES positions under its Section 717 authority of Title VII.
3. Does not cover older persons or handicapped.

B. How an Agency Determines Underrepresentation of Minorities and Women

1. Underrepresentation exists when the percentage of female and minority Federal employees in a given grade are less than their percentages in the civilian labor force.

2. EEOC has established that minorities and women are underrepresented in nearly every lower middle, middle and upper grades.
3. Agencies in consultation with OPM and EEOC are to determine underrepresentation agency wide, in appropriate geographic components; by grade; by broad occupational, professional and other groupings in comparison to the national civilian labor workforce.
4. Where an agency or major component is located in a geographic area where the percentage of underrepresented groups in the area civilian labor force is higher than their percentage in the national labor force, the agency or component should conduct its recruitment program for that component on the basis of the higher levels of representation in the local civilian labor force.
5. Where an agency or component of an agency is located in an area where participation of a particular underrepresented group in the area labor force is lower than their participation in the national labor force, such agency may in consultation with OPM utilize the lower applicable civilian labor force percentage in determining underrepresentation. However, the agency cannot utilize the figure lower than the nationwide percentage -- where nationwide recruitment is appropriate.

C. Recruitment

1. Defined - total process by which a Federal agency locates, identifies and assists in the employment of qualified or qualifiable applicants from under-represented groups for job openings in grades and in occupations where underrepresentation has been determined.
2. All job qualifications and personnel policies must be consistent with the Uniform Selection Guidelines 43 F.R. 38290.
3. Two types of recruitment
 - a. External - look especially at jobs which may be better performed by persons who are bicultural, bilingual and jobs that can be performed by persons not fluent in English.
 - b. Internal - develop mechanisms for informing incumbent minorities and women of jobs at other Federal agencies. Minorities and women are often locked into the lower paying Federal jobs. Their problem is that these individuals are trapped.

III. Office of Personnel Management's Responsibilities under FEORP:

- A. Aids Federal agencies in making determinations of underrepresentation based on national, regional, or other geographic basis as appropriate.
- B. Aids Federal agencies in grouping grades or other occupational categories.
- C. Identifies major recruitment sources of women and minority groups.
- D. Examines existing Federal personnel procedures to identify those which may serve as impediments to innovative internal and external recruitment.
- E. Reviews applicant pools to determine underrepresentation.

IV. Federal Agencies Responsibilities:

- A. Agency head is to assign an individual responsibility for a recruitment program and that individual will be evaluated on their effectiveness in carrying out the program.
- B. Recruitment plans should cover all positions including part-time and temporary positions.
- C. Where an agency or the OPM has determined that an applicant pool does not adequately provide for consideration of candidates from underrepresented groups, the agency must take one or more of the following steps:

1. Expand or redirect their recruitment activities in ways designed to increase the number of candidates from underrepresented groups.
2. Use selection methods involving other applicant pools which includes sufficient minorities and women.
3. Reopen the application process.
4. Take any other action consistent with law.

D. Agency Plans

1. All agencies must have up to date plans covering recruitment for positions at various organizational levels and geographic locations. These plans can be inspected by OPM on request. Such plans must also be included with the agency's submission of its affirmative action plan to EEOC as required under Section 717 of Title VII.
2. Agency plans must include:
Annual specific determinations of underrepresentation for each group and must be accompanied by quantifiable indices by which progress can be measured.

If the percentage of minorities and women is higher locally than the national figures, then agency should use local figures to determine underrepresentation.

If local figures on minorities and women is lower than national, than agency can consult with OPM on what figures to use. Agency can't utilize the lower local figures to determine underrepresentation, if recruitment for the positions are done nationwide.

Estimate of how many positions will be filled in the current year and identification of those occupations and positions suitable for external recruitment.

A similar assessment must be made for job categories and positions likely to be filled by recruitment from within the agency and a description of recruitment programs developed to increase minority and female candidates from internal sources for such positions.

Description of methods the agency intends to use to locate and develop minority and female candidates for each category of underrepresentation and an indication of how such methods differ from recruitment activities of the agency prior to establishment of the special recruitment program.

Description of special efforts planned by the agency to recruit in communities, educational institutions and other likely sources of qualified minority and female candidates.

Identification of jobs which can be redesigned so as to improve opportunities for women and minorities.

List of priorities for special recruitment program activities.

3. Agency plans were to have been submitted to OPM for their headquarters and component staffs by October 1, 1979.

B

FEDERAL AFFIRMATIVE ACTION INSTRUCTIONS
PURSUANT TO SECTION 717 OF TITLE VII

I. Background

- A. All Federal agencies and departments must submit a Federal Affirmative Action Plan to EEOC.
- B. The responsibility to review plans formerly rested with the Civil Service Commission -- transferred to EEOC in 1979.
- C. Fiscal year 1980 is considered by the EEOC as a transition year. At the end of this year EEOC will rank agencies according to their progress. EEOC will report to the President and to appropriate Congressional committees on the accomplishments of each Federal agency, based on agency reports, on-site inspections, and other review conducted by EEOC.

II. The Reporting Requirements of Every Agency:

- A. All agencies must send 1 consolidated plan for the entire agency to EEOC. They must also send their plans for the headquarters operation and certain agencies must submit major operating components as appendices.
- B. Field installations with more than 500 employees must develop their own plan which is to be consolidated into master agency plan. If a facility is smaller than 500, then the agency can consolidate several small facilities. Agencies with less than 500 total employees are required to submit a modified plan.

III. The Plan Requires All Agencies to Go Thru Step A to Step I. Steps A-H are Considered Phase I and was Due at EEOC February 1, 1980. Phase II - (Step I) was due April 1, 1980.

- A. Step A - Each agency is to develop a workforce profile indicating the numbers and percentages of employees in each race, sex and national origin group in all occupations and grade/pay levels.
 - 1. Agency is to identify the three most populous administrative and the three most populous professional occupations, or a total of six occupations.

2. EEOC will evaluate an agency's affirmative action efforts by looking at an agency's overall workforce at the beginning and the end of the transition year. Activities must result in a net increase in representation of minorities and women. Targeted occupations will be emphasized but all occupations will be considered.
- B. Step B - Agencies are to determine underrepresentation in the six-populous occupations. Vacancy projections are to be utilized for each occupation analyzed.
1. Underrepresentation is to be determined in the same manner it is done in FEORP -- even if these agencies are not covered by FEORP.
 2. Agencies should do the following to determine underrepresentation.
 - a. Compare the percentage of each race/national origin/sex group in each of the most populous occupations to:
 1. The percentage of each group in the overall national or SMSA civilian labor force as appropriate. EEOC provides the figures for professional groups.

If the percentage of minorities and women is higher locally than the national figures, then agency should use local figures to determine underrepresentation.

If local figures on minorities and women are lower than national figures, than agency can consult with EEOC on what figures to use. Agency can't utilize the lower local figures to determine underrepresentation if hiring for the positions are done nationwide.

2. Agencies then calculate underrepresentation by:

$$\frac{a(\text{agency workforce profile})}{b(\text{Nat'l, SMSA or data EEOC supplies regarding comparative profile})} \times 100 = \text{UI} \quad (\text{Underrepresentation Index})$$

Where the UI is 100 or more, no further calculation is required; there is no underrepresentation in this occupation and/or grade or pay system for the particular race, sex/ethnic group. Therefore no affirmative action goals will be established. If the UI is below 100:

Agencies must then compute underrepresentation as follows:

$$100 - \text{UI} = \text{Underrepresentation for setting affirmative action goals}$$

Separate computations by race, sex and national origin group must be submitted for each of the populous occupations being analyzed.

- C. Step C - Agencies are to select two occupations from the six most populous for which determinations of underrepresentation have been made. The criteria in selecting target occupations is:
1. Select occupations where the highest degree of underrepresentation for more than one group exists, as demonstrated by the determinations of underrepresentation.
 2. Occupations with the widest grade range.
 3. Occupations where substantial vacancies are anticipated.
- D. Step D - Analyzing Impediments to the elimination of underrepresentation - this must be done for the two targeted occupations and achievement of transition year goals.
1. Analyze recruitment process used for filling two targeted occupations.
 - a. Identify all recruitment sources which the agencies uses to attract applicants to fill the two targeted occupations.
 - b. Determine the number of women and minorities who applied for each occupation as a result of each recruitment source.
 - c. Rank each source in order of effectiveness -- source which generated the most minority and female applicants would be ranked first.
 - d. Evaluate or alter ineffective recruitment methods.

2. Analysis of selection process under the Uniform Guidelines on Employee Selection - agencies must inquire as to whether there is a substantially different rate of selection in hiring, promotion or other employment decisions which work to the disadvantage of members of a race, sex or national origin group. Hence, agencies must look at their applicant flow data.

- a. If there is an indication of adverse impact, the agency must then determine which component of the selection procedure results in adverse impact.
- b. After identifying the offending selection procedure, the agency must do one of the following:
 - .discontinue use of the procedure.
 - .modify the selection process to eliminate the adverse impact.
 - .complete a validation study which meets the requirements of UGESP.
 - .meet the requirements for interim use -- UGESP.
 - .otherwise justify the use of the procedure under Federal law.

E. Step E - Identification of Qualified/Qualifiable Applicants from three sources:

1. Internal Agency Workforce - Agencies are required to develop internal pools of qualified and underrepresented groups through a skills survey.
2. Federal Workforce Population - Central personnel data file maintained by OPM gives agencies an indication of potential applicant sources within other agencies. Agencies should go to this.
3. Civilian Labor Force - Agencies should identify potential applicant sources for underrepresented groups. Agencies should:
 - a. contact colleges having substantial minority and female enrollment;
 - b. contact minority and women's professional organizations;
 - c. commit resources to affirmative recruitment.

F. Step F - Establishment of Transition Year Affirmative Action Goals - the agency will have goals only for the two targeted occupations.

1. Goal for all occupations except professional.

Multiply the percentage of the underrepresented group in the appropriate civilian labor force (national or SMSA) times the projected number vacancies.

$\%$ of underrepresented group x (projected vacancies) = Goal of new minority or women hires

2. For professional occupations

(% of underrepresented group in professional category in CLF) x (projected = Goal of new minority or women professional hires)

3. Where agencies have severe underrepresentation -- (underrepresentation of more than 50) in other words 50% or less of the minorities or women an agency should have -- then the agency should double the rate of hiring for the severely underrepresented group for the transition year.
4. EEOC in assessing an agencies transition year efforts will consider the extent to which goals are actually achieved for targeted occupations.

G. Step G - Where underrepresentation is found, agencies are required to develop and implement innovative staffing strategies to increase available pools of qualified candidates. These strategies must include internal agency training and education.

H. Step H - Summary of Phase 1 Affirmative Action Plans for Federal agencies.

1. Target two occupations;
2. Hiring goals and timetables for each underrepresented group;
3. Statement on recruitment strategies and specific actions to be taken;
4. Phase 1 to have been filed with EEOC by Feb. 1, 1980.

- I. Step I -- Phase 2 - Agency to have submitted plan to EEOC by April 1, 1980.
 - 1. Affirmative action program plan for two additional targeted occupations;
 - 2. Procedures in place to ensure internal monitoring and an evaluation system. The agencies must be able to monitor the achievement of specific goals within designated time limits.

- J. Agencies were instructed to include as a supplement to their Phase II Affirmative Action Planning process a plan indicating the steps the agency will take to prevent sexual harassment. Supplements were to have been submitted by May 1, 1980. Agency plans will be evaluated on the extent to which they utilize training and/or other methods to prevent sexual harassment.

- IV. Criticisms of the Affirmative Action Program for Federal Agencies (basis of Commissioner Smith's dissent)
 - A. EEOC takes a conservative approach in determining correct representation in professional jobs. An agency must have minorities or women in professional jobs only in proportion to that group's presence in the category termed "professionals" by the Bureau of Labor Statistics. Two Commissioners (Walsh and Smith) favored agencies comparing their workforce to the undifferentiated civilian labor force because otherwise

agencies are using as a benchmark only those few minorities and women who have overcome great obstacles to obtain employment in non-traditional professional jobs.

- B. Use of the Bureau of Labor term "professional" obscures true availability.
 - 1. If agency has more black scientists (3%) than overall percentage of black "professionals" (2.5%) than under this plan agency need not hire more black scientists despite the fact actual availability of black scientists is 3.3%.
- C. Even if underrepresentation shown, hiring formula is not affirmative action but that which Title VII requires in the first place. Example - the plan works fine if the agency has been an egregious discriminator and the agencies has less than 50% of the minorities or women it should. Then the agency must hire minorities or women at a rate double their presence in the workforce. Hence, if 1% of an agency's engineers are Hispanic, but Hispanics are 5% of all the engineers, then 10% of all newly hired engineers, must be Hispanic. However, if agencies have 50% or more of the minorities or women they should have, then an agency is not really required to engage in affirmative action. For example, if an agency has 4% Hispanics and it should have 5%, the agency need only fill 5% of its new vacancies during the transition year with Hispanics. This is not affirmative action because

this is what Title VII already requires. See Hazelwood School District v. United States, 433 U.S. 299 (1977) which holds that Title VII requires employers to hire protected groups in proportion to their availability. Hence, the transition year affirmative action plan requires agencies to do no more than that which Title VII already requires them to do -- NOT DISCRIMINATE. This plan confuses non-discrimination with affirmative action.

D. Transition year plan creates a double standard -- weakens Commission efforts to secure meaningful goals after a finding of private sector discrimination. Employers will want to model their remedial plans after the one the government imposed upon itself.

E. Agencies should not favor one underrepresented group at the expense of another. All underrepresented groups should be tied to the same methodology in setting a goal.*

*/ The dissents of Commissioner Smith and Commissioner Walsh, who filed a statement on these issues are on file with the Executive Secretariat of the EEOC.

APPENDIX

To determine which occupation should be targeted.

Formula -
$$\frac{\text{Women hold what \% of a particular agency job}}{\% \text{ of women in civilian labor force}} \times 100 = \text{UI}$$
 (Underrepresentation Index)

Example -
$$\frac{\text{Women in agency hold 3\% of application processor jobs}}{\text{Women in civilian labor force - 30\%}}$$

$$\frac{3}{30} \times 100 = \text{Underrepresentation Index of 10}$$

Where the UI is 100 or more, no further calculation is required; there is no underrepresentation in this occupation and/or grade or pay system for the particular race, sex/ethnic group. Therefore, no affirmative action goals will be established. If the UI is below 100:

Agencies must then compute underrepresentation as follows:

$100 - \text{UI} = \text{Underrepresentation for setting affirmative action goals.}$

Repeat this process for;

Hispanic females

Hispanic males

Black males

Black females

etc. for the job of application processor and the

5 other populous jobs.

This exercise will identify those occupations which have the highest degree of underrepresentation for the most groups.

Setting Goals for the Targeted Occupation

Step 1 - determining underrepresentation:

Women hold what % of a particular job in agency
% of women in civilian labor force

Women in agency hold 20% of application processor jobs
Women in civilian labor force = 25%

$$\frac{20}{25} \times 100 = \text{Underrepresentation Index of } 80$$

Where the UI is 100 or more, no further calculation is required; there is no underrepresentation in this occupation and/or grade or pay system for the particular race, sex/ethnic group. Therefore no affirmative action goals will be established. If the UI is below 100:

Agencies must then compute underrepresentation as follows:

100 - UI = Underrepresentation for setting affirmative
 action goals.

Example - 100 - UI of 80 = 20

Step 2 - the actual goal

- a. Multiply the percentage of the underrepresented group in the appropriate civilian labor force times the projected number of vacancies.

CHART 2 continued

% of underrepresented group x projected vacancies = goal of new minority or women hires

25% x 100 vacancies = 25 application processor jobs should go to women (women in CLF)

- b. Where agencies have severe underrepresentation (underrepresentation of more than 50) an agency should double the rate of hiring for the severely underrepresented group for the transition year.

Women in agency hold 3% of application processor jobs

Women in civilian labor force 25%

$\frac{3}{25} \times 100 =$ Underrepresentation Index of 12.

100 - 12 = 88

88 is larger than 50 so severe underrepresentation and goal for transition year 80 is doubled.

100 new hires expected for application processors

x 50% (25% women in CLF x 2 for doubling of goal)

50 of the jobs go to women.