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August 14, 2023

Acting Director Michele Hodge
Office of Federal Contract Compliance Programs
Department of Labor
200 Constitution Ave NW
Washington, DC 20210

Dear Acting Director Hodge:

I write to request that the Office of Federal Contract Compliance Programs (OFCCP) promptly issue guidance to remind federal contractors of their obligation to maintain affirmative action programs as a condition of doing business with the federal government. According to the Department of Labor, federal contractors account for “approximately one-fifth of the U.S. labor force”.¹ Yet, in April 2023, a joint analysis of 19,000 federal contractors who have employed over 19 million workers by the Reveal Center for Investigative Reporting and USA Today found that federal contractors were woefully low in diversifying their workforce, especially at the management level. Additionally, the investigation noted that federal contractors were resistant to disclosing the “actual numbers of people of color and women they employ.”² In response to the assessment, New Jersey Senator Robert “Bob” Menendez noted that the findings expose “an abysmal record among federal contractors who have largely failed to improve and promote diversity at the highest levels of their organizations.”³

Recent attention has turned to affirmative action and diversity, equity, and inclusion initiatives (DEI), given the U.S. Supreme Court’s glaring departure from precedence in the *Harvard* and *University of North Carolina (UNC)* cases⁴. In those education cases, the Court dismissed the purpose of the 14th Amendment and Title VI of the Civil Rights Act to overturn the consideration of race as one of many factors institutions of higher education may use in their admissions

¹ <https://www.dol.gov/agencies/ofccp/about>

² <https://revealnews.org/article/diversity-data-top-federal-jobs/>

³ *Ibid.*

⁴ No. 20-1199, slip op. at 2-5, 23-30 (U.S. June 29, 2023)

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process. Emboldened by the Court's decision, 13 state attorneys general wrote collectively to the CEOs of the Fortune 100 companies that "diversity, equity, and inclusion" efforts may amount to "overt and pervasive racial discrimination... [that] violates both state and federal law".⁵

In the letter sent by the state attorneys general, they allege that "racial discrimination in employment and contracting is all too common among Fortune 100 companies and other large businesses." Yet, they incorrectly accuse major companies of:

"adopt[ing] explicitly race-based initiatives ... among other things, explicit racial quotas and preferences in hiring, recruiting, retention, promotion, and advancement. They also include race-based contracting practices, such as racial preferences and quotas in selecting suppliers, providing overt preferential treatment to customers on the basis of race, and pressuring contractors to adopt the company's racially discriminatory quotas and preferences."⁶

Interestingly, the letter makes no mention of the use of affirmative action on the basis of gender/sex, disability, or veteran status, even though written affirmative action components require such inclusion.

To that end:

- 1) What plan does the OFCCP have in place to issue guidance to every contractor to reinforce the affirmative action mandate that is part of the condition of doing business with the federal government?
- 2) How will the OFCCP work with the Equal Employment Opportunity Commission (EEOC), and other agencies to improve the coordination and enforcement of the affirmative action mandate of contractors?

I note that the Department of Labor's and OFCCP's website did acknowledge:

"OFCCP enforces nondiscrimination and affirmative action obligations to ensure equal opportunity in the federal contractor workforce ... However, the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina* does not address employer efforts to foster diverse and inclusive workforces or to engage the talents of all qualified workers, regardless of their background. It remains lawful for employers to implement diversity,

⁵ Letter from Kris Kobach, Atty. Gen. of Kan. & 12 other State Attys. Gen. to the CEOs of the Fortune 100 Companies (July 13, 2023), <https://ago.mo.gov/docs/default-source/press-releases/corporate-racial-discrimination-multistate.pdf>.

⁶ Letter from Kris Kobach, Atty. Gen. of Kan. & 12 other State Attys. Gen. to the CEOs of the Fortune 100 Companies (July 13, 2023), <https://ago.mo.gov/docs/default-source/press-releases/corporate-racial-discrimination-multistate.pdf>.

equity, inclusion, and accessibility programs that seek to ensure workers of all backgrounds are afforded equal opportunity in the workplace.”⁷

The Executive Order establishing OFCCP’s purpose and responsibility, coupled with the related regulations – per Executive Order (EO) 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) of 1974, as amended, – are clear that the affirmative action obligation of federal contractors “reaches all terms, conditions, and privileges of employment, including recruitment, promotion, termination, and compensation.”⁸ As such, the protected classes covered by OFCCP’s affirmative action **requirement** include race, color, religion, sex, sexual orientation, gender identity, national origin⁹, disability¹⁰, or status as a protected veteran¹¹. The OFCCP regulations cover contractors that have any number of employees and have contracts valued in aggregate at more than \$10,000 (EO 11246), a contract valued at more than \$15,000 (Section 503), or a contract valued at \$150,000 or more (VEVRAA)¹².

As you know, the OFCCP came to exist due to this Nation’s long history of excluding African Americans and others from contracting opportunities with the federal government. When A. Philip Randolph and other civil rights leaders planned to march on Washington, D.C. on the eve of the United States’ entrance into WWII to protest the discrimination African Americans were facing at defense plants, President Franklin D. Roosevelt signed Executive Order 8802. On June 25, 1941, Roosevelt signed the Executive Order to require that “contracting agencies of the Government of the United States shall include in all defense contracts hereafter negotiated by them a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin.” Presidents Dwight D. Eisenhower and Kennedy expanded on EO 8802 to address continuing institutional racism in the federal contracting sector overall. In particular, President John F. Kennedy’s EO 10925 for the first time used the term **affirmative action** to state “[t]he contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.” Notably, President Lyndon B. Johnson’s issuance of EO 11246 built on his predecessors to include sex as a protected class for federal contracting and for the first time created an enforcement arm within the Department of Labor called the Office of Federal Contract Compliance Programs. On July 21, 2014, President Barack H. Obama signed EO 13672, amending EO 11246, to prohibit federal contractors and subcontractors from discriminating on the basis of sexual orientation or gender identity.

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<https://www.dol.gov/agencies/ofccp/faqs/AAFAQs#:~:text=Affirmative%20action%20is%20defined%20by,status%20as%20a%20protected%20veteran.> (Last updated July 27, 2023.)

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<https://www.dol.gov/agencies/ofccp/faqs/AAFAQs#:~:text=Affirmative%20action%20is%20defined%20by,status%20as%20a%20protected%20veteran.> (Last updated July 27, 2023.)

⁹ 41 CFR 60-1.4

¹⁰ 41 CFR 60-300.5

¹¹ 41 CFR 60-741.5

¹² 41 CFR 60-1.4, 60-300.5, and 60-741.5

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Given that historical and necessary context of the OFCCP's affirmative action mandate and related regulations, it is imperative for OFCCP to send notices to every contractor to remind them that the benefit of doing business with the federal government comes with a commitment to affirmative action. Further, that the affirmative action mandate does not require a quota. In fact, OFCCP is clear that:

“OFCCP regulations do not permit quotas, preferences, or set asides. They are strictly forbidden. Placement goals (under Executive Order 11246), utilization goals (under Section 503), and hiring benchmarks (under VEVRAA) are not to be interpreted as a ceiling or floor for the employment of particular groups of persons but, rather, should serve as a benchmark against which the contractor measures the representation of persons within its workforce.”¹³

Numerous amicus briefs filed by businesses and others in the Harvard and North Carolina cases argued that affirmative action programs are narrowly tailored to meet the compelling government interest to protect against discrimination and to ensure opportunities at all levels of education, employment, and national security. In that spirit, I reiterate my request that you communicate your plan to issue guidance to every contractor to reinforce the affirmative action mandate that is part of the condition of doing business with the federal government; and how OFCCP will work with the EEOC, and other agencies to improve the coordination and enforcement of the affirmative action mandate of contractors. Please provide a written response to my office no later than September 14, 2023.

Thank you in advance for your response.

Sincerely,



ROBERT C. "BOBBY" SCOTT

Ranking Member

cc: Acting Secretary Julie Su, Department of Labor