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The President's Committee on Equal Employment Opportunity

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THE PRESIDENT'S COMMITTEE ON EQUAL EMPLOYMENT OPPORTUNITY

by
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I. INTRODUCTION

THE President's Committee on Equal Employment Opportunity was created on March 6, 1961.[1] In substance, the Executive Order which created the Committee prohibits discrimination in employment on account of race, color, creed, or national origin within the government and among those with whom the government deals, subject to certain exceptions and exemptions. This Article will not deal with questions involving intra-government personnel matters. Only questions arising from the application of the Executive Order to government contractors will be discussed.

The principle underlying the Executive Order is not a new one; it has been maintained by executive orders of four successive Presidents.[2]

The authority to require the inclusion of such a non-discrimination clause has never been questioned in the courts. The Comptroller General stated recently:

> The inclusion of non-discrimination clauses in contracts let by the Executive Branch has been mandatory since 1941. See Executive Order No. 8802, June 25, 1941. So far as we are aware the propriety of clauses of the type under consideration has never been seriously questioned by any responsible administrative or judicial tribunal; nor has the Congress seen fit to proscribe the use of such clauses by appropriate legislation.[3]

Moreover, the power of the President to issue such an order has been recognized by the Attorney General. On September 26, 1961, he issued to the Vice President an opinion which concluded that the President had legal authority to require the inclusion in government

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[1] Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

[2] President Roosevelt: Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941); Exec. Order No. 9001, 6 Fed. Reg. 6787 (1941); Exec. Order No. 9346, 8 Fed. Reg. 7183 (1943). See also, Letter to the Attorney General, Nov. 3, 1943, in 8 Fed. Reg. 15419 (1943).

President Truman: Exec. Order No. 10308, 16 Fed. Reg. 12303 (1951).

President Eisenhower: Exec. Order No. 10479, 18 Fed. Reg. 4899 (1953); Exec. Order No. 10557, 19 Fed. Reg. 5655 (1954).

President Kennedy: Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961).

[3] — Decs. Comp. Gen. —, Dec. B-145475 (April 21, 1961).

contracts of a non-discrimination clause[4] and to impose the sanctions and penalties specified in Section 312 of the Order. Furthermore, the opinion concluded that the safeguards established by the Committee to protect the procedural rights of contractors were adequate.

In *Perkins v. Lukens Steel Co.*[5] the Supreme Court gave apt expression to the underlying principle upon which the use of a non-discrimination contract provision is based:

> Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.

Even more important is the factual foundation for the promulgation of the Order. In general, the rapid technological changes which have taken place in the past few years have been responsible for increased unemployment, particularly among the unskilled and semi-skilled classes of workers. At the same time, the demand for skilled craftsmen has been substantially enhanced and, it is estimated, will continue on an upward curve.[6] This shift in the composition of the labor force has created problems of particular severity for those minority groups which have been traditionally confined to unskilled employment and which have likewise suffered from inferior educational opportunity. Among this group, the problem presented by discrimination against Negroes appears to be of special importance. It is estimated that the rate of unemployment for Negroes was twice that of the white population during the recent recession. In some cities, more than one third of the Negro work force was unemployed. Moreover, if this limitation of Negroes to unskilled and semi-skilled positions continues, the statistics make it apparent that we will face an increasingly serious employment problem for this segment of the population. Consequently, the entire nation will face an increase in all of the unfortunate ramifications produced by extended unemployment and lack of opportunity to obtain employment.

In this connection, it is interesting to note that there is no competitive necessity for the continued limitation of Negroes and other minority groups to unskilled and semi-skilled positions. In a recent address before the American Personnel and Guidance Association, Mr. Seymour Wolfbein, Deputy Assistant Secretary of Labor, pointed out that at the present time our vocational education and ap-

[4] As provided by § 301 of Exec. Order No. 10925 (1961).

[5] 310 U.S. 113, 127 (1940).

[6] Statistics gathered by the Department of Labor indicate that for every 100 skilled workers the Nation had in 1955, 122 will be needed in 1965, and 145 by 1975.

prenticeship programs are not producing enough skilled workers to replace those who retire. It follows that the continuation of the arbitrary restriction in training members of minority groups for skilled employment is a disservice not only to the members of these groups but to the nation as a whole and renders no corresponding benefit to members of the so-called majority.

The Washington Post of October 23, 1961, carried an editorial which stated, in part, the following:

> In both private and public employment, Negro workers are disproportionately concentrated in the ranks of the unskilled and semiskilled. The easy explanation is that they are commonly less educated, less skilled, less qualified than competing white workers. This is true enough, no doubt; but it overlooks the facts that the educational facilities available to Negroes have long been markedly inferior and that Negroes are systematically excluded from many vocational and apprenticeship training programs. In short, they are deliberately kept unskilled and unqualified. Berl Bernhard, the [Civil Rights] Commission's staff director, had this to say: "The discriminatory practices of some labor organizations in determining admission to apprenticeship training programs, particularly in the construction crafts, result in few Negroes having opportunity to acquire the necessary skills. The gravity of such discrimination is underscored when it is realized that in the construction crafts, job opportunities will soon exceed the number of qualified applicants. . . . Negroes who might otherwise be equipped to man these skilled positions as they open will not have been prepared. They will continue to suffer economic deprivations, and the Nation will have wasted human resources at the very moment in history when it is being challenged to develop to the utmost all the resources at its command."

In summary, primary justification for this Executive Order exists entirely apart from the necessity of impressing foreign countries, friendly or unfriendly, with the justice and morality of our actions. This justification may be found in the creation of the strongest possible economy, a system which will be more viable because the burden of maintaining it will be spread over an increased number of productive citizens. The development of such a program could well cause a reduction in the national outlay for the prevention of crime and social services to the unemployed. It could also serve to lessen the frustration and despair that is so frequently found among many members of our society who, through no fault of their own, are unable to find employment which will challenge the skills which they possess. The thrust of the program, therefore, is to create a practicable and intelligent manpower policy on as nearly a national basis as is feasible at this time.

II. Executive Order 10925

A. *General Requirements*

The Order establishes the President's Committee on Equal Employment Opportunity. At present the Committee has twenty-eight members of whom fourteen are public members and fourteen are government officials. The Chairman of the Committee is the Vice President of the United States and the Vice Chairman is the Secretary of Labor. The Executive Vice Chairman of the Committee is Mr. Jerry R. Holleman, Assistant Secretary of Labor and former President of the Texas AFL-CIO. He has been delegated the power to act on behalf of the Committee between its meetings.

The obligations of Government contractors and subcontractors are contained in Part III of the Order beginning with Section 301. This section sets forth the standard non-discrimination clause which is required to be included in all Government contracts, unless the contract is exempted under Section 303 of the Order. Section 301 requires that the contractor perform the following acts:

1. That he agree not to discriminate in any personnel action and to take affirmative action to ensure that the non-discriminatory policy applies among his employees.

2. He must post in conspicuous places notices which set forth the provisions of the non-discrimination clause.

3. He must, in all advertisements or solicitations for employees, state that he will pursue a non-discriminatory policy in hiring.

4. He must notify his labor unions on a form provided by the government that he is subject to the provisions of the Order, and he must post copies of the notice in conspicuous places available to employees and applicants for employment.

5. He must comply with all provisions of the Order and abide by any rule, regulation, or relevant order of the Committee.

6. He must furnish any information or report required by the Order or the Committee and permit access to his books and records by the contracting agency or the Committee when requested pursuant to an investigation as to compliance.

7. He must include the provisions of the non-discrimination contract clause in his purchase orders and subcontracts so as to make the same binding upon subcontractors and vendors.

8. He must file, and cause each of his subcontractors to file, compliance reports at such times and containing such information as to personnel policy as the Committee may prescribe.

9. He must, when directed by the contracting agency or the Execu-

tive Vice-Chairman, secure statements in writing from his labor unions certifying that the labor unions' policies do not discriminate on the grounds of race, color, creed, or national origin and consenting to the application of such policy in connection with work under the government contract.

B. *Sanctions And Penalties*

The Order further contains certain sanctions and penalties for non-compliance with its provisions. I shall mention these because they are a part of the Order, but I should also like to state that we do not think of these as the basic machinery in our compliance program. The Committee seeks to accomplish its objectives primarily by alerting American businesses to the needs of the hour and seeking their voluntary cooperation in the successful execution of this task, and in this effort the Committee has experienced great success. We do not anticipate the use of any of the sanctions set forth in this Order, although we are prepared to use them if we find ourselves compelled to do so. The sanctions provided by the Order and the rules and regulations of the Committee are the following:

1. Publication of the names of contractors or subcontractors who have failed to comply with the non-discrimination policy set forth in the Order.

2. Taking action through the Department of Justice to enjoin organizations, individuals, or groups who prevent or seek to prevent, directly or indirectly, compliance with the provisions of the Order.

3. Recommending to the Department of Justice that criminal proceedings be brought for the furnishing of false information to the Committee or to any contracting agency.

4. Termination, in whole or in part, of any government contract for failure to comply with the non-discrimination provisions of the Order.

5. Debarment of any non-complying contractor from further government contracts until such contractor has satisfied the Committee that he has established and will carry out personnel and employment policies in compliance with the provisions of the Order.

Before these sanctions are used, the Committee, through its rules and regulations, has required itself to notify the contractor and to give him an opportunity to comply. Where the Committee proposes to terminate a contract or to declare contract ineligibility or debarment, a slightly more detailed procedure applies which is set forth in Sections 60-1.26 through 60-1.31 of the rules and regulations of the Committee.

In studying the rules and regulations as a whole, it is to be noted that the primary responsibility for the implementation of the Order rests upon the contracting agency which deals directly with private business and that every effort has been made to centralize power in these agencies. It should be noted, however, that the Committee retains authority at all times to take jurisdiction of any case or matter before any agency, to review any action of an agency, and in any case to enter a final order that will be binding upon the agency and upon contractors. The scope of the powers granted the Committee may, therefore, be taken as an indication of the seriousness with which the Administration views the problems created by the existence of employment discrimination in the American economy.

III. Rules and Regulations of the Committee

Many of the matters contained here are specifically mentioned in the Order, and repetition may be avoided by limiting discussion to the rules that grant exemptions or detail procedures authorized by the Order.

One of the major functions of the rules is to define and limit the scope and operation of the Order. The Order requires that the contract clause be included "in every subcontract or purchase order unless exempted by [the] rules" of the Committee. The rules of the Committee provide that the contract clause must be included by the prime contractor in all first-tier subcontracts, and the first-tier subcontractors in all second-tier subcontracts. The second tier is not required to carry the contract provisions further unless specifically ordered to do so by the contracting agency or the Executive Vice Chairman of the Committee. This limitation recognizes the fact that in a complex industrial society such as ours the production of a single item may easily involve 10 or 15 tiers of producers and that it would be impracticable to attempt to administer the Order through so many tiers of producers, many of whom would have little, if any, relationship with the government. For practical purposes, therefore, it may be stated that the Order does not require administration of its provisions below the second tier of subcontracts. It should be noted, however, that the Executive Vice Chairman and the contracting agency retain authority to require its inclusion in any contract below the second tier when either feels it appropriate. This reservation of authority should be sufficient to prevent any attempt at evasion through the artificial creation of additional tiers of contracts.[7]

[7] This limitation is contained in Section 60-1.3 (a) of the rules.

In considering the meaning of subcontract or purchase order, it is advisable to note the definitions contained in Section 60-1.2(h), which construe these terms as covering subcontracts or purchase orders executed with a contractor or subcontractor if a *material* part of the supplies or services covered by the subcontracts or purchase order is being obtained for use in the performance of a contract subject to the Order. The concept of materiality has been used in order to cover the situation where the contractor habitually purchases large quantities of raw material for stock and then uses them generally in all of his production, including that which is for general non-government consumption. For example, persons engaged in the distribution of natural gas may obtain their supplies from several hundred producers and will have no way of knowing whether the gas thus obtained will be sold to the government or used in the performance of government contracts. The same principle is applicable to the purchase of any fungible commodity, such as corn or other food grains which are generally purchased and processed without reference to specific government contracts. In any of these situations, this definition becomes useful because it furnishes a rule of thumb which the government contractor may utilize in determining whether it is necessary to insert the contract clause in a specific subcontract or purchase order. Although the phrase "material part" is not susceptible of precise definition, it is nevertheless a term used frequently in the law and has come to have a meaning that lawyers should understand. It represents the best suggestion to date for handling this problem and it is for that reason embraced in the regulation.

The regulations further provide in Section 60-1.3(a) for the incorporation by reference of the non-discrimination provisions of Section 301 of the Order in all subcontracts or purchase orders. This is a provision which may be used with profit, particularly where purchase orders are executed on short or middle-sized forms for the contract provisions themselves are somewhat lengthy.

Section 60-1.3(b) contains the exemptions authorized by the Committee pursuant to authority granted in the Order. The first exemption is one of specific contracts, subcontracts, or purchase orders where the Executive Vice Chairman finds that special circumstances in the national interest so require. It is not expected that this exemption will receive much use, and that the special circumstances referred to must actually bear some relationship to primary national interest. No exemptions have as yet been granted under this provision.

The second exemption granted is one for all transactions under

$10,000. The purpose of this exemption is to relieve small contractors from the necessity of complying with the Order. The government annually makes millions of transactions in an amount less than $10,000, and the practical problems that would arise from the examination of compliance reports of such contractors should be evident. In this connection, the Committee is giving consideration to some expansion of the scope of this money exemption.

The third exemption relates to combinations of subcontractors and provides for the extension of the $10,000 exemption to any series of subcontracts with the same subcontractor where the aggregate amount of such subcontracts does not reach $50,000. Some difficulty has been experienced in the administration of this provision, and it is quite possible that it may soon be deleted.[8]

Government bills of lading are made subject to the Order, but carriers are exempted from filing compliance reports or from administering the Order to their subcontractors unless they are specifically ordered to do so by the contracting agency or the Executive Vice Chairman.

Contracts outside the United States are exempt from the nondiscrimination provisions of the Order, but the Order nevertheless applies to the extent that work pursuant to such contracts is done within the limits of the United States. The term "United States," as used in the rules and regulations, is understood as including all of our possessions and the Commonwealth of Puerto Rico.[9]

The sixth exemption covers standard commercial supplies and raw materials. This exemption in practice has been a source of great difficulty because of the problems associated with the definition of the term. When does steel cease to be a raw material? Presumably, taconite, when mined in the Mesabi Range, is a raw material. Are steel ingots made from taconite steel raw material? And what of specialty steel alloys? Should combinations of material still be treated as raw materials? Are Boeing or Douglas jets standard commercial articles? The complications inherent in the definition of terms such as these in a complex society such as ours are staggering.[10]

[8] This exemption was in fact deleted by the Committee on December 11, 1961. The effect of the elimination of the exemption of such contracts from the submission of compliance reports is to obviate the necessity of aggregating a group of small contracts to ascertain whether the $50,000 level has been reached. When the instructions of the compliance report are considered along with this deletion, it is clear that the net effect is to create a situation in which compliance reports are not required to be filed for any contract, subcontract, or purchase order for an amount less than $50,000 (or less than $100,000 if solely for standard commercial supplies or raw materials). See 26 Fed. Reg. 11974 (1961).

[9] Amendment to Rules & Regs., § 60-1.2(m). 26 Fed. Reg. 11974 (1961).

[10] A definition of this phrase was adopted by the Committee in amendments approved

Section 60-1.3(b)(7) provides for the withdrawal of exemptions from contracts where the Executive Vice Chairman finds that the exemption is not required by the national interest and when such action is necessary or appropriate to achieve the purpose of the Order. This permits the application of the Order to individual cases where the exemption is granted but the general rule should not properly be evadable.

However, a saving clause is provided in subsection (8) immediately following. It grants to an exempt contractor whatever exemption he is entitled to under the Order or the rules although he may have executed a contract containing the provisions of Section 301. This section was written in order to expedite the execution of contracts in situations where the right to require the Section 301 clause might be in question. As a result of this subsection, contractors may execute contracts containing this clause and investigate the question of its applicability in a more leisurely fashion.

Section 60-1.5 of the regulations relates to compliance reports. Compliance reports are required to be filed within thirty days after the award of the government contract in accordance with instructions attached to the official compliance report form. The instructions to these forms, which were issued in January 1962, provide that each prime contractor and each first-tier subcontractor subject to the order who has a contract, subcontract, or purchase order for 50,000 dollars or more (or 100,000 dollars or more if solely for standard commercial supplies and raw materials) and *who also has fifty or more employees shall file compliance reports.* The instructions contain detailed procedures governing the number of establishments for which a single report should be filed, the time of filing, and the method of submission. It should be noted that reports are required to be filed only for those establishments where work is being, or is to be, performed under any government contract during a current reporting period, and for the principal office of the company. However, this does not mean that the anti-discrimination clause is applicable only to those plants for which compliance reports are filed.[11] The compliance report form requires a somewhat detailed analysis of the

December 11, 1961, 26 Fed. Reg. 11974 (1961). This definition reads as follows:

> (n) "Standard commercial supplies" means an article:
>
> (1) Which in the normal course of business is customarily maintained in stock by the manufacturer or any dealer, distributor, or other commercial dealer for the marketing of such article; or
>
> (2) Which is manufactured and sold by two or more persons for general commercial or industrial use or which is identical in every material respect with an article so manufactured and sold.

[11] Rules & Regs., § 60-1.63(b) (1961), 26 Fed. Reg. 11974 (1961).

composition of the labor force of government contractors by occupation and grade. It also will be useful in ascertaining relative rates of mobility and to compare opportunities for training and promotion within the work force of each contractor. It is the basic tool which will be used in measuring the progress of individual contractors under the Order. At the same time, the information gained from these reports should be of the greatest interest to persons in the field of industrial relations, and also to those who may wish to study general manpower policies of the Nation.

Section 60-1.7 assures contractors and subcontractors that information obtained through compliance reports will be used only in connection with the administration of the Order.

As mentioned above, subpart B of the regulations, Sections 60-1.30 through 60-1.31, contains enforcement procedures. However, no specific attention will be devoted to this section except to point out that among other things it provides for the filing of complaints by individuals or groups of employees with the Committee or with the contracting agency. Under the provisions of Section 301, the contractor is required to comply with any order made by the Committee in connection with such complaints. In this field particularly the Committee is still uncertain of the best procedure. We believe that it is most important that our procedures in the enforcement of sanctions, in the unlikely event that such becomes necessary, should be of a character that will least inconvenience the contractor and will afford him the greatest opportunity for full and free discussion of whatever problems may be involved.

Subpart C of the regulations, commencing at Section 60-1.40, discusses Certificate of Merit. These are awarded when the Committee is satisfied that the general personnel policies of the company conform to the purposes and provisions of the Order. In addition to being awarded the Certificate of Merit, the contractor is also relieved from the necessity of filing compliance reports so long as this status is maintained.

Subpart D, beginning at Section 60-1.60, permits the use of abbreviated forms of advertisements and details government procedures where investigation is made of employment records. It also sets forth the method for requesting an exemption and provides for rulings and interpretations on points where the same may become necessary.

Particular attention should be given to the provisions which govern rulings on multi-plant situations and which permit questions generally to be submitted for clarification and determination concern-

ing the applicability of the Order to specific contracts, subcontracts, or purchase orders.[12]

Generally, the rules and regulations, as adopted by the Committee, have received a rather favorable response from business. We have made a serious effort to cut down the volume of paper work and duplication that so frequently accompanies the filing of a new reporting form. However, in this endeavor we have not been entirely successful. For example, the present regulations require the filing of a compliance report or of a statement reciting that another compliance report has been filed, identifying other contracts under which compliance reports have been filed. In a large corporation this requirement of listing contracts as at any given time may present a considerable problem. We are taking steps to correct this difficulty, but we are sure that many others will present themselves as we move along with this program.[13]

IV. Plan for Progress

Special notice should be given the program developed at the suggestion of Mr. Robert Troutman, a distinguished attorney of Atlanta, Georgia, and a member of the Committee. This program is known as the "Plan for Progress." These plans, which, on April 1, 1962, were adopted by fifty-two of the largest government contractors employing over 3,000,000 persons, are becoming a fundamental part of the Committee's continuing program. It is expected that it will come to include some of our large corporations which are not government suppliers. The Plan for Progress Program, which is entirely voluntary in nature, has been developed primarily for those companies that desire to construct a program which will perhaps be even more positive than that required by the Executive Order. Such companies may well be among the first to receive Certificates of Merit. The program is also of assistance to companies that are confronted with practical problems and would therefore benefit from the availability of a more detailed plan of procedure to aid them in attaining the full objectives of the Order.

[12] *Supra* note 11.

[13] This particular problem was remedied by amendment on December 14, 1961. Standard Form 40-A, the Certificate of Submission of Current Compliance Report, only requires that a statement be filed showing the date of filing of such report, the employer identification number under which filed, and the predominant interest agency at the time of filing of the prior report. 26 Fed. Reg. 6587 (1961). The "predominant interest agency" is that contracting agency having the largest aggregate dollar value of contracts at the time of filing the compliance report.

V. Conclusion

The program which the Executive Order attempts to carry forth is not a program of the President or of the Committee or any particular group. It is aimed at meeting a basic need of our Nation and it comes at a time which is critical in the long struggle for human liberty. As lawyers in the common-law tradition, we bear a particular responsibility for the preservation of free institutions and for the cautious improvement of existing procedures where the need has been clearly proven. I submit that the problems to which I have alluded at the outset of this Article are of such a character as to merit this type of sympathetic study and re-examination. They bear a relationship to our total posture as a Nation and cannot be remedied without the help of our leadership. It is my hope, and indeed my fervent belief, that as we go forward on this task, we will do so with the understanding and support of the American Bar.