

White House Takes On Diversity in the Government Workplace, Hiring/Appt. Discrimination Complaints Rise

By Mathew B. Tully

Diversifying the federal workforce remains a work in progress. This point is evidenced by the Executive Order signed by President Barack Obama on August 18, 2011 (“EO 13583”). This EO is one of many passed by various presidents in recent years in an effort to prod federal agencies into diversifying their ranks. While this order certainly reemphasizes federal agencies’ obligations to promote a diverse workplace, it will not, on its own, do away with discriminatory practices within the government. Federal agencies are stubborn creatures and are long set in their ways. As such, it will take some time to see any tangible results from this newly-enacted mandate.

In short, EO 13583 requires the Office of Personnel Management (OPM) and Office of Management and Budget (OMB) to work with the President’s Management Council (PMC) and Equal Employment Opportunity Commission (EEOC)

in developing a government-wide plan for improving diversity and inclusion in the federal workforce. The collaboration of these four, powerful agencies is intended to provide the most comprehensive and effective plan to eliminate obstacles that have long-stood in the way of a diversified federal workplace.

The president’s order requires that a government-wide plan be developed and issued within 90 days. Because the barriers to equal employment opportunity

are ever-changing, the order requires that the government also update the plan at least every four years. Additionally, OPM and OMB are required to publish guidance instructing individual federal agencies as to how to develop and implement plans that will address agency-specific issues and goals. Finally, within 120 days of issuance of the government-wide initiative, each agency must develop its own specially-tailored plan to promote and retain a diverse workforce.

This is not the first executive order aimed at promoting diversity and inclusion in the workplace. Indeed, many prior executive orders – dating back to the Clinton administration – have sought to “make the Federal workplace look like America” by enhancing recruitment and career development with respect to Hispanic-Americans, veterans and disabled individuals. In addition to these prior executive orders, there are also many federal laws prohibiting discriminatory hiring and employment decisions based on race

, color

, religion

, sex

or national origin

(the Title VII of the Civil Rights Act of 1964), age

(the Age Discrimination in Employment Act of 1967) and disability

(the Rehabilitation Act of 1973).

What Current and Prospective Federal Employees Need to Know:

Current and prospective federal employees have a 45 day window to contact an EEO counselor after being subjected to hiring or promotion discrimination;

If the current or prospective employee's complaint cannot be resolved through arbitration or by an EEOC

counselor, he or she will have 15 days to file a lawsuit against the discriminating agency after receiving a Notice of Right to File a Discrimination Complaint.

Federal employers charged with hiring discrimination usually provide nondiscriminatory explanations for why they hired or promoted one individual over another.

For example, an agency might say that the individual who was hired or promoted is more qualified than the plaintiff and ask the court to grant a summary judgment dismissing the employee's discrimination suit.

In order to defeat summary judgment, the aggrieved employee must produce enough evidence to convince the court that the employer's asserted non-discriminatory reason was "pretextual," or not the actual reason for its decision and that the employer intentionally discriminated against the plaintiff on a prohibited basis. (*Adeyemi v. District of Columbia*

).

This could be achieved by showing how the plaintiff's qualifications were superior to the hired individual, but the qualifications gap must be "great enough to be inherently indicative of discrimination." (*Jackson v. Gonzales*

).

The D.C. Circuit Court of Appeals recently ruled that a federal employee's hiring discrimination complaint may defeat summary judgment if a hiring official provides conflicting nondiscriminatory reasons (i.e. lies) for non-selection, is ignorant of the plaintiff's qualifications and works at an agency with a history of discrimination. (*Colbert v. Tapella, U.S. Government Printing Office*

).

Current or prospective federal employees who believe that they were not hired or not promoted for discriminatory reasons should immediately contact a federal sector employment law

attorney who will aggressively defend their right to access the privileges of federal employment, free from discrimination.

