



TRANSMITTAL

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Federal Contract Compliance Programs
Washington, D.C. 20210

NUMBER: 260

DATE: September 13, 2002

ADM Notice/Separate Facility
Exemptions/Waivers

1. **SUBJECT**: Separate Facility Exemptions/Waivers
2. **PURPOSE**: To identify the factors that will be considered by the Deputy Assistant Secretary when deciding whether to grant separate facility exemptions/waivers from the requirements of Executive Order 11246 and the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and the procedure for considering requests for such exemptions/waivers.

3. **FILING INSTRUCTIONS**:

Holders of ADM and LEG Binders only: Insert a new tab, "Separate Facility Exemptions/Waivers", immediately after the "SEL" tab in your Administrative Practices Binder, and file this Notice behind that tab.

District and Area Office CO and EOAs Only: File this notice with the attachment behind the tab for ADM Directives in your FCCM Binder.

4. **OBSOLETE DATA**: None
5. **DISTRIBUTION**: A, B, C
6. **EXPIRATION DATE**: This Notice expires when implemented and may be discarded or retained for reference, at your option.

(signed)

9-13-02

CHARLES E. JAMES, SR.
Deputy Assistant Secretary for
Federal Contract Compliance

DATE

EMPLOYMENT STANDARDS ADMINISTRATION
U.S. DEPARTMENT OF LABOR
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS
WASHINGTON, D.C. 20210

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Exemptions/Waivers

1. **SUBJECT**: Separate Facility Exemptions/Waivers
2. **PURPOSE**: To identify the factors that will be considered by the Deputy Assistant Secretary when deciding whether to grant separate facility exemptions/waivers from the requirements of Executive Order 11246 (EO 11246) and the affirmative action provisions the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), and the procedure for considering requests for such exemptions/waivers.
3. **BACKGROUND**: The regulations implementing Executive Order 11246, and the affirmative action provisions of VEVRAA, provide for an exemption from the requirements of their laws for facilities of a contractor that are not connected to the performance of a Government contract. Specifically, the regulations implementing EO 11246 authorize the Deputy Assistant Secretary to grant an exemption for "any of the prime contractor's or subcontractor's facilities which he finds to be in all respects separate and distinct from activities of the prime contractor or subcontractor related to the performance of the contract or subcontract," provided that there is also a finding that such an exemption "will not interfere with or impede the effectuation of the order." 41 CFR 60-1.5(b)(2).

Similarly, the regulations implementing the affirmative action provisions of VEVRAA allow the Deputy Assistant Secretary to grant separate facility waivers based on the same general standards. 41 CFR 60-250.4(b)(3).

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Under both the regulations implementing EO 11246 and the affirmative action provisions of VEVRAA, the contractor is responsible for providing sufficient information for the Deputy Assistant Secretary to find that: 1) the facility for which an exemption is sought is in all respects separate and distinct from activities of the contractor related to the performance of a Government contract; and 2) such an exemption/waiver will not interfere with or impede the effectuation of EO 11246 or the affirmative action provisions of VEVRAA. This directive identifies the factors that the Deputy Assistant Secretary will consider in deciding whether the contractor has sufficiently demonstrated that it meets the general standards for a separate facility exemption/waiver under EO 11246 and the affirmative action provisions of VEVRAA.

Historically, OFCCP has narrowly interpreted the exemption and waiver provisions and has granted requests for exemptions only in rare and compelling circumstances. OFCCP intends to continue this practice when considering requests for separate facility exemptions/waivers under EO 11246 and the affirmative action provisions of VEVRAA.

4. **POLICY:** The Deputy Assistant Secretary may grant a separate facility exemption/waiver from the requirements of EO 11246 or the affirmative action provisions of VEVRAA, based on a finding that:
 - 1) the facility is in all respects separate and distinct from activities of the contractor related to the performance of its Government contract; and
 - 2) such an exemption/waiver will not interfere with or impede the effectuation of the Order or the statute.

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- (a) The Deputy Assistant Secretary's finding as to whether the facility for which an exemption/waiver is sought is separate and distinct from the performance of the contractor's Government contracts shall be based upon a consideration of the following factors:
- (i) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;
 - (ii) The extent to which the contractor derives benefits from a Government contract, directly or indirectly, at the facility to be exempted;
 - (iii) Whether any costs associated with operating the facility are charged to a Government contract;
 - (iv) Whether working at the facility for which an exemption/waiver is sought is a prerequisite for advancement in job responsibility or pay at facilities connected to a Government contract; and whether working at facilities connected to a Government contract is a prerequisite for advancement in job responsibility or pay at the facility for which an exemption/waiver is sought;
 - (v) Whether employees who normally work at the facility are required to perform work related to a Government contract at another facility;
 - (vi) Whether the facility regularly or substantially transfers employees to or from facilities at which a Government contract is performed;

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- (vii) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

Other factors could include the number of facilities connected to the contractor's Government contracts and the nature of the contractor's contractual relationship with the Government.

Example: A Government agency seeks to enter into a contract with a company that has several hundred retail stores nationwide. Employees from the company's corporate office would perform the work on the contract and the total costs of the services would not exceed \$65,000. The proposed contract would be in effect for a 6-month period. Under the regulations implementing EO 11246, the company would be required to develop and maintain written affirmative action programs for all of its establishments, including its retail stores. The company has requested an exemption from the requirement to develop and maintain written AAPs for its retail stores. In deciding whether the retail stores are separate and distinct from activities related to the proposed Government contract, the Deputy Assistant Secretary considers the total number of establishments connected with the proposed Government contract and nature of the contractual relationship.

- (b) The Deputy Assistant Secretary's finding as to whether granting the request for the separate facility exemption/waiver will interfere with or impede the effectuation of EO 11246 or the affirmative action provisions of VEVRAA shall be based upon a consideration of the following factors:

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- (i) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under federal, state, or local equal employment opportunity laws;
 - (ii) The contractor's record of compliance with Federal, State or local equal employment opportunity laws; and
 - (iii) Such other factors that the Deputy Assistant Secretary deems are necessary or appropriate for considering whether the granting of the exemption/waiver would interfere with or impede the effectuation of either the Executive Order or the affirmative action provisions of VEVRAA.
5. **PROCEDURES:** A contractor desiring a separate facility waiver/exemption must submit a written request to the Deputy Assistant Secretary. The contractor must reasonably demonstrate that its circumstances meet the standards for a separate facility exemption/waiver. OFCCP will not seek to make unduly burdensome information requests in the process of considering an exemption/waiver request. Contractors seeking such an exemption/waiver must be prepared to submit information and materials in support of the request, and that will allow the agency to understand the rationale for granting its request. Otherwise, OFCCP will deny the request.

OFCCP will act with reasonable promptness in considering a contractor's request for an exemption/waiver. Although no strict deadline can be established for OFCCP's consideration of such requests, in light of their variability, the agency will normally issue a decision within ninety (90) days of the contractor's submission of the necessary information.

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The exemption/waiver shall be conditioned upon the contractor promptly notifying OFCCP of significant changed circumstances pertaining to the work at the facility covered by a separate facility exemption/waiver and the performance of its Government Contracts. Specifically, the contractor shall advise OFCCP of significant changed circumstances relating to the factors enumerated in paragraph 4, above, and considered by the Deputy Assistant Secretary in granting the separate facility exemption/waiver. Based upon the information provided by the contractor or any other relevant information, the Deputy Assistant Secretary will determine whether the separate facility exemption/waiver should continue. The Deputy Assistant Secretary will terminate an exemption/waiver upon sixty (60) days written notice to the contractor, based on a determination that the facility no longer meets the standards for a separate facility exemption/waiver. Once the termination of the exemption/waiver is effective, OFCCP will afford the contractor 120 days to develop affirmative action programs for facilities covered by the terminated exemption.

OFCCP will require the contractor to certify in writing every three years that there has been no changed circumstances affecting the separate facility exemption/waiver.

When a facility covered by a separate facility exemption/waiver gets a Government contract, or performs work that directly contributes to the satisfaction of a Government contract, the exemption/waiver for the facility automatically terminates. The contractor shall notify OFCCP when a facility covered by a separate facility exemption/waiver gets a Government contract or when Government contract work has been shifted to the exempted facility. The contractor will have 120 days from the commencement of the Government contract work at the exempted facility to develop an affirmative action program.

(signed) Charles James

9-13-02

CHARLES E. JAMES, SR.
Deputy Assistant Secretary for
Federal Contract Compliance

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