

TITLE VII: RELATIONSHIP AND EFFECT ON EXECUTIVE ORDER NO. 11246

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With much less controversy than accompanied the passage of Title VII of the Civil Rights Act of 1964, Presidents of the United States since 1941 have issued Executive orders proscribing discrimination by employers holding government contracts.¹ Currently, the program of nondiscrimination in employment by government contractors and by contractors holding construction contracts financed with federal assistance is regulated by Executive Order No. 11246 of September 24, 1965.²

The issuance of this Executive order subsequent to the effective date of Title VII clearly demonstrates the Government's commitment to a broad-based program of equal employment opportunity.³ There is a considerable functional overlap between Executive Order No. 11246 and Title VII, but significant differences exist between the two programs in effectuating the common goal of nondiscrimination in employment practices. This paper will examine the operational functions of Executive Order No. 11246.

I. GENERAL BACKGROUND

Executive Order No. 10925 of March 6, 1961,⁴ established the President's Committee on Equal Employment Opportunity (PCEEO), an inter-agency committee composed of the heads of the principal executive departments and agencies and public members. The Committee was charged with the responsibility of carrying out the executive branch's program of nondiscrimination in government employ-

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¹ This form of control is derived from the Government's power to do business with its contractors and suppliers on its own terms. *Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940). Exec. Order No. 8802, 6 Fed. Reg. 3109 (1941), stated that employers and unions have a duty "to provide for the full and equitable participation of all workers in defense industries without discrimination because of race, creed, color or national origin." As to the constitutionality of the promulgation of a nondiscrimination clause by Executive order, see Pasley, *The Non-Discrimination Clause in Government Contracts*, 43 Va. L. Rev. 837 (1957).

² 30 Fed. Reg. 12319 (1965). The order became effective on October 24, 1965.

³ At present, contracts subject to this order cover approximately 38,000 employers and over 18,000,000 employees. Powers, *Federal Procurement and Equal Employment Opportunity*, 29 Law & Contemp. Prob. 468 (1964).

⁴ 26 Fed. Reg. 1977 (1961).

ment⁵ and in employment by government contractors and suppliers. The authority of the Committee was later extended to the employment practices of contractors and subcontractors on federally assisted construction contracts.⁶

In order to give the President's Committee a statutory basis and, more important, to enable the Committee to obtain appropriations for its work,⁷ the Administration's proposed Civil Rights Act of 1963 authorized the establishment of a committee to prevent discrimination in employment by government contractors and contractors on federally assisted programs. However, that provision of the original bill was deleted in the House Committee on the Judiciary.

The legal status of the Committee was somewhat strengthened by the Civil Rights Act of 1964.⁸ The Committee was directed by Title VII to confer with the Equal Employment Opportunity Commission (EEOC) and with state agencies, employers, employment agencies and unions subject to the title, at the direction of the President.⁹ The act also provided specific statutory support for the executive action already taken: employers filing compliance reports pursuant to the Executive order were not required to duplicate their efforts by also filing reports under Title VII.¹⁰

After the enactment of Title VII, the problem of coordinating the Government's numerous equality programs became the responsibility of Vice-President Humphrey,¹¹ who subsequently recommended to the President that operational functions be reassigned to departments and agencies with clearly defined responsibilities, as distinguished from inter-agency committees such as the PCEEO.¹²

⁵ The President's Committee on Government Employment Policy, established by Exec. Order No. 10590, 20 Fed. Reg. 409 (1955), as amended, Exec. Order No. 10722, 22 Fed. Reg. 628 (1957), was abolished and its duties transferred. Exec. Order No. 11246 subsequently transferred responsibilities for insuring nondiscrimination in federal employment to the Civil Service Commission.

⁶ Exec. Order No. 11114, 28 Fed. Reg. 6485 (1963), extended coverage to construction contracts financed with federal funds.

⁷ The President's Committee, which received no appropriation, was financed by contributions from the interested federal agencies. The authority of the Committee, while nominally great, had been weakened by its lack of a specific statutory basis. As a consequence, the President's Committee tended to emphasize voluntary compliance.

⁸ 78 Stat. 241 (1964), 42 U.S.C. § 2000e (1964) [hereinafter cited by section only].

⁹ § 716(c).

¹⁰ § 709(d).

¹¹ N.Y. Times, Dec. 11, 1964, p. 1, col. 6 (city ed.).

¹² The reassignment was intended to eliminate confusion and duplication and establish a well-defined responsibility for the basic program of discrimination in employment in the contracting agencies. Memorandum to the President from the Vice President, CCH Employment Practices Guide ¶ 16,012.50 (Sept. 24, 1965). Each agency is required to appoint a Contracts Compliance Officer who is to be subject to the immediate supervision of the head of that agency for carrying out the organization's nondiscrimination responsibilities. 41 C.F.R. § 60-1.5(b).

In a move designed to streamline enforcement procedures, President Johnson issued Executive Order No. 11246 which transferred to the Secretary of Labor the supervision of programs guaranteeing fair employment practices on the part of government contractors and contractors working on federally financed projects.¹³ The reassignment of these functions eliminated the need for the PCEEO and it was abolished on October 24, 1965. Its records and property were transferred to the Office of Federal Contract Compliance, Equal Employment Opportunity¹⁴ which was established by the Secretary of Labor to absorb the Committee's functions.¹⁵ In the interest of continuity of the program, the Secretary of Labor has provided that all rules, regulations, orders, instructions and other directives issued by the President's Committee are to remain in effect unless inconsistent with Executive Order No. 11246.¹⁶

II. COVERAGE OF EXECUTIVE ORDER NO. 11246

Generally, the Executive order is applicable to the employment practices of all government contractors, their subcontractors and vendors, and contractors and subcontractors on federally assisted construction contracts.¹⁷

Every person or company awarded a contract with the Government for supplies or services, including construction, or for the use of government property, is termed a "prime contractor" and is subject to the order.¹⁸ Coverage of prime contractors is assured by requiring all contracting agencies¹⁹ of the Government to include in every government contract²⁰—unless otherwise exempted—a so-called equal opportunity clause²¹ which prohibits employment discrimination be-

¹³ The Secretary of Labor had served as Vice-Chairman of PCEEO. § 102(b), Exec. Order No. 10925, 26 Fed. Reg. 1977 (1961). In that position he had the primary responsibility for reviewing complaints and, through the contracting agencies, insuring compliance by government contractors with nondiscrimination requirements.

¹⁴ § 403(a), Exec. Order No. 11246, 30 Fed. Reg. 12325 (1965).

¹⁵ 30 Fed. Reg. 13441 (1965).

¹⁶ And all references to the "Committee," "Chairman," "Vice-Chairman," and "Executive Vice-Chairman" in such rules, regulations, etc., are to mean the Director of the Office of Federal Contract Compliance of the United States Department of Labor. *Ibid.*

¹⁷ §§ 203, 301, 30 Fed. Reg. 12319 (1965).

¹⁸ 41 C.F.R. §§ 60-1.2(g), (h), (j), (l), as amended, 30 Fed. Reg. 13441 (1965).

¹⁹ A contracting agency is any department, agency and establishment in the executive branch, including wholly-owned government corporations. 41 C.F.R. § 60-1.2(o) (1965).

²⁰ "Government contract" is defined in 41 C.F.R. § 60-1.2 (1965). A "contract," as used in the order, is any government contract or any federally assisted construction contract. C.F.R. § 60-1.2(g) (1965). A "construction contract" includes any contract for the construction, rehabilitation, alteration, conversion, extension or repair of buildings, highways or other improvements to real property. § 302(a), Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965).

²¹ Exec. Order No. 11246, 30 Fed. Reg. 12319, 12320 (1965).

cause of race, creed, color, or national origin, and, in addition, requires certain affirmative action by the employer.²²

Subcontractors²³ who, by agreement or purchase order with the prime contractor or subcontractor, furnish services or supplies for use in the performance of a contract,²⁴ are subject to the provisions of the order unless otherwise exempted.²⁵ To insure that the provisions of the order will be binding upon each nonexempt subcontractor or vendor, government contractors are required to include the equal employment opportunity clause in every subcontract or purchase order.²⁶

The Executive order also covers construction contracts and subcontracts which are financed in whole or in part by funds obtained from the federal government.²⁷ The applicant for any grant, contract, loan, insurance or guarantee under a program of federal financial assistance must, as a condition of approval, obligate himself to incorporate the equal opportunity clause in construction contracts he awards, and to require his contractors to include the clause in their subcontracts.²⁸

While discriminatory practices of labor unions are not directly prohibited by the Executive order,²⁹ the Secretary of Labor is empowered to use his best efforts, directly or indirectly, to cause any labor union engaged in work under a government contract "to cooperate in the implementation of the purposes of this Order."³⁰ Whenever the Secretary of Labor has reason to believe that practices of the labor union violate Title VII, he may publish the name of the union,³¹ or

²² E.g., the contractor must post notices setting forth the provisions of the non-discrimination clause, and advise the union of its commitments under the Executive order.

²³ The Regulations designated two types of subcontractors. A "first-tier subcontractor" is one holding a subcontract with the prime contractor. A "second-tier subcontractor" holds a subcontract with the first-tier subcontractor. 41 C.F.R. § 60-1.2(m) (1965).

²⁴ See note 20 *supra*.

²⁵ § 202(7), Exec. Order No. 11246, 30 Fed. Reg. 12320 (1965). A "material" part of the supplies or services must be used in the performance of a contract for the subcontractor to be covered. 41 C.F.R. § 60-1.2(k) (1965).

²⁶ § 202(7), Exec. Order No. 11246, 30 Fed. Reg. 12320 (1965). A first-tier subcontractor must include the clause in agreements with nonexempt second-tier subcontractors. 41 C.F.R. § 60-1.3(c) (1965). Subcontracts may incorporate by reference the provisions of the equal opportunity clause. *Ibid*.

²⁷ § 301, Exec. Order No. 11246, 30 C.F.R. 12319 (1965). "Federally assisted construction contract" is defined in 41 C.F.R. § 60-1.2(i) (1965).

²⁸ 41 C.F.R. § 60-1.3(b) (1965).

²⁹ However, the definition of a "subcontractor" holding a "subcontract" appears broad enough to include some arrangement whereby a union furnishes workers to a contractor for use in the performance of a nonexempt contract. See 41 C.F.R. §§ 60-1.2(k), (m) (1965). This exclusion contrasts with the provisions of Title VII, §§ 701(e), 704, which prohibit certain discriminatory practices of covered labor organizations.

³⁰ § 207, Exec. Order No. 11246, 30 Fed. Reg. 12322 (1965).

³¹ § 209(a)(1), Exec. Order No. 11246, 30 Fed. Reg. 12322 (1965).

notify the EEOC, the Department of Justice or other appropriate federal agency of the alleged violation.³²

Employment agencies, in contrast to their coverage under Title VII,³³ are not specifically subject to the Executive order unless they happen to qualify as nonexempt subcontractors. They are subject, however, to the same indirect pressures applied to labor unions, if the Secretary of Labor has reason to believe that the practices of any such agency violate Title VII.³⁴

III. QUALIFICATIONS AND EXEMPTIONS

The Secretary of Labor is authorized to grant certain exemptions from the coverage of the Executive order.³⁵ Generally, the exemptions apply equally to government contractors, subcontractors and contractors on federally assisted construction projects. The major exception to this general rule relates to subcontracts below the second tier involving on-site construction work.

When special circumstances in the national interest so require, a government contracting agency may be exempted from including any or all of the provisions of the equal opportunity clause in any specific contract, subcontract or purchase order.³⁶ Other exemptions from coverage made by rules and regulations implementing the Executive order are as follows: (1) Contracts and subcontracts under which work is performed outside the United States and under which no recruitment of workers in the United States is included;³⁷ (2) contracts and subcontracts not exceeding \$100,000 for standard commercial supplies or raw materials;³⁸ (3) contracts and subcontracts not exceeding \$10,000, other than government bills of lading;³⁹

³² § 207, Exec. Order No. 11246, 30 Fed. Reg. 12322 (1965).

³³ §§ 701(c), 703(b).

³⁴ See §§ 207, 209(a)(1), Exec. Order No. 11246, 30 Fed. Reg. 12322 (1965). In addition, an agency supervising apprenticeship or training for or in the course of work on a government contract is subject to regulations prohibiting nondiscrimination in apprenticeship and training. See 29 C.F.R. § 30; 40 C.F.R. § 80, as amended, 30 Fed. Reg. 13441 (1965).

³⁵ § 204, Exec. Order No. 11246, 30 Fed. Reg. 12321 (1965).

³⁶ This exemption may also be granted to groups or categories of contracts of the same type where administrative convenience dictates. 41 C.F.R. § 60-1.4(b)(1) (1965).

³⁷ To the extent that work pursuant to such contracts is done within the United States, the equal opportunity clause is applicable. 41 C.F.R. § 60-1.4(a)(3) (1965).

³⁸ The Secretary of Labor may, if he finds it necessary or appropriate to achieve the purposes of the order, withdraw the exemption in whole or in part with regard to any specific articles or raw materials. In addition, no agency, contractor or subcontractor is permitted to procure supplies in less than usual quantities to avoid the application of the equal opportunity clause. 41 C.F.R. § 60-1.4(a)(2) (1965). "Standard commercial supplies" are defined in the regulations, 41 C.F.R. § 60-1.2(u) (1965), as items customarily in stock or fungible articles manufactured by two or more persons. Public utility services have not been considered standard commercial supplies.

³⁹ In any federally assisted construction contract or subcontract, this dollar limitation is governed, not by the amount of federal financial assistance, but by the amount

(4) except for subcontracts for on-site construction work, subcontracts below the second tier are exempt;⁴⁰ (5) contracts for the sale of government real and personal property, provided no appreciable amount of work is involved on the property;⁴¹ (6) contracts and subcontracts for an indefinite quantity;⁴² and (7) the Secretary of Labor may exempt facilities of a contractor or subcontractor which are separate and distinct from those related to the performance of a non-exempt contract.⁴³ Periodic review of this exemption and of exemptions granted in the national interest are provided for in the Regulations.⁴⁴ The exemption granted to a class of contracts and subcontracts may be withdrawn for a specific contract or group of contracts to achieve the purposes of the order.⁴⁵

If a contractor or subcontractor is, in fact, exempt from coverage, he is not obliged to comply with an equal opportunity clause included in his contract or subcontract.⁴⁶ However, exempt contractors and subcontractors must still comply with the requirements of Title VII, if they qualify as employers within the meaning of sections 701(b), (g) and (h) of the Civil Rights Act. Conversely, because of the three-year gradual inclusion provision of Title VII and the act's nonapplication to employers with fewer than twenty-five employees,⁴⁷ contractors and subcontractors not now covered by the act may still be subject to the prohibitions of the Executive order.

IV. PRACTICES PROHIBITED

Contractors and subcontractors covered by the Executive order are prohibited from discriminating against an employee or applicant with respect to employment decisions.⁴⁸ Upgrading, demotion or trans-

of the construction contract or subcontract. 41 C.F.R. § 60-1.4(a)(1) (1965). Government bills of lading may incorporate by reference the equal opportunity clause. 41 C.F.R. § 60-1.3(a) (1965).

⁴⁰ 41 C.F.R. § 60-1.3(c) (1965).

⁴¹ *Ibid.* This reflects the common-sense policy of granting exemptions to contracts not involving the employment of labor.

⁴² Contracts and subcontracts which are not to extend for more than one year are exempt if the purchaser determines that the amounts ordered are not reasonably expected to exceed the appropriate dollar limitations. Where the contract extends for more than one year or continues indefinitely, the equal opportunity clause must be included unless the purchaser knows in advance that the amounts to be ordered in any year will not exceed the appropriate dollar amount exemption. 41 C.F.R. § 60-1.4(a)(5) (1965).

⁴³ This exemption will be granted only if it does not interfere with or impede the effectuation of the order. 41 C.F.R. § 60-1.4(b)(2) (1965).

⁴⁴ 41 C.F.R. § 60-1.4(b)(3) (1965).

⁴⁵ However, the withdrawal of the exemption does not apply to contracts or subcontracts entered into prior to the effective date of the withdrawal. 41 C.F.R. § 60-1.4(d) (1965).

⁴⁶ 41 C.F.R. § 60-1.4(c) (1965).

⁴⁷ § 701(b).

⁴⁸ § 202(1), Exec. Order No. 11246, 30 Fed. Reg. 12320 (1965). Labor organizations

fer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, selection for training (including apprenticeship),⁴⁹ or any other personnel action adversely affecting an individual must be made without regard to the individual's race, creed, color or national origin.⁵⁰ There are no qualifications applied to these broad prohibitions.⁵¹

Enforcement of the equal opportunity clause will necessarily require the Secretary of Labor (or the contracting agency) to determine the particular meaning, in specific circumstances, of the contractual obligation of the employer not to so discriminate. Presumably, such determination will draw upon the interpretations and decisions issued under Title VII of the Civil Rights Act.

Executive Order No. 11141 prohibits discrimination in employment by government contractors and subcontractors on the basis of the age of the employee or applicant for employment,⁵² absent a bona fide occupational qualification, retirement plan, or statutory requirement. But the order provides no method for the enforcement of this policy. Similarly, an individual aggrieved because of age discrimination is afforded no relief under either Executive Order No. 11246 or Title VII.

The Executive order imposes an affirmative duty on the non-exempt employer to give wide publicity to the nondiscrimination requirements of the equal opportunity clause. In all advertisements and solicitations for employees, the employer is required to state that consideration for employment will be made without regard to race, creed, color or national origin.⁵³ Nonexempt employers must also display equal opportunity posters, provide notices to labor unions with which they have collective bargaining agreements of their commit-

and employment agencies within the scope of Title VII are also prohibited from discriminating on the grounds of sex or because of an individual's opposition to prohibited discriminatory practices or his participation in the enforcement of the Title. § 704.

⁴⁹ See note 34 *supra*.

⁵⁰ § 202(1), Exec. Order No. 11246, 30 Fed. Reg. 12320 (1965).

⁵¹ In contrast, Title VII provides that discrimination on the grounds of religion, sex or national origin is not prohibited when these are bona fide occupational qualifications. § 703(e)(1). Also exempted are employment practices that are pursuant to a bona fide merit or seniority system. § 703(h).

⁵² 29 Fed. Reg. 2477 (1964). Neither Executive Order No. 11246 nor Title VII prohibit discrimination on account of age. However, pursuant to § 715 of Title VII, the Secretary of Labor has submitted a study on employment of older workers together with certain recommendations to eliminate age discrimination in employment.

⁵³ Alternative methods for satisfying this requirement are permitted. 41 C.F.R. § 60-80.1 (1965). If the solicitation is placed in a Help Wanted—Female advertisement, however, the employer might well be in violation of Title VII. See EEOC General Counsel Opinion Letter 159-65, Oct. 1, 1965, CCH Employment Practices Guide 17, 251.041.

ments under the contract clause⁵⁴ and, as noted above, include the equal opportunity clause in their subcontracts.

V. REPORTING AND DISCLOSURE REQUIREMENTS

1. *Compliance Reports.*—An important feature of the Executive order is the requirement that nonexempt contractors and subcontractors file periodic Compliance Reports with the particular contracting agency.⁵⁵ Prospective contractors, subcontractors and bidders may also be required to file Compliance Reports prior to the award of a government contract or subcontract.⁵⁶ Contractors and subcontractors subject to the Executive order, with contracts of \$50,000 or more and employing fifty or more workers must, after submitting an initial report, file subsequent reports within thirty days after the award of a contract, and thereafter on March 31 of each year in which the contract is being performed.

The Compliance Reports are designed to provide information of employment patterns and policies within detailed geographical areas and industry groups, as well as within a particular company. The employer must report the existence *vel non* of company-wide employment practices and policies that insure equal employment opportunity. In addition, the employer must report on the statistical composition of its work force with regard to sex, color and national origin in nine classified occupations, apprenticeship programs and on-the-job training programs. The contractor must also include in its report information as to its labor unions' practices and policies affecting the contractor's compliance with the nondiscrimination provisions. If the information is within the exclusive possession of a labor union which refuses to furnish it to a contractor, the contractor is required to so certify in its Compliance Report and set forth its efforts to obtain such information.⁵⁷

The reports will provide a systematic means of evaluating and comparing the status of a contractor's minority-group employees and, over a period of time, should afford a positive method for measuring progress in the direction of equal opportunity. The information contained in the Compliance Report can only be used in the administra-

⁵⁴ The union notification is made on Form 38 supplied by the Office of Federal Contract Compliance, Equal Employment Opportunity. This notice must also be displayed at conspicuous places available to employees and applicants for employment.

⁵⁵ § 203, Exec. Order No. 11246, 30 Fed. Reg. 12320 (1965); 41 C.F.R. § 60-1.6 (1965). There are separate Compliance Report forms for non-construction employers (Forms 40 and 40-A) and for employers on construction sites (Form 41). Each form contains precise instructions for the preparation and filing of the report.

⁵⁶ 41 C.F.R. § 60-1.6(b)(1) (1965).

⁵⁷ 41 C.F.R. § 60-1.6(b)(2) (1965). Section 60-1.7 of the Regulations provides for indirect pressures to force the union's compliance, including the use of public hearings or notifications of any federal, state or local agency of the union's failure to cooperate.

tion of the order or in furtherance of its purposes.⁵⁸ Thus, the reports could become the basis for civil actions instituted by the United States Attorney General under Section 707(a) of the Civil Rights Act of 1964.

Employers covered by both Title VII and the Executive order are not subject to the record keeping or reporting requirements of Section 709(c) of the Civil Rights Act if they are submitting Compliance Reports. However, the failure to file accurate and timely Compliance Reports is a ground for the imposition of any sanction available under the Executive order.⁵⁹

2. *Plans for Progress.*—The Executive order directs the Secretary of Labor to provide administrative support for the execution of the "Plans for Progress" program.⁶⁰ While these plans vary from company to company, they contain numerous similarities with respect to recruitment of qualified minority-group candidates for professional, technical and administrative jobs; publicity of its non-discrimination policy to college placement officials and employment offices; and effective utilization of the potential of all its employees.

The Plans for Progress program has been criticized on the ground that a participating company does not commit itself to do anything that it is not already obligated to do under the Executive order. Since the passing of Title VII, the criticism is perhaps more valid. However, the chief value of these long-range undertakings is that they publicly demonstrate the leadership of many of the nation's largest industrial concerns in the program of equal employment opportunity.

3. *Certificates of Merit.*—Employers and labor unions who conform to the purposes and provisions of the Executive order on non-discrimination may be awarded a United States Certificate of Merit.⁶¹ While no substantive benefits derive from the award, issuance of a certificate does provide some public relations value to image-conscious organizations.

VI. SANCTIONS AND PENALTIES

The available penalties for an employer who does not comply with the equal opportunity clause can be divided into economic penalties and referral penalties. The first group consists of: (1) Publishing the names of noncomplying employers; (2) cancelling, suspending or terminating nonexempt contracts; and (3) forbidding all government agencies to enter into future contracts with a noncomplying employer.

⁵⁸ The reports will constitute evidence whether for or against the employer in actions under the order or under Title VII.

⁵⁹ 41 C.F.R. § 60-1.6(a)(4) (1965). Each nonexempt contractor and subcontractor is also responsible for causing their nonexempt subcontractors to file compliance reports.

⁶⁰ § 402, Exec. Order No. 11246, 30 Fed. Reg. 12325 (1965).

⁶¹ 41 C.F.R. § 60-1.40 (1965).

The second group of penalties include: (1) Recommending suits by the Justice Department to compel compliance; (2) recommending criminal action by the Justice Department for the furnishing of false information; and (3) recommending to the EEOC or the Justice Department that proceedings be instituted under Title VII.⁶²

The prospect of voluntary corrective action by a noncomplying employer is enhanced by the availability of the economic sanctions. In contrast, demands for voluntary compliance made by the EEOC under Title VII provide no similar economic motivation for an employer. However, the lack of any individual affirmative relief under the order makes recourse to Title VII procedures more attractive.

VII. ENFORCEMENT METHODS AND PROCEDURE

Enforcement of the order begins with giving wide publicity to the nondiscrimination requirements in notices to employees and labor unions, in statements in help-wanted advertising and by inclusion of the equal opportunity clause in subcontracts. This publicity not only informs employees and applicants for employment of their rights, but it also may generate complaints of discriminatory treatment.

While the Secretary of Labor receives and processes individual complaints, he is not limited to complaint-centered enforcement but may investigate patterns of discrimination, apparent racial or religious imbalances and other employment practices of nonexempt employers.⁶³ Together with the availability of economic sanctions, the Secretary's power to detect and prevent discrimination is stronger within his jurisdiction than that exercised by the EEOC under Title VII. In large measure, the strength of his economic "bargaining power," and not the threat of referral to the Commission, provides the foundation and support for the enforcement procedure.

1. *Complaint Procedure.*—When any employee or applicant for employment believes himself to be aggrieved under the equal opportunity clause, he (or his representative) may file a complaint with the contracting agency or the Secretary of Labor within ninety days of the alleged discrimination.⁶⁴ The right of an individual to file a complaint is of small worth to the discriminatee for the Executive order does not provide for hiring, reinstatement, upgrading or back pay.

2. *Investigation Procedure.*—Investigations of alleged discrimination may be conducted by the contracting agency or by the Sec-

⁶² § 209, Exec. Order No. 11246, 30 Fed. Reg. 12322 (1965).

⁶³ § 206, Exec. Order No. 11246, 30 Fed. Reg. 12321 (1965).

⁶⁴ 41 C.F.R. §§ 60-1.21, .22 (1965). The Secretary of Labor may refer complaints to the contracting agency. When a complaint is filed against a contractor or subcontractor who has contracts involving more than one agency, the agency having the predominant interest (i.e., the largest amount of money involved in the contracts) will normally conduct the investigation.

retary of Labor. The employer is required to permit access to his books, records and accounts during investigation of its compliance with the equal opportunity clause.

A prompt investigation is conducted by the contracting agency when an individual complaint is filed with it or referred to it by the Secretary of Labor. The investigation is not limited to the circumstances under which the alleged individual discrimination occurred. Thus, an individual complaint can result in a complete evaluation of the employer's minority-group employment practices.

When, through a compliance review,⁶⁵ a possible violation of the equal opportunity clause is indicated, an investigation can also be conducted. The contracting agency conducts a "routine compliance review" as a normal part of contract administration. It consists of a general review of employment practices of the contractor or subcontractor. A "special compliance review" may be conducted by either the contracting agency or the Secretary of Labor. If the reports indicate unsatisfactory compliance with the contract provisions, the special compliance review may be utilized to investigate the minority-group employment practices of the contractor or subcontractor. While these review procedures appear well-suited to uncover a pattern or practice of discrimination in employment, they are of little value in cases involving individual discrimination.

3. *Post-Investigation Procedure.*—Within sixty days after the receipt of a complaint, the agency must submit to the Secretary of Labor a case record and a summary report of its findings, orders and/or recommended action. No time limit is set for the submission of a report involving an agency-initiated investigation. If the agency's investigation of an individual's complaint shows no violation, the Secretary of Labor is so advised. If, after review of the case record, he concurs, the parties are notified that the case is closed. If he does not concur, the case may be remanded to the agency or investigated by the Secretary of Labor.

If the investigation of an individual complaint or an agency-initiated review indicates an apparent violation, the agency seeks voluntary compliance by informal means. For the individual discriminatee, specific affirmative relief, including employment, reinstatement, etc., could well be obtained at this informal stage in the proceedings. The threat of imposition of sanctions upon a contractor may prove an effective method of supplying relief to an individual employee or applicant for employment.

In cases involving widespread violations of the equal employment

⁶⁵ Compliance reviews are conducted by an agency to ascertain the extent to which the order is being implemented by the creation of equal employment opportunities for all qualified persons. 41 C.F.R. § 60-1.20 (1965).

clause, the informal compliance procedure—used in combination with the threatened imposition of economic sanctions—could lead to voluntary progress in the direction of equal opportunity. Where the matter is not resolved in this fashion, the agency may issue orders or recommendations with or without a hearing.⁶⁶

4. *Hearing Procedure.*—The contractor must be afforded an opportunity for a hearing before referral of a case to the Justice Department, before cancellation or termination of a contract, and before debarment from federal contracts. In addition, when a contractor has complied with the recommendations of an agency without a hearing, he will, by filing a request for review within ten days of such compliance, be afforded a hearing to review the alleged erroneous action by the agency.⁶⁷ The hearings are informally conducted, but each party has the right to counsel and “a fair opportunity to present his case or his defense including such cross-examination as may be appropriate in the circumstances.”⁶⁸

In cases involving contract debarment or referral to the Justice Department, a notification of such proposed determination is issued to the contractor or subcontractor. Unless a request for hearing is made within ten days thereafter, the appropriate order is entered. If a hearing is conducted upon request, no decision by the contracting agency is final without prior approval of the Secretary of Labor. Even after the decision, the contractor or subcontractor is afforded ten days in which to achieve compliance with the provisions of the order before referral or debarment is carried out.⁶⁹

In contrast to the method of enforcement under Title VII,⁷⁰ the enforcement procedures contemplated by the Executive order provide a quicker and more informal method for securing compliance with the equal opportunity clause.

⁶⁶ 41 C.F.R. § 1.24 (1965).

⁶⁷ 41 C.F.R. § 1.24(b)(3) (1965).

⁶⁸ 41 C.F.R. § 60-1.27(a)(2) (1965).

⁶⁹ 41 C.F.R. § 60-1.28 (1965). Ineligible contractors and subcontractors may be reinstated if they can show an acceptable program of compliance. 41 C.F.R. § 60-1.31 (1965). A contractor dissatisfied with debarment after a hearing could probably seek injunctive or declaratory relief. See *Cooper Plumbing & Heating Co. v. Campbell*, 290 F.2d 368 (D.C. Cir. 1961); *Schlesinger v. Gates*, 249 F.2d 111 (D.C. Cir. 1957); Comment, *The Blacklisted Contractor and the Question of Standing to Sue*, 56 Nw. U.L. Rev. 811 (1962).

⁷⁰ Title VII provides the following procedures in the standard case: (1) State or local action if state law proscribes the alleged discriminatory activity; (2) filing of charges with the EEOC if no state law applies, if state proceedings have terminated or if sixty days have elapsed since the commencement of state proceedings; (3) a thirty-day period during which the Commission attempts to secure voluntary compliance with the act; and (4) commencement of injunctive proceedings in a federal district court by the aggrieved party. §§ 706(a)-(f).

VIII. CONCLUSION

Executive Order No. 11246 provides both a separate and a complementary method of securing equal employment opportunity. Although the extent of the order's coverage is not as wide as that provided by Title VII, the Secretary of Labor has broader powers to detect and prevent discrimination in employment practices.

The sanction upon which enforcement of the order ultimately depends is the power of the Secretary of Labor to compel compliance by use of the threat of debarment. This economic sanction is a more direct remedy than any relief offered by the provisions of Title VII. However, the power of referral does point up the efforts being made to coordinate enforcement of equal employment policies with other federal agencies.

In the areas of its concurrent jurisdiction with Title VII, the Executive order provides the more attractive forum for both class relief and individual complaints. It should continue to share the major responsibility for effectuating the policy of nondiscrimination in employment.