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05/25/2007

1       **AN ACT** *to amend* 16.765 (1) of the statutes; **relating to:** affirmative action  
 2                   requirements applicable to state contracting.

*The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:*

**JOINT LEGISLATIVE COUNCIL PREFATORY NOTE:** This draft was prepared for the joint legislative council’s special committee on affirmative action. Wisconsin law currently requires businesses that contract with the State of Wisconsin or any agency of the state to take affirmative action to ensure equal employment opportunities for their employees. The specific requirements for affirmative action are set forth in department of administration (DOA) rules (ch. Adm. 50) and DOA policy.

Federal law likewise requires businesses that contract with the federal government to take affirmative action with regard to their employees. Different requirements apply for supply and service contractors and for construction contractors. The requirements that apply to federal supply and service contractors are set forth at 41 CFR ss. 60–2.10 to 60–2.17.

This draft amends Wisconsin statutes pertaining to the affirmative action that must be undertaken by state contractors by creating a cross–reference to federal affirmative action requirements that apply to supply and service contractors. As a result, the affirmative action requirements for businesses that contract with the State of Wisconsin would be the same as those that apply to businesses that contract with the federal government for supplies and services.

Set forth below, for purposes of comparison, are the substantive provisions of current Wisconsin affirmative action law (set forth in the Wisconsin Administrative Code at ch. Adm. 50) along with the provisions of federal law that would replace those provisions under the draft.

**PURPOSE AND CONTENTS OF AFFIRMATIVE ACTION PLANS; DOCUMENTATION**

**Wisconsin Law**

**Adm 50.02 Purpose.** The purpose of this chapter is to:

- (1) Aid state agencies and contractors in implementing equal employment opportunity and affirmative action practices; and

(2) Encourage and foster to the fullest extent practicable the employment of all properly qualified persons regardless of their age, race, religion, color, handicap, sex, physical condition, developmental disability, sexual orientation, as defined in s. 111.32 (13m), stats., or national origin.

**Federal Law**

**Section 60-2.10 General purpose and contents of affirmative action programs.**

(a) Purpose. (1) An affirmative action program is a management tool designed to ensure equal employment opportunity. A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects. Affirmative action programs contain a diagnostic component which includes a number of quantitative analyses designed to evaluate the composition of the workforce of the contractor and compare it to the composition of the relevant labor pools. Affirmative action programs also include action--oriented programs. If women and minorities are not being employed at a rate to be expected given their availability in the relevant labor pool, the contractor's affirmative action program includes specific practical steps designed to address this underutilization. Effective affirmative action programs also include internal auditing and reporting systems as a means of measuring the contractor's progress toward achieving the workforce that would be expected in the absence of discrimination.

(2) An affirmative action program also ensures equal employment opportunity by institutionalizing the contractor's commitment to equality in every aspect of the employment process. Therefore, as part of its affirmative action program, a contractor monitors and examines its employment decisions and compensation systems to evaluate the impact of those systems on women and minorities.

(3) An affirmative action program is, thus, more than a paperwork exercise. An affirmative action program includes those policies, practices, and procedures that the contractor implements to ensure that all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment. Affirmative action, ideally, is a part of the way the contractor regularly conducts its business. Office of Federal Contract Compliance Programs (OFCCP) has found that when an affirmative action program is approached from this perspective, as a powerful management tool, there is a positive correlation between the presence of affirmative action and the absence of discrimination.

(b) Contents of affirmative action programs. (1) An affirmative action program must include the following quantitative analyses:

- (i) Organizational profile -- s. 60-2.11;
- (ii) Job group analysis -- s. 60-2.12;
- (iii) Placement of incumbents in job groups -- s. 60-2.13;
- (iv) Determining availability -- s. 60-2.14;
- (v) Comparing incumbency to availability -- s. 60-2.15; and
- (vi) Placement goals -- s. 60-2.16.

(2) In addition, an affirmative action program must include the following components specified in the s. 60-2.17 of this part:

- (i) Designation of responsibility for implementation;
- (ii) Identification of problem areas;
- (iii) Action -- oriented programs; and
- (iv) Periodic internal audits.

(c) Documentation. Contractors must maintain and make available to OFCCP documentation of their compliance with ss. 60-2.11 through 60-2.17.

#### **ANALYSIS OF CURRENT AND AVAILABLE WORKFORCE**

##### **Wisconsin Law**

**Adm 50.05 (3) ANALYSIS OF WORK FORCE.** The affirmative action plan shall include an analysis of the contractor's work force by job categories and organizational units. The job categories shall be those currently in use for construction and procurement by the U.S. equal employment opportunity commission. The work force analysis shall specifically indicate for each job category the following:

- (a) Total number of employees;
- (b) Total number of males;
- (c) Total number of females;
- (d) Total number of minority males;
- (e) Total number of minority females;
- (f) Total number of handicapped.

##### **Federal Law**

**Section 60-2.11 Organizational profile.**

(a) Purpose. An organizational profile is a depiction of the staffing pattern within an establishment. It is one method contractors use to determine whether barriers to equal employment opportunity exist in their organizations. The profile provides an overview of the workforce at the establishment that may assist in identifying organizational units where women or minorities are underrepresented or concentrated. The contractor must use either the organizational display or the workforce analysis as its organizational profile:

(b) Organizational display. (1) An organizational display is a detailed graphical or tabular chart, text, spreadsheet or similar presentation of the contractor's organizational structure. The organizational display must identify each organizational unit in the establishment, and show the relationship of each organizational unit to the other organizational units in the establishment.

(2) An organizational unit is any component that is part of the contractor's corporate structure. In a more traditional organization, an organizational unit might be a department, division, section, branch, group or similar component. In a less traditional organization, an organizational unit might be a project team, job family, or similar component. The term includes an umbrella unit (such as a department) that contains a number of subordinate units, and it separately includes each of the subordinate units (such as sections or branches).

(3) For each organizational unit, the organizational display must indicate the following:

(i) The name of the unit;

(ii) The job title, gender, race, and ethnicity of the unit supervisor (if the unit has a supervisor);

(iii) The total number of male and female incumbents; and

(iv) the total number of male and female incumbents in each of the following groups: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives.

(c) Workforce analysis. (1) A workforce analysis is a listing of each job title as appears in applicable collective bargaining agreements or payroll records ranked from the lowest paid to the highest paid within each department or other similar organizational unit including departmental or unit supervision.

(2) If there are separate work units or lines of progression within a department, a separate list must be provided for each such work unit, or

line, including unit supervisors. For lines of progression there must be indicated the order of jobs in the line through which an employee could move to the top of the line.

(3) Where there are no formal progression lines or usual promotional sequences, job titles should be listed by department, job families, or disciplines, in order of wage rates or salary ranges.

(4) For each job title, the total number of incumbents, the total number of male and female incumbents, and the total number of male and female incumbents in each of the following groups must be given: Blacks, Hispanics, Asians/Pacific Islanders, and American Indians/Alaskan Natives. The wage rate or salary range for each job title must be given. All job titles, including all managerial job titles, must be listed.

#### **Section 60-2.12 Job group analysis.**

(a) Purpose: A job group analysis is a method of combining job titles within the contractor's establishment. This is the first step in the contractor's comparison of the representation of minorities and women in its workforce with the estimated availability of minorities and women qualified to be employed.

(b) In the job group analysis, jobs at the establishment with similar content, wage rates, and opportunities, must be combined to form job groups. Similarity of content refers to the duties and responsibilities of the job titles which make up the job group. Similarity of opportunities refers to training, transfers, promotions, pay, mobility, and other career enhancement opportunities offered by the jobs within the job group.

(c) The job group analysis must include a list of the job titles that comprise each job group. If, pursuant to s. 60-2.1(d) and (e) the job group analysis contains jobs that are located at another establishment, the job group analysis must be annotated to identify the actual location of those jobs. If the establishment at which the jobs actually are located maintains an affirmative action program, the job group analysis of that program must be annotated to identify the program in which the jobs are included.

(d) Except as provided in s. 60-2.1(d), all jobs located at an establishment must be reported in the job group analysis of that establishment.

(e) Smaller employers: If a contractor has a total workforce of fewer than 150 employees, the contractor may prepare a job group analysis that utilizes EEO-1 categories as job groups. EEO-1 categories refers to the nine occupational groups used in the Standard Form 100, the Employer Information EEO-1 Survey: Officials and managers, professionals,

technicians, sales, office and clerical, craft workers (skilled), operatives (semiskilled), laborers (unskilled), and service workers.

**Section 60-2.13 Placement of incumbents in job groups.**

The contractor must separately state the percentage of minorities and the percentage of women it employs in each job group established pursuant to s. 60-2.12.

**ESTABLISHING GOALS**

**Wisconsin Law**

**Adm 50.03 (1) “Balanced work force”** means an equitable representation of qualified handicapped persons, minorities and women in each level of a work force which approximates the percentage of handicapped persons, minorities and women available for jobs at any particular level from the relevant labor market. For construction work, the relevant labor market consists of all craft journeypersons, all craft indentured apprentices and all qualified apprentice applicants available for employment for a specific project. Persons in the construction workforce shall be excluded from the labor market where the contractor can show that these persons are unwilling to make themselves available at the job site for employment on a regular and ongoing basis.

**Adm 50.04 Contract provisions. (1)** In addition to the requirement of s. 16.765 (2), stats., every contracting agency of the state shall include in all contracts executed by it, provisions which are in substantial conformity with the following:

(a) The contractor agrees to make every reasonable effort to develop a balance in either its total workforce or in the project-related workforce that is based on a ratio of work hours performed by handicapped persons, minorities, and women except that, if the department finds that the contractor is allocating its workforce in a manner which circumvents the intent of this chapter, the department may require the contractor to attempt to create a balance in its total workforce. The balance shall be at least proportional to the percentage of minorities and women present in the relevant labor markets based on data prepared by the department of industry, labor and human relations, the office of federal contract compliance programs or by another appropriate governmental entity. In the absence of any reliable data, the percentage for qualified handicapped persons shall be at least 2% for whom a contractor must make a reasonable accommodation.

(b) The contractor shall develop and submit to the department, within 15 working days after the commencement date set in the official notice to proceed for construction work or 15 days after the date the contract is

awarded for all other contracts, one copy of the written affirmative action plan or a copy of a current plan which has been approved by an agency of the federal, state or local government.

(c) Within 15 days after awarding each subcontract, the contractor shall submit one copy of the affirmative action plan of each subcontractor to the department.

**Adm 50.05 Affirmative action plan. (1) POLICY STATEMENT.** The affirmative action plan shall include an equal employment opportunity policy for all personnel including a statement that:

(a) The contractor shall not engage in discrimination and shall take action to achieve a balanced work force.

(b) Indicates which persons are responsible for the affirmative action program.

(c) The contractor shall comply with s. 16.765, stats., state regulations and all applicable federal contract compliance laws and shall work cooperatively with the department and other interested parties in ensuring equal employment and advancement opportunities.

**Adm 50.05 (4) GOALS AND OBJECTIVES.** The affirmative action plan shall include goals directed toward the achievement of a balanced work force within a reasonable period of time. A reasonable period shall normally be in the range of 6 months to no more than 2 years. Previous affirmative action plans submitted to the department under other contracts shall be considered in determining a reasonable period.

### **Federal Law**

#### **Section 60-2.14 Determining availability.**

(a) Purpose: Availability is an estimate of the number of qualified minorities or women available for employment in a given job group, expressed as a percentage of all qualified persons available for employment in the job group. The purpose of the availability determination is to establish a benchmark against which the demographic composition of the contractor's incumbent workforce can be compared in order to determine whether barriers to equal employment opportunity may exist within particular job groups.

(b) The contractor must separately determine the availability of minorities and women for each job group.

(c) In determining availability, the contractor must consider at least the following factors:

(1) The percentage of minorities or women with requisite skills in the reasonable recruitment area. The reasonable recruitment area is defined as the geographical area from which the contractor usually seeks or reasonably could seek workers to fill the positions in question.

(2) The percentage of minorities or women among those promotable, transferable, and trainable within the contractor's organization. Trainable refers to those employees within the contractor's organization who could, with appropriate training which the contractor is reasonably able to provide, become promotable or transferable during the AAP year.

(d) The contractor must use the most current and discrete statistical information available to derive availability figures. Examples of such information include census data, data from local job service offices, and data from colleges or other training institutions.

(e) The contractor may not draw its reasonable recruitment area in such a way as to have the effect of excluding minorities or women. For each job group, the reasonable recruitment area must be identified, with a brief explanation of the rationale for selection of that recruitment area.

(f) The contractor may not define the pool of promotable, transferable, and trainable employees in such a way as to have the effect of excluding minorities or women. For each job group, the pool of promotable, transferable, and trainable employees must be identified with a brief explanation of the rationale for the selection of that pool.

(g) Where a job group is composed of job titles with different availability rates, a composite availability figure for the job group must be calculated. The contractor must separately determine the availability for each job title within the job group and must determine the proportion of job group incumbents employed in each job title. The contractor must weight the availability for each job title by the proportion of job group incumbents employed in that job group. The sum of the weighted availability estimates for all job titles in the job group must be the composite availability for the job group.

**Section 60-2.15 Comparing incumbency to availability.**

(a) The contractor must compare the percentage of minorities and women in each job group determined pursuant to s. 60-2.13 with the availability for those job groups determined pursuant to s. 60-2.14.

(b) When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with s. 60-2.16.

**Section 60-2.16 Placement goals.**

(a) Purpose: Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Placement goals also are used to measure progress toward achieving equal employment opportunity.

(b) A contractor's determination under § 60-2.15 that a placement goal is required constitutes neither a finding nor an admission of discrimination.

(c) Where, pursuant to § 60-2.15, a contractor is required to establish a placement goal for a particular job group, the contractor must establish a percentage annual placement goal at least equal to the availability figure derived for women or minorities, as appropriate, for that job group.

(d) The placement goal-setting process described above contemplates that contractors will, where required, establish a single goal for all minorities. In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, a contractor may be required to establish separate goals for those groups.

(e) In establishing placement goals, the following principles also apply:

(1) Placement goals may not be rigid and inflexible quotas, which must be met, nor are they to be considered as either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(2) In all employment decisions, the contractor must make selections in a nondiscriminatory manner. Placement goals do not provide the contractor with a justification to extend a preference to any individual, select an individual, or adversely affect an individual's employment status, on the basis of that person's race, color, religion, sex, or national origin.

(3) Placement goals do not create set-asides for specific groups, nor are they intended to achieve proportional representation or equal results.

(4) Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations in this part do not require a contractor to hire a person who lacks qualifications to perform the job successfully, or hire a less qualified person in preference to a more qualified one.

(f) A contractor extending a publicly announced preference for American Indians as is authorized in 41 CFR 60-1.5 (a) (6) may reflect

in its placement goals the permissive employment preference for American Indians living on or near an Indian reservation.

### **MONITORING**

#### **Wisconsin Law**

(5) **MONITORING.** The affirmative action plan shall include a description of a planned internal system to monitor and evaluate regularly the results achieved by the company in the implementation of its affirmative action plan. This system will include evaluation of the results regarding minorities, women and handicapped persons including those actions taken to provide reasonable accommodation for qualified handicapped persons.

#### **Federal Law**

#### **Section 60-2.17 Additional required elements of affirmative action programs.**

In addition to the elements required by s. 60-2.10 through s. 60-2.16, an acceptable affirmative action program must include the following:

(a) Designation of responsibility. The contractor must provide for the implementation of equal employment opportunity and the affirmative action program by assigning responsibility and accountability to an official of the organization. Depending upon the size of the contractor, this may be the official's sole responsibility. He or she must have the authority, resources, support of and access to top management to ensure the effective implementation of the affirmative action program.

(b) Identification of problem areas. The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:

(1) The workforce by organizational unit and job group to determine whether there are problems of minority or female utilization (i.e., employment in the unit or group), or of minority or female distribution (i.e., placement in the different jobs within the unit or group);

(2) personnel activity (applicant flow, hires, terminations, promotions, and other personnel actions) to determine whether there are selection disparities;

(3) compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities;

(4) selection, recruitment, referral, and other personnel procedures to determine whether they result in disparities in the employment or advancement of minorities or women; and

(5) any other areas that might impact the success of the affirmative action program.

(c) Action-oriented programs. The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to s. 60-2.17 (b) and to attain established goals and objectives. In order for these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.

(d) Internal audit and reporting system. The contractor must develop and implement an auditing system that periodically measures the effectiveness of its total affirmative action program. The actions listed below are key to a successful affirmative action program:

(1) Monitor records of all personnel activity, including referrals, placements, transfers, promotions, terminations, and compensation, at all levels to ensure the nondiscriminatory policy is carried out;

(2) Require internal reporting on a scheduled basis as to the degree to which equal employment opportunity and organizational objectives are attained;

(3) Review report results with all levels of management; and

(4) Advise top management of program effectiveness and submit recommendations to improve unsatisfactory performance.

1           **SECTION 1.** 16.765 (1) of the statutes is amended to read:

2           16.765 (1) Contracting agencies, the University of Wisconsin Hospitals and Clinics  
3 Authority, the Fox River Navigational System Authority, the Wisconsin Aerospace Authority,  
4 the Health Insurance Risk-Sharing Plan Authority, and the Bradley Center Sports and  
5 Entertainment Corporation shall include in all contracts executed by them a provision  
6 obligating the contractor not to discriminate against any employee or applicant for  
7 employment because of age, race, religion, color, handicap, sex, physical condition,

1 developmental disability as defined in s. 51.01 (5), sexual orientation as defined in s. 111.32  
2 (13m), or national origin and, except with respect to sexual orientation, obligating the  
3 contractor to ~~take~~ develop and implement an affirmative action program that contains all the  
4 elements described in 41 CFR s. 60-2.10 through 60-2.17 to ensure equal employment  
5 opportunities.

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(END)