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Affirmative Action Dents the National Labor Policy

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Affirmative Action Dents the National Labor Policy†

Aims C. Coney, Jr.*

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† This article originally appeared in somewhat different form as Affirmative Action and the Employer's Counsel, in The Pittsburgh Legal Journal, February, 1971, No. 2, p. 15. The original has been revised and expanded for publication in the Duquesne Law Review. The author gratefully acknowledges the assistance of the Duquesne Law Review staff in researching parts of this article.
In this author's earlier review of Executive Order 11,246,\(^1\) published in February, 1971, it was predicted that 1971 would be the year in which affirmative action would achieve the awe and the respect of the legal profession. Among the reasons then given for the profession's expanding awareness were the following: (1) the far greater circulation of equal opportunity certification forms among government contractors and subcontractors; (2) the growing tendency of federal, state and local civil rights enforcement agencies to use affirmative action criteria in adjudicating issues of discrimination; (3) the federal government's readiness to use stop orders in the construction industry; (4) and perhaps most significant, the serious challenges of affirmative action to the Congressionally mandated national labor policy. Since February, 1971, construction industry affirmative action plans have survived concentrated attacks in two landmark cases: Contractors Association of Eastern Pennsylvania v. Sec. of Labor\(^2\) and Southern Illinois Builders Association v. Ogilvie.\(^3\)

In these cases the courts have resolved some of the conflicts and apparent irreconcilabilities noted in the earlier article in favor of the

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\(^2\) 442 F.2d 159 (3d Cir. 1971).

\(^3\) 327 F. Supp. 1154 (S.D. Ill. 1971).
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Executive Order. For the employer's counsel, accustomed to union power, the warning is that his client must now accommodate two formidable systems, the national labor policy and affirmative action. For the trade union counsel, the warning is that affirmative action threatens a period of insecurity during which many bulwarks will fall.

National labor policy for purposes of this article means the court-formulated doctrine that the National Labor Relations Act, as amended, requires the subjection to collective bargaining of a vast number of decisional processes at one time considered within the domain of management, Fibreboard Paper Products Corp. v. N. L. R. B.; Textile Workers v. Darlington Mfg. Co.; United Steelworkers v. Warrior & Gulf Navigation Co. While the national labor policy does not give unions exclusive control of matters subject to collective bargaining, the rules of the game, as grounded in legislation, rulings of the National Labor Relations Board and decisions of the federal and state courts give unions an immense probability of achieving their aims. It is the thesis of this article that in the face of the civil rights onslaught some of the doctrinal strongholds are crumbling.

Beyond the ambit of this article are actions in the federal courts under Title VII of the Civil Rights Act of 1964, in which the Justice Department or individual minority complainants have successfully shaken seniority systems, hiring halls and methods of internal union management. In the widely publicized case of United States v. Bethlehem Steel Corp., the Second Circuit Court of Appeals vastly broadened the District Court's remedial order. That order had evolved from findings that the seniority and transfer provisions of the collective bargaining agreement perpetuated the effects of years of discrimination. On authority of Title VII the Second Circuit ordered a suspension of the fragmented seniority system of departments and units. It also ordered that each minority discriminatee be granted the right to make

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4. For an extended discussion of these and other related cases see pp. 22-28 infra.
5. 29 U.S.C. § 151 et seq.
one move to a job within his qualifications in a different unit or depart-
ment with a guarantee of pay not less than that in his former job.

It is submitted that unions and their attorneys are less sensitive to the
inroads of affirmative action on the national labor policy than they are
to the inroads of Title VII suits. Yet, for reasons developed in this
article, when affirmative action in involved, the government's crunch is
speedier, more pervasive and harder for a union to defend against.15

I. INTRODUCTION TO THE EXECUTIVE ORDER

Executive Order 11,246, the central pier of affirmative action
programs, was signed on September 24, 1965. This article does not
consider Part I, dealing with non-discrimination in government em-
ployment. Its treatment is strictly limited to Part II, dealing with
non-discrimination in employment by government contractors and
subcontractors, and Part III, dealing with non-discrimination provi-
sions in federally-assisted construction contracts.

Part II consists of Sections 201 through 215.16 Section 201 lodges
administrative responsibility in the Secretary of Labor.17 Section 20218
contains the Equal Opportunity Clause to be reproduced in all
contracts between government contracting agencies and government
contractors. Section 20319 deals with compliance reports by contrac-
tors, subcontractors and unions. Section 20420 empowers the Secretary
of Labor to grant certain exemptions.

In Sections 205 through 20821 are provisions dealing with the follow-
ing: (1) coordination between the Secretary of Labor and the various
government contracting agencies; (2) investigations by the Secretary
of Labor on his own initiative or on complaints by employees or pros-
pective employees of a government contractor or subcontractor; (3)
the inclusion of labor unions in the implementation of the Order;
and (4) the holding of hearings.

Sections 209 through 21222 contain the sanctions and penalties.

15. For a discussion of the impact of administration and enforcement as applicable to
unions, see p. 45 infra.
17. Id. at 402.
18. Id.
19. Id. at 403.
20. Id. at 404.
21. Id. at 404-405.
22. Id. at 406-407.
From the standpoint of the company dependent on government contracts or subcontracts, the penalty of cancellation, termination, or suspension is perhaps the most significant. In addition, the Secretary of Labor may debar a contractor or subcontractor from any government work until the contractor or subcontractor satisfies the Secretary that he will "carry out personnel and employment policies in compliance with the provisions of this Order."23

Part III24 deals with federally-assisted construction contracts; establishing a regulatory pattern in which parties receiving federal construction aid (called "applicants")25 are responsible for compliance with Equal Employment Opportunity by contractors and subcontractors on the construction projects.

The question of coverage is recurrently touched on in this article. Suffice it to say at this point that the rules for determining exemption, the definition of subcontract and the definition of subcontractor appear not in the Executive Order but in the Regulations of the Office of Federal Contract Compliance.26 In brief, the reach of Part II27 of the Executive Order is to persons who hold contracts with an agency of the federal government and their subcontractors at any tier. The reach of Part III28 is to persons who contract with applicants for federal construction assistance and their subcontractors. The federal assistance programs subject to Part III are, under the phraseology of Section 301,29 programs entailing assistance in any contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.

The Executive Order as originally issued condemned discrimination in race, color, religion and national origin. Amendatory Executive Order 11375,30 signed October 13, 1967, and effective October 13, 1968, added sex.

Executive Order No. 11,246 transferred compliance supervision from the President's Committee on Equal Employment Opportunity to the
Secretary of Labor. Labor Secretary Willard Wirtz created the Office of Federal Contract Compliance\textsuperscript{31} in 1965,\textsuperscript{32} and in 1968 transferred all of his authority to it.\textsuperscript{33}

The awakening of an employer normally results from repeated receipt of the certification forms\textsuperscript{34} (required by the OFCC regulations under the Executive Order) furnished by the employer's customers who are government contractors or subcontractors. When an employer asks for advice concerning the new trend, his counsel should at a minimum point out the following outstanding features of affirmative action:

1. A need for newly directed hiring methods, called by some, "preferential hiring" or "compensatory hiring."\textsuperscript{35}
2. Treatment by the United States Government of women as well as Negroes, Orientals, American Indians and Spanish surnamed Americans as beneficiaries of affirmative action.\textsuperscript{36}
3. A new stature for quotas.\textsuperscript{37}
4. The requirement that employers attempt to influence the affirmative action performance of their subcontractors.\textsuperscript{38}
5. The power of government to disqualify some employers for government contract work.\textsuperscript{39}
6. The requirement that some employers find ways of circumventing certain entrenched union protective systems, such as seniority and bidding.\textsuperscript{40}
7. The opening of an entirely new appeals framework for aggrieved employees and non-employee opponents of the employer.\textsuperscript{41}

II. THE QUANDARY OF THE SUBCONTRACTOR

A. Source of Definitions and Exemptions

General responsibility for the Executive Order is lodged in OFCC. In its Regulations § 60-1,\textsuperscript{42} effective October 24, 1965, and last amended

\textsuperscript{31} Hereinafter identified as OFCC.
\textsuperscript{33} Secretary's Order No. 15-68 (August 8, 1968).
\textsuperscript{34} 41 C.F.R. § 60-1.7 (1970).
\textsuperscript{35} See discussion pp. 14-22, 26-27, 36-38 infra.
\textsuperscript{36} See 41 C.F.R. § 60-20.1 (1970) and note 92, infra.
\textsuperscript{37} See discussion pp. 25-26 infra.
\textsuperscript{38} See discussion pp. 6-11 infra.
\textsuperscript{39} See discussion pp. 41-47 infra.
\textsuperscript{40} See discussion pp. 29-33 infra.
\textsuperscript{41} See discussion pp. 43-44 infra.
\textsuperscript{42} 41 C.F.R. § 60-1 (1970).
July 1, 1970, OFCC has promulgated the standards and procedures for implementation. In addition most federal departments have contract compliance sections, charged with insuring that affirmative action programs are maintained by contractors and subcontractors whose work is awarded or regulated by that department.\textsuperscript{43} Control entails conducting pre-award compliance reviews when contracts exceed $1,000,000\textsuperscript{44} maintaining standing lists of approved and ineligible contractors and subcontractors,\textsuperscript{45} investigating contractors and subcontractors during the course of contract performance,\textsuperscript{46} acting on complaints,\textsuperscript{47} issuing stop-orders,\textsuperscript{48} and coordinating with other agencies.\textsuperscript{49}

The regulatory scheme reaches a subcontractor at any tier.\textsuperscript{50} From the standpoint of the employer who inquires about coverage, there are two important criteria. The first is that the work, whether performed by a prime contractor or subcontractor, must be in furtherance of a government contract or a federally-assisted construction contract.\textsuperscript{51} Secondly, the contract, whether held by a prime contractor or subcontractor at any tier must be worth $10,000 or more.\textsuperscript{52} The following definition of subcontract indicates broad regulatory scope:

The term "subcontract" means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the furnishing of supplies or services or for the use of real or personal property, including lease arrangements, which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.\textsuperscript{53}

In § 60-1.5 there appears the exemption for contracts and subcontracts not exceeding $10,000.\textsuperscript{54} This provision continues that: "No

\begin{itemize}
\item \textsuperscript{43} Id. § 60-1.6(b).
\item \textsuperscript{44} Id. § 60-1.20(d).
\item \textsuperscript{45} Id. § 60-1.30.
\item \textsuperscript{46} Id. § 60-1.20(a).
\item \textsuperscript{47} Id. § 60-1.24.
\item \textsuperscript{49} Id.
\item \textsuperscript{50} 41 C.F.R. § 60-1.3(x) (1970).
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id. § 60-1.5(a).
\item \textsuperscript{53} Id. § 60-1.3(w).
\item \textsuperscript{54} Id. § 60-1.5(a)(1).
\end{itemize}
agency, contractor, or sub-contractor shall procure supplies or services in less than usual quantities to avoid applicability of the equal opportunity clause.”\textsuperscript{55} With respect to contracts and subcontracts for indefinite quantities, the section further provides that a purchaser shall require compliance by a supplier unless the purchaser has reason to believe that the amount to be ordered in any year will not exceed $10,000.\textsuperscript{56}

The Regulation in § 60-1.40\textsuperscript{57} fixes a second jurisdictional demarcation of $50,000 and 50 employees. The requirement of instituting and maintaining a satisfactory written affirmative action program applies only to a contractor or subcontractor who has at least one contract in furtherance of government work worth $50,000 or more and which employs at least 50 persons. For employers with contracts in the intermediate range between $10,000 and $50,000 there is relief from the necessity of having a written plan. But such employers are still governed by the seven paragraphs of the Equal Opportunity Clause.\textsuperscript{58} Among the requirements which apply to companies with contracts above $10,000, are providing compliance reviews, assuring compliance by subcontractors, informing labor organizations of the company’s policy towards affirmative action, and maintaining an affirmative action posture.\textsuperscript{59}

B. Jurisdictional Obscurity

The actual perimeter of jurisdiction is a matter of real confusion. Some corporations with annual sales in excess of $10,000,000 a year claim they are exempt. Some small fabricating shops have acknowledged coverage and are trying to comply. If an employer holds the prime contract to construct a $1,000,000 post office and engages a brickmason subcontractor who performs brick work on the site for a fee of $100,000, both the prime contractor and the brickmason are obviously covered.

The status of the brickmason’s supplier perhaps illustrates the quandary of thousands of employers. This supplier replenishes the mason’s stock as purchase orders are received. The supplier is one of a half dozen brick yards which add products to that inventory. When

\begin{itemize}
\item 55. Id.
\item 56. Id. § 60-1.5(a)(2).
\item 57. Id. § 60-1.40(a).
\item 58. Id. § 60-1.4.
\item 59. Id.
\end{itemize}
purchase orders are placed, there is no way of estimating which bricks will go into the post office or into any other government edifices on which the mason works. It is entirely conceivable that all bricks in a single order worth more than $10,000 will go into the post office. It is also conceivable that the mason will use this supplier's bricks exclusively for civilian work or that bricks covered by any order and devoted to government work will represent less than $10,000 of that order.

The mason would like to treat his supplier as subject to the regulations in order to obtain the signed Equal Opportunity Clause from the supplier. The mason anticipates that an investigator in the contracts compliance section of the Post Office Department will, after examining the prime contractor's records, check the mason and expect an explanation of any of the mason's supply contracts not accompanied by the federal certification. The supplier, on the other hand, wants to be exempt because his work force consists of three brothers, a son, his wife's uncle and two cousins and because he abhors interference by bureaucrats. Nevertheless, the supplier knows that if he does not sign the clause his favored customer will take the line of least resistance and hand his share of the trade to competitors.

An even more baffling illustration is that of the builders' supply house which furnishes hi-lifts, ladders, buckets, protective clothing and other equipment to the mason. Although none of these items are called for by the contract between the mason and the government and although they will contribute to the mason's civilian as well as government work, they are clearly indispensable to the mason's operations and, therefore, to his fulfillment of any contract. Since the definition of subcontract quoted in the preceding subchapter mentions the furnishing of supplies "necessary to the performance of any one or more [government] contracts," some cautious attorneys are advising their business clients that even a thin connection between the supplies and the performance of the government work satisfies the functional test of coverage. Although there are no known case-law precedents on this issue, the author submits that this interpretation disregards the fundamental principle that the prime contract fixes jurisdiction. When the prime contractor elects to subdivide the prime contract, each of the pieces is covered as a functional unit within the perimeters of the covered prime contract. A supply contract for facilities and equipment not mentioned in the prime contract is not one of those pieces. The point is illustrated by a perhaps absurd hypothetical set of facts. If a
company holds a government prime contract in the amount of $9,000, that contract is exempt and cannot by itself be the basis of coverage. If in order to tool up for the contract and for anticipated civilian work the company in its own shop prepares patterns, dyes, pallets and other equipment with a cost on the company's books of $10,000, the prime contract does not thereby become a $19,000 contract, $9,000 above the coverage minimum. If, as more frequently happens, the company procures these items from a subcontractor for a purchase price of $10,000, the company does not thereby create a subject of regulation when the prime contract is itself exempt. To misconstrue the term "necessary" in the definition of subcontract is to overlook the unity of the prime contract and to permit a collection of parts, in the form of subcontracts, to exceed the whole.

C. The Pervasiveness of the System

At this time there are no known precedents establishing presumptions regarding exemption or non-exemption. However, certain constants are known. One is that the $10,000 test is fulfilled when there is one $10,000 contract in any year or when there is an open-end buying arrangement in which orders exceed $10,000 in any year. Another is that the term subcontract has a broad meaning, embracing the furnishing of services, the supplying of products and the supplying of raw materials. Still another constant is that in most disputes about coverage federal administrators take the most expansive view possible. What remains unresolved is the availability of the exemption to subcontractors whose goods and services contribute generally to the operations of another subcontractor or prime contractor but cannot be traced directly to any government order.

The machinery established by OFCC and the contracting agencies for administering the Executive Order perhaps prevents many exempt employers from taking advantage of the exemption. The regulations require that each prime contractor have on record two important commitment documents from each first-tier subcontractor who contributes

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60. Id. § 60-1.5(a)(1).
61. Id. § 60-1.3(w).
62. Interviews with federal administrators.
63. One estimate of coverage is that about one-third of the American labor force is employed by companies which hold some government contracts. United States Commission on Civil Rights, The Federal Civil Rights Enforcement Effort 133 (1970).
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to the prime contractor's performance through a subcontract worth $10,000 or more. The first is a signed certification that the subcontractor does not maintain segregated facilities and that the subcontractor complies with the seven clauses comprising the Equal Opportunity Clause.\textsuperscript{64} The second is a purchase order addressed to the particular subcontractor in which the seven paragraphs of the Equal Opportunity Clause are designated as terms of the subcontract.\textsuperscript{65} If the prime contractor lacks such substantiation in the case of some subcontractors and is unable to convince the government that those subcontracts are exempt, the prime contractor faces the penalty of a stop-order, possible blacklisting and possible inability to bid on later projects.\textsuperscript{66} From the standpoint of the prime contractor it is easier to maintain a complete file than to defend exceptions.

Paragraph 7 of the Equal Opportunity Clause, embodied in the certification signed by the first-tier subcontractor and included as a term of the purchase order, requires the first-tier subcontractor to include the clause in his subcontracts.\textsuperscript{67} Again, the test of coverage is work in furtherance of the government order and a price of $10,000 or more.\textsuperscript{68} The rippling effect continues to the second-tier subcontractor and subcontractors at successive tiers.

Today, purchasing departments of many large businesses automatically furnish the certification forms on an annual basis to all regular subcontractors and to prospective subcontractors. The subcontractor who claims an exemption or who ignores the form faces the risk of being classified as ineligible. Similarly, the Equal Opportunity Clause is often included as standard in all purchase orders of certain companies. As a practical matter these companies cannot, at the time of buying, draw the fine distinctions necessary to determine whether or not the clause is needed in a given purchase order.

\section*{III. The Equal Opportunity Clause}

In order to lay down a compliance network the government has prescribed two important documents. The first is the certification form

\textsuperscript{64} 41 C.F.R. § 60-1.8(b) (1970).
\textsuperscript{65} Id. §§ 60-1.4(a)(7), (b)(7), (c).
\textsuperscript{68} Id. §§ 60-1.3(f), 1.5(a).
which contractors and subcontractors subject to the Executive Order send to their known and prospective subcontractors on an annual or other periodic basis.\textsuperscript{69} This document contains the certification as to non-segregated facilities and the Equal Opportunity Clause. The second documentary control is provided through the inclusion in actual purchase orders of the Equal Opportunity Clause.\textsuperscript{70} When the purchase order is for an amount less than $50,000, the Regulations approve incorporation by reference.\textsuperscript{71}

The certification as to non-segregated facilities deals with locker rooms, drinking fountains, rest rooms, places of work, and, generally, with physical attributes.\textsuperscript{72} Since women are now beneficiaries of affirmative action, there will be some delicate questions about physical facilities.

It is in certain sections of the Equal Opportunity Clause, embodied in both the pre-transaction certification and the eventual purchase order, that the signer makes the pledge to affirmative action. Unfortunately, the obligatory language is camouflaged by technical phraseology and by blanket references to the Executive Order.

Paragraph \textsuperscript{173} of the seven is a pledge to avoid discrimination in any facets of employment (in addition to the physical facilities previously discussed) and, most importantly, to adopt a policy of affirmative action in employment.

In paragraph \textsuperscript{274} the employer agrees to include the language “An Equal Opportunity Employer” in advertisements for help. This requirement has not proven troublesome.

In paragraph \textsuperscript{375} the employer agrees to notify the union of its equal opportunity undertaking.

In paragraph \textsuperscript{476} the employer agrees to obey the Executive Order 11,246 and all regulations issued thereunder. Employers would take the certification more seriously if the government had added the following words: “which Executive Order may require preferential hiring,\textsuperscript{77} negation of some clauses of your union agreement,\textsuperscript{78} lessening of ability

\textsuperscript{69.} Id. \textsuperscript{60-1.8(b).}
\textsuperscript{70.} Id. \textsuperscript{60-1.4(a)(7), (b)(7).}
\textsuperscript{71.} Id. \textsuperscript{60-1.4(d).}
\textsuperscript{72.} Id. \textsuperscript{60-1.8.}
\textsuperscript{73.} Id. \textsuperscript{60-1.4(a)(1), (b)(1).}
\textsuperscript{74.} Id. \textsuperscript{60-1.4(a)(2), (b)(2).}
\textsuperscript{75.} Id. \textsuperscript{60-1.4(a)(3), (b)(3).}
\textsuperscript{76.} Id. \textsuperscript{60-1.4(a)(4), (b)(4).}
\textsuperscript{77.} See discussion pp. 14-22, 26-27, 36-38 infra.
\textsuperscript{78.} See discussion pp. 42-43 infra.
as a factor in promotions, and the incorporation of women in all levels of your work force." 

Paragraph 5 deals with the filing of Equal Opportunity Commission Form EEO-1 and with inspection of the employer's records.

In paragraph 6 the employer acknowledges that in the event of his non-compliance with any rules, regulations or orders of OFCC, the government may cancel, terminate or suspend the contract in whole or in part and may declare the employer ineligible for further government contracts.

Paragraph 7 contains the promise to include the Equal Opportunity Clause in purchase orders when the transaction is non-exempt. In the writer's experience, most employers who deal with the Equal Opportunity Clause do not recognize the implications of paragraph 7. They are unaware that conditions may require them to cease dealing with a long-standing, faithful supplier, who lacks the wherewithal to institute affirmative action or who claims exemption.

IV. THE FABRIC OF AFFIRMATIVE ACTION—MANUFACTURING AND SERVICE INDUSTRIES

The OFCC Regulations in § 60-1.4 impose on contractors and subcontractors with a government contract exceeding $50,000 and with 50 or more employees a requirement of developing and maintaining a written affirmative action compliance program.

For immediate immersion in the concepts of the OFCC, the writer recommends a reading of the OFCC Guidelines dated January 30, 1970, embodied in Regulation Part 60-2 entitled "Affirmative Action Guidelines." An affirmative action program is defined to be "a set of specific and result-oriented procedures to which a contractor commits himself to apply every good faith effort." The Guidelines are known as "Order No. 4."

This chapter deals with employers outside the construction industry.

80. See discussion pp. 14-15 infra.
82. For a discussion of Form EEO-1, see note 92, infra.
84. Id. §§ 60-1.4(a)(7), (b)(7).
85. Id. § 60-1.48.
86. Id. § 60-2 [Hereinafter cited as Order No. 4].
87. Id. § 60-2.10.
88. Hereinafter referred to as Order No. 4.
Such employers are to take the initiative in formulating their own affirmative action programs, subject to inspection by compliance officers during compliance reviews. For employers in the construction industry, (considered in the following chapter) the standards are those negotiated in a “hometown solution” or those dictated by the federal government because of the inability of industrial, trade union and civil rights representatives to mold a satisfactory “hometown solution.”

A. Category Deficiencies

Essential to an understanding of Order No. 4, as it applies to both the construction and non-construction field, is the concept of a category deficiency. In the manufacturing and service industries, employers are encouraged to detect their own category deficiencies. In their written affirmative action programs, the prologue is to set forth an analysis of employment categories, including middle and upper management, and to label as deficient those categories in which minority group representation is less than in some base such as the population of the local municipality. Choice of the base is usually a matter of negotiation with compliance officers, local civil rights spokesmen, the union and such local governmental officials as may get involved. Section 60-2.11 states the following factors will influence the determination of the base: the minority population of the labor area surrounding the facility; the size of the minority unemployment force in that area; the percentage of minority work force as compared with the total work force in the immediate labor area; the general availability of minorities having requisite skills in an area in which the contractor can reasonably recruit; the availability of promotable minority employees within the contractor’s organization; the anticipated expansion, contraction and turnover of and in the work force; the existence of training institutions capable of training minorities in the requisite skills; and the degree of training which the contractor is reasonably able to undertake as a means of making all job classes available to minorities.

Since OFCC now recognizes four traditional minority groups and also classifies women as a group to which affirmative action applies,
what are the chances that any major employer in this century will be free of deficiency categories? Will a time come when certain now incipient movements, such as the drive to protect civil rights of Italo-Americans and to gain equal justice for homosexuals catch the attention of OFCC?

It is known that an employer's responsibility to correct a deficiency category is in no way lessened by such practical considerations as a traditional disinterest of a minority toward work in that category, the employer's rigorous profession of a non-discriminatory intent, the aversion of the union to changing conditions in that category, or the existence of adequate minority group ratios in other categories. Satisfactory ratios throughout 24 departments do not excuse a deficiency in the 25th, which might be sales or engineering. Any analysis must take account of the distribution of women.

B. Rectifying Deficiencies

For any employer with a contract or subcontract worth more than $50,000 and with 50 or more persons in the organization, the existence of a deficiency requires remedial action. Specifically that employer must set target dates for progressive correction of the deficiency.
These target dates must appear in the written affirmative action program.102

The government does not settle for unsubstantiated pledges. As part of the affirmative action program the employer must indicate how he expects to rebuild the categories involved.103 Specific measures referred to in governmental directives are advertising in minority group media,104 notification to welfare agencies and minority group manpower sources105 and closer coordination with unemployment compensation authorities.106 The perceptive employer will realize that during the rebuilding period he will have to shift away from conventional recruiting methods, such as use of known employment agencies, canvassing of existing workers and advertising in media of broad circulation. There is no known prohibition on measures which extinguish or reduce exposure to prospective employees possessing traditional characteristics.

The deficiency may be in a category for which experience is a necessary qualification. If the employer has traditionally promoted from within, he may have to break away from this policy, even at the risk of antagonizing a union or breaching a union contract. If he already has some minority group workers in his regular force, he may have to give them preferential promotional opportunities. His affirmative action plan may show how minority group workers, once hired, will have especial opportunities to learn the better-paying jobs in order that they may bypass employees of more seniority.107 In the writer's experience unions have not been tolerant towards these changes.

A few other employer actions required or recommended by Order No. 4 are giving active support of local and national community action programs;108 publicizing the employer's commitment in the company newspaper, annual report and other media;109 indoctrinating supervisory personnel;110 seeking the cooperation of union officials;111 picturing both minority and non-minority employees when employees are

102. Id.
103. Id.
104. Id. § 60-2.25(c)(10).
105. Id. § 60-2.25(c)(2).
106. Id. § 60-2.25(c)(1).
107. Id. § 60-2.25(f).
108. Id. § 60-2.27.
109. Id. § 60-2.21(a)(2).
110. Id. § 60-2.22(b)(4).
111. Id. § 60-2.21(a)(6).
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featured in product of consumer advertising;\textsuperscript{112} informing recruiting sources of the policy;\textsuperscript{118} incorporating the Equal Opportunity Clause in purchase orders subject to Executive Order 11,246;\textsuperscript{114} notifying minority organizations, community agencies and colleges of the policy;\textsuperscript{118} seeking appropriate action by subcontractors;\textsuperscript{118} appointing one executive as director of company Equal Opportunity programs;\textsuperscript{117} and assuring that minority employees are afforded a full opportunity to participate in all company-sponsored educational, training, recreational and social activities.\textsuperscript{118}

V. THE FABRIC OF AFFIRMATIVE ACTION—CONSTRUCTION INDUSTRY

A. Disenchantment with the "Hometown Solution"

It is in the construction industry that affirmative action has come of age. In this sector the exposure of the unions, as well as of employers, to demands for reform is especially intense. Typically unions influencehirings and recalls through hiring halls, regulate apprentice programs and fix standards for employment.

Contrary to the OFCC policies for the manufacturing and service industries, the construction industry employers and unions do not stipulate deficiencies and goals. These are dictated by a community plan, such as those negotiated in Indianapolis\textsuperscript{119} and Boston,\textsuperscript{120} or by governmentally promulgated bid conditions such as those now in effect in Pittsburgh and discussed in this chapter.\textsuperscript{121} It was such area standards which were sustained as valid in \textit{Eastern Contractors} and \textit{Southern Illinois Builders}.

In the evolution which occurred in various metropolitan areas during the late 1960's and early 1970's, there has been a drift away from the so-called "hometown solution." At the outset local civil rights groups caused negotiations to begin, in which the participants were

\begin{footnotesize}
\item \textsuperscript{112} \textit{Id.} \textsuperscript{\S} 60-2.21(a)(10), (b)(4).
\item \textsuperscript{113} \textit{Id.} \textsuperscript{\S} 60-2.21(b)(1).
\item \textsuperscript{114} \textit{Id.} \textsuperscript{\S} 60-2.21(b)(2).
\item \textsuperscript{115} \textit{Id.} \textsuperscript{\S} 60-2.21(b)(3).
\item \textsuperscript{116} \textit{Id.} \textsuperscript{\S} 60-2.21(b)(5).
\item \textsuperscript{117} \textit{Id.} \textsuperscript{\S} 60-2.22(a).
\item \textsuperscript{118} \textit{Id.} \textsuperscript{\S} 60-2.22(b)(7)(iii).
\item \textsuperscript{119} A summary of the Indianapolis Plan appears in \textit{1 CCH EMPL. PRAC. GUIDE} \textsuperscript{\S} 5064 (1970).
\item \textsuperscript{120} A commentary on the Boston and Denver Plans appears in \textit{1 CCH EMPL. PRAC. GUIDE} \textsuperscript{\S} 5078 (1970).
\item \textsuperscript{121} See pp. 18-22 \textit{infra}.
\end{footnotesize}
normally civil rights leaders, construction industry employer associations, craft unions and local government officials. If the talks became sluggish or if the civil rights activists became impatient with the concessions of the industry and union representatives, pressure was exerted by denunciations in the media, street demonstrations and appeals to the federal contracting office which was distributing funds in the area.\(^\text{122}\) When faced with such pleas, the government normally exhorted the industry and union representatives to a greater degree of receptivity, pointing out the ultimate weapon of a suspension of federal funding.

Sometimes, as in Denver,\(^\text{123}\) an agreement emerged from this process. Sometimes, as in Pittsburgh, the government instituted a suspension of grants. Agreements when reached sometimes became the objects of energetic attack by minority spokesmen who did not take part in the discussions. Some agreements, as in Boston and Denver,\(^\text{124}\) received government approval. Others, as in Pittsburgh, did not.

For a number of reasons the course has shifted to direct intervention by the federal government and its establishment of the area standards. In 1969, for illustration, the Department of Labor issued the standards for Philadelphia.\(^\text{125}\) As of this writing, Atlanta, Philadelphia, San Francisco, Seattle and Washington, D.C. have governmentally imposed standards.\(^\text{126}\) In Chicago, the originally negotiated plan was found to be unworkable, and the Labor Department has now announced plans to impose racial quotas.\(^\text{127}\)

**B. The Pittsburgh Experience**

In Pittsburgh construction industry affirmative action has had a most cloudy and contentious history. In the late summer of 1969, dissatisfaction in the minority community erupted into protests, street marches and battles with police. Representatives of the Master Builders Association, the craft unions, and an organization called the Black

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\(^{122}\) For a brief summary of the pattern whereby local civil rights leaders influenced negotiations, see *TIME*, September 5, 1969, at 78.


\(^{124}\) *Id.*

\(^{125}\) See the opinion in *Contractors Association of Eastern Pennsylvania v. Sec. of Labor*, 442 F.2d 159 (3d Cir. 1971).


\(^{127}\) According to the statement of a Labor Department spokesman, the 1970 construction season ended with not a single minority member at work under the Plan, *165 BNA Fair Empl. Prac.* 1, *Summary of Latest Developments*. 18
Construction Coalition met for several months in a heated atmosphere. At stake were the federal contributions to several hospital building projects, constructing at local universities and some industrial construction partly dependent on federal funding. In November, 1969, when negotiations were still at an impasse, the Department of Health, Education and Welfare announced a suspension of grants. The directive was that the construction industry, the trade unions and leaders of the black community forge a solution compatible with Order No. 4. By some informal but effective process various urban action groups designated spokesmen to comprise the negotiating team. They operated as the Black Construction Coalition. By and large, contractors, unions, newspapers and officials of the federal, state and local government acknowledged the authority of the Black Construction Coalition to speak for the masses. While many civil right leaders criticized the Coalition's bargaining-table decisions and its ultimate acquiescence in the controversial Pittsburgh Plan, they did not publicly challenge the negotiators' general authority.

Negotiations in Pittsburgh took place, as elsewhere, in the context of affirmative action. The Coalition spokesmen insisted on the fixing of certain quotas, waiver of apprenticeship requirements for some minority group hires, arrangements for circumventing some promotional hurdles and early access of minority groups to the higher paying jobs. In early 1970 the Mayor intervened and, largely under his persuasion, a pact known as the Pittsburgh Plan evolved on January 28, 1970. Several civil rights spokesmen denounced it, and one initiated an action before the Pittsburgh Commission on Human Relations to have the Plan voided. The critics also let their views be known to the federal government. The Department of Labor has never approved the Pittsburgh Plan. The moratorium continued in effect and on September 25, 1970, the Department of Health, Education and Welfare announced that because it still lacked evidence of the ability of contractors to meet their obligations under Executive Order 11,246, the moratorium on contract award approvals would remain in effect.

130. The Pittsburgh Courier, December 26, 1970, at 16. The complaint was formally filed with the Mayor's Commission on Human Relations for the City of Pittsburgh (Docket No. C.T. 1760) and to date has not been dropped.
131. Letter from J. Stanley Pottinger, Director of Office for Civil Rights, De-
In total there were thirteen projects involved, with a total value of $60,000,000 and a federal share of $10,000,000.

The disarray in Pittsburgh, not unlike that in many cities, finally induced the federal government to mandate standards. In early 1971 the Department of Labor, under pressures to release funds for urgently needed public and institutional facility construction, issued Bid Conditions for Pittsburgh metropolitan area contractors. The conditions were strictly provisional and were subject to being voided or superseded by later action of the Department. Although the Department had not approved the Pittsburgh Plan, it nevertheless incorporated the Plan by reference in the Conditions and declared it applicable to those trades where both the employer and the representative union had previously subscribed to the Plan. As to non-subscribing trades, the Department imposed specific quotas, which in the view of some industry representatives represent stricter and less realistic requirements than those for crafts subject to the Plan. Some employers which had subscribed to the Plan nonetheless found themselves subject to the stricter requirements as any trade where the union had not subscribed to the Plan.

Through the Bid Conditions the government exacted from bidders a number of pre-award assurances intended to reduce the risk of unperformable pledges and breakdowns in affirmative action programs during the life of the projects. The parties responsible for assembling and evaluating the evidence of contractors' commitments and abilities to perform were the hospitals, universities and other grantees which, in the terms of the Executive Order, constitute the "applicants" for federal financial assistance. Among the evidence was a signed pledge which bound contractors covered by the Pittsburgh Plan to comply with the Plan and which bound contractors not so covered to adopt

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132. Bid Conditions—Affirmative Action Requirements, Equal Employment Opportunity for all federal and federally-assisted construction contracts to be awarded in Allegheny County, Pennsylvania area, consisting of Paragraphs A through R inclusive. (Hereinafter referred to as Bid Conditions).
133. Bid Conditions, Paragraph N.
134. Id. Paragraphs B,D.
135. Id. Paragraph G.
136. Id. Paragraph G(2),(3).
and comply with the terms of an affirmative action plan, consisting of eighteen steps, specified in Paragraph II of the Conditions. Each contractor, on his part, was required to obtain corresponding substantiation from subcontractors. Prior to award, the government reviewed the affirmative action plans prepared by contractors not subject to the Pittsburgh Plan.

Among the casualties which the government sought to reduce were those involving contractors whose affirmative action zeal might fade in face of the trade union opposition, contractors whose written plans might merely parrot some model used in the industry and contractors which might proclaim affirmative action without understanding the depth of the commitment. Consequently the Allegheny County Area Conditions required the contractor to notify the federal contracting agency if a union should fail to refer minority workers sent to the union by the contractor and specifically removed as a defense any claim that a union had failed to refer minority employees. As indicated, bidders and contractors not under the Pittsburgh Plan were disqualified unless they produced plans setting forth the specific affirmative action steps specified in the Conditions. Among these steps were notification to community organizations, maintenance of files on minority workers, and participation in area training programs. The focal point of the undertaking is, of course, the percentage goals established in the Pittsburgh Plan and applicable to covered contractors and the specially promulgated goals applicable to the others. The Conditions imposed on the contractor the burden of substantiating a failure to achieve these goals.

Because of the importance of the numerical goals and governmental emphasis on the aforementioned eighteen steps, most contractors, in the writer's experience, did not concern themselves with the one hundred fifty-seven paragraphs of Order No. 4 except as the principles of Order No. 4 were included in the Bid Conditions. No reason can
be found for excusing construction industry employers from Order No. 4.150 Many parts of Order No. 4, such as the establishment of deficiency categories,151 are superseded by the construction industry plans. Other parts, however, such as periodic interviews of minority employees,152 recruitment in the local high schools153 and generation of statistics154 would appear to reinforce the specifically mandated construction industry steps and perhaps to increase the probability of their accomplishment.

VI. VICTORY IN THE COURTS

A. Dismantling Six Arguments Against Validity

In the spring of 1971 the Executive Order, to the anguish of many devotees of the national labor policy, survived important court tests in Contractors Association of Eastern Pennsylvania v. Sec. of Labor and Southern Illinois Builders Association v. Ogilvie. Eastern Contractors dealt with the Philadelphia Plan and Southern Illinois Builders with the Ogilvie Plan designed by the state for federally-financed highway construction in two Illinois counties. Previously the Newark Plan devised by the State of New Jersey had withstood litigation in Joyce v. McCrane,156 and in Weiner v. Cuyahoga Community College District156 the Ohio Supreme Court had upheld an owner's decision to reject the low bidder for inadequate affirmative action pledges.

Six challenges resolved by these decisions unfavorably to protesting unions and employers are of primary concern to the practitioner. First, there is a contention that the government in piloting the Philadelphia Plan, Ogilvie Plan and other programs in implementation of the Executive Order, exceeded the authority of the Executive. Secondly the argument was raised in Eastern Contractors that affirmative action plans conflict with two much publicized provisos to Title VII of the Civil Rights Act of 1964. The first proviso is found in Section 703(h),157

150. Paragraph L of the Conditions reads as follows: "Nothing herein is intended to relieve any contractor or subcontractor during the term of its contract on this project from compliance with Executive Order 11,246 and the Equal Employment Opportunity Clause of its contract, with respect to matters not covered in the Pittsburgh Plan or in Part II of these Bid Conditions."
151. Order No. 4 § 60-2.11.
152. Id. § 60-2.25(f)(6).
153. Id. § 60-2.25(e)(7).
154. Id. § 60-2.26.
which specifically excludes, as an unlawful employment practice, differentials in pay and other conditions based on bona fide seniority and merit systems. The second proviso, found in Section 703(j),\textsuperscript{158} disavows an interpretation of Title VII which would require preferential treatment on account of an existing imbalance (sometimes considered Congress' rejection of quotas).

A third contention aired in these cases is that affirmative action plans require reverse discrimination, thereby contravening the ban on discrimination which is the hub of Title VII. A fourth unsuccessful argument is that the affirmative action plans require actions by employers and unions in conflict with the National Labor Relations Act and the national labor policy.

A further argument, urged only in *Eastern Contractors*, is that an affirmative action plan may require steps in violation of a state statute which forbids discrimination in employment. Still another argument raised in *Eastern Contractors* is that an employer cannot espouse affirmative action and simultaneously embrace paragraph 1 of the Equal Opportunity Clause\textsuperscript{159} forbidding discrimination in employment.

\section*{B. Power of the Executive}

In the *Eastern Contractors* case there is an elaborate discussion\textsuperscript{160} of the historical phase of the constitutional question, leading to conclusions which are cited and quoted in part in *Southern Illinois Builders.*\textsuperscript{161} The *Joyce* court reached the same result on the brief pronouncement that "The fundamental principle underlying the Presidential power to require non-discrimination by contractors is found in the power of the Federal Government to set conditions upon which anyone desiring to do business with the United States must meet."\textsuperscript{162} The opinion in *Eastern Contractors* traces the origin to the Fair Employment Practice Commission created by President Roosevelt during the Second World War\textsuperscript{163} in conjunction with mobilization authority in a Congressional "Act to Expedite the War Effort" enacted in December, 1941.\textsuperscript{164} According to the historical recital in the opinion, the program, though

\textsuperscript{158} Id. § 703(j), 42 U.S.C. § 2000e-2(j) (1964).
\textsuperscript{159} 41 C.F.R. § 60-1.4(a)(1) (1970).
\textsuperscript{160} 442 F.2d at 176-177.
\textsuperscript{161} 327 F. Supp. 1154 (S.D. Ill. 1971).
\textsuperscript{162} 320 F. Supp. at 1290.
\textsuperscript{164} Act of December 18, 1941, ch. 593, 55 Stat. 838.
modified and broadened from time to time, continued under Presidents Truman and Eisenhower as an attempted curb on discrimination. Important changes by President Eisenhower were transfers of compliance functions to the Government Contract Committee and deletion of the former limitation to defense production. The Kennedy Administration, conceiving of certain positive measures by business and unions, added to the Equal Opportunity Clause a requirement of affirmative action.

On June 22, 1963, President Kennedy signed Executive Order 11,114. According to the constitutional analysis of the Eastern Contractors court, it was particularly significant that this Order extended affirmative action requirements, previously confined to federal procurement contracts, to federally-assisted construction contracts (such as those on which the contractors subject to the Philadelphia Plan had bid). Finally, the court noted, Executive Order 11,246 was signed in 1965.

Upon completing its historical summary the court declared itself at the edge of a chasm. It took account of the doctrine that the Executive can fix terms and conditions applicable to procurement contracts but pointed out the absence of any precedent for application of the doctrine to federally-assisted construction contracts. Finding guidance in the concurring opinion of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sawyer*, the court declared that when Congress authorizes appropriations for a program of federal assistance and authorizes the Executive to implement the program, in the absence of specific statutory regulations, it must be deemed to have granted a general authority to act for the protection of federal interests. As indicated, the District Court in the *Southern Illinois Builders* case incorporated that part of the Eastern Contractors reasoning which sustained the implied author-

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166. Exec. Order No. 10,925, 3 C.F.R. 1959-63 Comp. 448. [During the early Kennedy years the federal government attempted to develop a program of nationwide voluntary compliance. Executive Order No. 10,925, dated March 6, 1961, established the President's Committee on Equal Employment Opportunity. Affirmative action was then a new and vague term and the commonly understood enemy remained discrimination in employment. Some of the nation's giant employers joined the government in seeking the machinery for overcoming the racial imbalances. At this time the women's crusade had not climbed aboard.]
167. 3 C.F.R., 1959-63 Comp. 774.
169. 442 F.2d at 166.
171. 442 F.2d at 171.
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ity of the Executive to institute affirmative action.\textsuperscript{172} In Joyce v. McCrane, which preceded Eastern Contractors by four months, the court did not even note a possible distinction between appropriations for procurement and appropriations for federal assistance.\textsuperscript{173}

In considering the constitutionality of the Philadelphia, Ogilvie and Newark Plans, each court put considerable stress on detailed statistical findings made by federal or state agencies prior to the setting of percentages and the establishment of affirmative steps. These findings deal with existing minority percentage utilization in selected crafts, with ratios in the population and work force generally, and with such criteria as feasibility as anticipated work force expansion, turnover and trainability. The importance of these findings to the three opinions may be a warning to the proponents of negotiated hometown solutions. The terms incorporated in a voluntary plan are typically the product of negotiations and do not rest on administrative findings. Whether or not such a plan may be enforced as to the contractors and unions which voluntarily subscribe, it is questionable whether, in the absence of prior findings, a court would hold the implementation of the plan through federal bid conditions to be an act within the implied authority of the Executive.

C. Provisos 703(h) and 703(j) to Title VII

In Eastern Contractors, the court dealt with the contention that the Philadelphia Plan conflicts with Sections 703(h)\textsuperscript{174} and 703(j)\textsuperscript{175} of the Civil Rights Act of 1964. The contractors maintained that Section 703(h) conveys express Congressional approval of differentials in compensation and other terms and conditions of employment when they are based on bona fide seniority or merit systems. They also urged that Section 703(j) constituted express Congressional approval of differen-

\textsuperscript{172} 327 F. Supp. at 1160.
\textsuperscript{173} See discussion at 320 F. Supp. at 1290-1291.
\textsuperscript{174} Title VII § 703(h), 42 U.S.C. § 2000e-2(h) reads in pertinent part, "Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system."
\textsuperscript{175} Title VII § 703(j), 42 U.S.C. § 2000e-2(j).
"Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual or to any group because of the race . . . of such individual or groups on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed . . . in comparison with the total number or percentage of persons of such race . . . in the available work force in any community . . . or other area."
tials in compensation and other terms and conditions of employment when they are based on bona fide seniority or merit systems. They also urged that Section 703(j) constitutes express Congressional disapproval of the use of ratios and of remedial action incorporating ratios. In finding no conflict between these clauses and the Executive Order, the court declared that the clauses must be confined to Title VII and do not express overriding Congressional policy. The reasoning proceeded that Title VII establishes a ban on certain types of discrimination and requires that violations be determined by certain tests. According to the court provisos in Section 703(h) and 703(j) simply preclude consideration of certain seniority-related preferences and certain quota-related factors. It was concluded that nothing in the provisos prevents the Executive from establishing a regulatory system inimical to certain seniority preferences and partial towards quotas.

D. Reverse Discrimination

A more formidable issue concerned the relationship between affirmative action and Title VII's prohibition of discrimination in employment. Interlocked with this question was the argument whether the percentages in any plan constitute quotas or merely goals. The employers argued that they could not attain the percentages unless they widened opportunities for minorities and depressed opportunities for non-minorities.

In *Southern Illinois Builders, Joyce v. McCrane* and *Weiner v. Cuyahoga Community College District*, the courts neutralized the issue by refusing to characterize percentages as quotas. In *Weiner*, the Ohio Supreme Court declared by way of dictum that: "The establishment of a quota of employment of any particular minority would also be discriminatory in violation of the Civil Rights Act of 1964." The court declared that the affirmative action undertaking required of bidders by the community college on its federally-assisted construction project merely constituted an unequivocal assurance of equal employment opportunity. The holding was maintained that the college had the power to disqualify the low bidder on the basis that its affirmative action plan did not contain sufficient assurance that Negroes would be represented in all crafts employed on the project.

176. 442 F.2d at 173.
178. 19 Ohio St. 2d at 39, 249 N.E.2d at 910.
While the *Southern Illinois Builders* case expressed an approval of the reasoning in *Eastern Contractors*, it did not expressly adopt that part of the opinion giving an apparent blessing to quotas. Instead, the court stressed the fact that compliance is judged by a contractor's demonstration of good-faith efforts. While specifically approving minimum ratios adopted for the purpose of implementing affirmative action, the Court pointed out that the benefits are available to all without regard to race or color. Similarly *Joyce v. McCrane* contains a brief dismissal of the quota argument, finding the percentages to be goals only and judging performance in terms of good faith.

*Eastern Contractors*, however, showed no fear of the quota label and expressly recognized the need for preferential employment practices. The court approvingly classified the Philadelphia Plan as "color conscious" and attributed to the Executive Orders a design to make government contractors "color conscious." In the court's view Congress did not intend by passage of Title VII to prevent the President from attempting to remedy minority disparities in the Philadelphia construction labor force. In fact in one paragraph the Third Circuit comes within an eyelash of calling the percentages quotas.

### E. National Labor Policy

The issue of reconciliation with the national labor policy arose in both *Eastern Contractors* and *Southern Illinois Builders*. In *Southern Illinois Builders*, craft unions and employers, in attacking the Ogilvie plan, argued that the general obligation to submit employment questions to collective bargaining precluded them from embracing a conflicting system. The court held nevertheless that the Executive Order takes precedence.

In reaching the same result *Eastern Contractors* held that nothing in the National Labor Relations Act limits the contracting power of the federal government. It is irrelevant that facets of the Philadelphia Plan...
may be at variance with other contractual undertakings of the contractor. In upholding Executive power the court declared:184

Factually it is entirely likely that the economics of the marketplace will produce an accommodation between the contract provisions desired by the unions and those desired by the source of the funds. Such an accommodation will be in violation of the National Labor Relations Act.

F. Conflicts with State Law

The State law issue arose solely in Eastern Contractors. The contractors argued that performance under the Philadelphia Plan would require activity in conflict with Pennsylvania's direct ban on discriminatory employment practices.185 The court acknowledged that the requirement in the Philadelphia Plan for maintenance of records and forms with notations of race probably contravenes the prohibition of such race-conscious recordkeeping in Section 5186 of the Act.187 Also mentioned was the prohibition in Section 5 on the use of quotas. Nevertheless the court concluded that any conflict must be resolved in favor of the presidential power, if otherwise validly exercised.

G. Conflict with Paragraph 1 of Equal Opportunity Clause

The contention was pressed in Eastern Contractors that programs for special treatment of disadvantaged groups conflict with the ban on discrimination which appears in Paragraph 1 of the Equal Opportunity Clause. The short answer of the court in refutation was that Section 201 of the Executive Order188 empowers the Secretary of Labor through his administrative authority to interpret the Executive Order; that the Labor Department had interpreted affirmative action to mean more than refraining from discrimination; and that therefore the departmental interpretation must be given deference by the courts.189 Since the court had held that the Title VII ban on discrimination does not preclude affirmative action, it would have been startling had the court given such effect to the ban appearing in the Executive Order.

184. Id. at 174-175.
186. Id. § 955.
187. 442 F.2d at 166.
189. 442 F.2d at 163.
VII. THE PORTENT FOR THE NATIONAL LABOR POLICY

A. The Irreconcilabilities

In the aggregate the four decisions mentioned in the preceding chapter, while sparse, represent a judicial approval of affirmative action. The rationale common to these cases is that affirmative action is constitutional, that it does not conflict with Title VII of the Civil Rights Act of 1964 and that it represents a limitation on the national labor policy.

The OFCC regulations establish the machinery by which the government may cause unions to agree to revisions in collectively bargained clauses at variance with affirmative action. Unions, which have come to rely on these clauses as impregnable, may have to prepare for their emasculation by affirmative action. Employers reconciled to union power must also become reconciled to affirmative action power.

A non-conforming employer can be declared ineligible for government work. A non-conforming union can prevent an employer from conforming and thereby cause loss of work opportunities for union members. While the immediate targets of compliance and remedial measures are contractors and subcontractors, the Executive Order and the regulations definitely reach unions. For example, the Executive Order directs the Secretary of Labor and the contracting agencies to use their best efforts to induce cooperation by unions. In the event the Secretary believes a union to be in violation of Title VI or Title VII of the Civil Rights Act, the Secretary is to inform the appropriate enforcement agency.

As indicated previously the national labor policy has evolved through a long procession of rulings dealing with the scope of collectively bargainable issues. Such cases might be of only academic interest if unions lacked potency to win their demands. But another procession of cases sustains the trade union philosophy as to what weapons belong to unions and what weapons are denied to management. No one has detected a shift in this court-made doctrine. Unless this doctrine is somehow accommodated to the commands of affirmative

190. Authority reposes in 41 C.F.R. § 60-1.9(a) (1970).
action, however, it is believed that certain irreconcilabilities will continue to generate crises in the streets and in the courts. The end result can only be a dampening of the effectiveness of affirmative action.

Some of the business decisions which management must submit to collective bargaining include a decision to contract out work; a decision to close one plant in a multi-establishment organization; decisions by a successor employer concerning the work force of the predecessor; a decision to perform maintenance through an independent contractor; adjusting the price of meals served to employees; and making adjustments in insurance.

B. Factors Which Will Perpetuate the Irreconcilabilities

A rule of bargainability is more than a mere abstract principle. Unions normally get their demands in collective bargaining. For example, union economic achievements publicized in late July, 1971, included a 31 percent three-year settlement in the copper industry, $1.30 over three years for employees of ITT Continental Baking Company in the Midwest, and 23% over two years for maintenance employees of American Airlines and Pan American World Airways. Union demands which most directly affect an employer's ability to meet affirmative action commitments are those in such realms as seniority, crew size, hiring, promotion and subcontracting. Unions have been equally successful in these spheres.

Congress, the National Labor Relations Board and state regulatory agencies have affirmed that unions possess the tools to get these results. To the person unexposed to industrial warfare, it is natural to credit the gains to bargaining table persuasiveness and to the potency of strikes. Society is less aware of a battery of supporting weapons which the courts and the National Labor Relations Board have declared

200. 682 WHAT'S NEW IN COLLECTIVE BARGAINING, NEGOTIATIONS & CONTRACTS 2 (July 22, 1971).
201. 680 WHAT'S NEW IN COLLECTIVE BARGAINING, NEGOTIATIONS & CONTRACTS 1 (July 24, 1971).
202. 681 WHAT'S NEW IN COLLECTIVE BARGAINING, NEGOTIATIONS & CONTRACTS 2 (July 8, 1971).
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available to unions. It is not the purpose of this article to lament any imbalance in power which has resulted from these decisions. It is the purpose to point out that the inability of some employers to fulfill affirmative action commitments is attributable to the balance of power in the bargaining relationship.

Consider some of the tactical advantages which unions have secured through legislation or court decision. The National Labor Relations Act permits union security clauses requiring employees to join the labor organization which is the collective bargaining representative within thirty days following the date of hire. When an employee with more than thirty days of service fails to comply with payment of union fees and dues, the union can compel the employer to discharge him. An employer may not bypass the majority representative of his employees and deal with the employees directly or with anybody other than the accredited representative. The employer may not deal with a rival union or with another organization claiming representational privileges.

Once a union has been established as the majority representative, only an extraordinary chain of events can dislodge it. For a one year period following certification no competitor can file a decertification petition or a petition for representation. Once an agreement has been adopted the agreement acts as a bar on decertification petitions and certification petitions by rival unions for the life of the agreement. If employees should wish to oust the union, they must file a decertification petition with the National Labor Relations Board during the period beginning not more than 90 days prior to the expiration of the contract and not less than 60 days prior thereto. The human traits of apathy, inattentiveness and inefficiency favor the perpetuation of the once certified union.

When a strike is in effect, the public may think that the tests of endurance are the employees’ ability to forego compensation and the employer’s ability to operate with supervisors and green replacements. A number of less recognized forces support the effort of the strikers.

204. N.L.R.B. v. Broderick Wood Products Co., 261 F.2d 548 (10th Cir. 1958) (dicta).
208. General Cable Corp., 139 NLRB 1123 (1962). The National Labor Relations Board has declared three years to be the maximum period of effectiveness of the bar.
Whatever may be the reader's philosophical view of concerted action, the reader must keep in mind that factors which favor the union and strikers also tend to perpetuate the irreconcilabilities between the national labor policy and affirmative action.

The striking union may post pickets at the place of business of the struck employer's customer. If the employer tries to fulfill any customer orders by farming out work to another enterprise, the union may picket that enterprise on the rationale that it is an ally of the struck employer. If the employer somehow persuades numbers of the striking union to cross the picket line and come to work, the union may fine these individuals.

In the classical sense one safeguard against unrestrained industrial warfare should be the ability of employers to hire replacements. But the struck employer is severely limited as to the group from which it can draw. Congress has declared the act of importing strike breakers from other states to be a federal crime. A Pennsylvania statute has the effect of limiting the employer to substitute workers who appear casually in response to the employer's invitation to work and who have not been recruited by an agency unrelated to the employer. The agency found to be engaged in such recruiting on behalf of struck employers is guilty of a misdemeanor. In the Pennsylvania "Labor Anti-Injunction Act," specifying the limited conditions under which state courts may enjoin strikes, a proviso disqualifies an employer from obtaining an injunction if he has engaged non-employees as substitutes.

Some scholars who defend the right to strike argue that the stoppage causes a void in workers' compensation which acts to import reason into bargaining table demands and to fore-shorten the duration of the conflict. In this connection it should be noted that in New York strikers become eligible for unemployment compensation benefits after seven weeks. If the state is to provide a partial replacement for lost

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213. 18 U.S.C. § 1231 (1964). Under the terms of this statute it is a criminal offense for an employer to transport individuals from one state into his state for the purpose of crossing a picket line at his plant.
216. N.Y. LABOR LAW § 592(1) (McKinney (1965)).
earnings, it should follow that strikers will be able to hold out for longer periods of time and will be able to exact broader concessions from employers. Among these concessions might be terms and conditions of employment desired by the union but incompatible with affirmative action.

The struck employer may find that employees of his suppliers and truckers are restrained from crossing the picket line at his struck premises. The union representing the employees of these suppliers and truckers may legally exact from their employer a clause in the applicable collective bargaining agreement which exonerates the employees for refusal to cross a picket line.217

Thus, the union’s tactical array is much more formidable than the bare power to withhold labor from the struck establishment. It is submitted that the employer who is besieged by such weapons will yield such issues as seniority, promotions, apprenticeship, and hiring halls in order to tone down demands in the economic realm. The realist must recognize that employers do not have the means to exact the reforms expected of them by the Department of Labor, the Office of Federal Contract Compliance, and various civil rights and enforcement agencies.

VIII. SIGNIFICANCE OF THE GRIGGS CASE

For the attorney who is studying the escalating conflict between affirmative action and the national labor policy, a complete view requires an awareness of parallel developments under Title VII of the Civil Rights Act of 1964. In the much noticed Griggs v. Duke Power Co.,218 which dealt exclusively with Title VII, the affirmative action enthusiast can find encouragement for certain vital precepts mellowed, however, by an unsettling reticence of the Supreme Court to bless preferential employment practices. The case was a resounding triumph for the champions of some progressive interpretation of an employer’s civil rights obligations. It at least partly legitimates the use of statistics as a measure of an employer’s compliance with Title VII. It holds employers responsible for the results of perpetuating the effects of past discrimination. It holds that hiring and promotional criteria which are seemingly neutral or nondiscriminatory on their face, are nonetheless

217. 345 U.S. 71 (1953).
invalid if they are not related to job performance, if they tend to perpetuate the effects of past discrimination, or if they tend to limit employment opportunities for a culturally deprived minority.

Five departments comprised the defendant's facility in Griggs. At the time the action was instituted there were 95 employees of whom 14 were Negroes. All but one of the blacks worked in the labor department. The highest rated job in labor paid less than the lowest rated jobs in the other four departments.

In 1955 the company had instituted a requirement of a high school education for initial assignment to any department except labor. Up to July 2, 1965, the effective date of the Civil Rights Act of 1964, the employer prohibited promotion from labor into other departments. On lifting this restriction, the company extended the previously imposed prerequisite of a high school education to prospects for transfer from labor or other departments.

On July 2, 1965, the company also made satisfactory completion of certain aptitude tests a requirement for transfer. Critical to the holding against the company was the court's conclusion that these tests did not bear a demonstrable relation to the jobs for which candidates were being considered and, further, that the tests and the diploma requirement tended to favor whites over Negroes because of segregation of education in North Carolina.

Among the precepts of affirmative action seemingly bolstered by the Griggs' decision are the emphasis on racial disproportions within a work force, the requirement that employers become deficiency conscious and color conscious and the vulnerability of subtle barriers against integration.

One passage in the case, however, may portend a setback for affirmative action and for the rationale of the Eastern Contractors decision announced six weeks later. In construing the intent of Title VII, the Supreme Court said:

In short the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.219

219. 401 U.S. at 430-431.
This language is, arguably, not compatible with the statement in the *Eastern Contractors* opinion that Title VII countenances color-conscious remedial action designed to correct past injustices. In short the *Griggs* statement may jeopardize the ability of employers to adopt quota-related hiring, training and promotion measures and force employers to a double standard, pursuant to which they must correct past injustices while maintaining totally non-discriminatory current policies.

IX. PRIMER FOR DRAFTSMAN OF AN AFFIRMATIVE ACTION PLAN

A. The Project

Actual production of the comprehensive written plan sometimes occurs during the last seventy-two hours available to a construction contractor to get bid clearance, in ten days to two weeks following the government's letter announcement of a compliance review or in a short grace period permitted by the compliance officer after the officer cites various deficiencies. Because of the extensive logistical, administrative and attitudinal problems inherent in the adoption of a written affirmative action plan it is recommended that an employer, which recognizes its accountability, not await the emergency.

This chapter will cover only a half dozen important features of an affirmative action plan. It is recommended, however, that the draftsman absorb the numerous provisions of Order No. 4 and try to project each of them into a final plan. The draftsman will find guidance in plans previously prepared by other companies in his industry and by samples appearing in some of the employment practices services. While some compliance officers are impressed by mere sentence volume, many try to penetrate to the substance of a plan. In the construction industry, as indicated previously, various phases of a plan (such as the percentage goals) are dictated by a community-wide plan or by government bid conditions. Also in the construction industry the government requires undertakings over and above those in Order No. 4.

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220. 442 F.2d at 159.
221. In the concluding paragraphs of the *Griggs* opinion appears the additional qualification, "Congress has not commanded that the less qualified be preferred over the better qualified simply because of minority origins." 401 U.S. at 436.
223. E.g., The plan for Arthur D. Little Inc. is reproduced in 1 CCH EMPL. PRACTICES GUIDE ¶ 5023 (1970).
224. For a detailed discussion see pp. 17-22 *supra*. 

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The aspects of an affirmative action plan considered in this chapter are fixing of percentages, recruiting, interviewing, career motivations, relations with minority agencies, and programs for the hard core. In addition, there is a look at the special problems involved in reaching a negotiated plan with civil rights advocates.

B. Percentages

Percentages govern the identification of deficiency categories and the setting of goals. An employer outside the construction industry may take the initiative in setting a base. It is recommended that the employer determine the realistic geographical circumference of his labor market and then martial data by which to defend that choice during a compliance review. In the age of the automobile it is plausible to contend that workers will gravitate to a plant from all regions of the county in which it is located.

Chicago, Philadelphia, Pittsburgh and Indianapolis show interesting tussles with percentages. The Chicago Plan, dated January 12, 1970, aims over a period of not more than five years at "a level of minority group employees at least proportionate to their percentage in the community at large." In the Philadelphia Plan the figures vary from trade to trade, and the average attainment after four years is to be 20%. In Indianapolis the base used for formulating a proportion is Marion County, a metropolitan area considerably broader than the city itself.

The minority manpower utilization tables in the previously discussed Bid Conditions for Pittsburgh would appear to defy logical explanation. Insofar as the crafts included in the Pittsburgh Plan are concerned, the percentages are relatively moderate. For example, by 1975, plumbers must reach 9.2%, bricklayers 13% and steamfit-

225. Order No. 4 § 60-2.11.
226. See discussion p. 25 supra.
227. In the Eastern Contractors decision, the Third Circuit expressly approved the Secretary of Labor's adoption of percentages based on minority representation in the five-county Philadelphia area. 442 F.2d at 164.
228. Text of the negotiated Chicago Plan appears in 1 CCH EMPL. PRACTICES GUIDE ¶ 5013 (1970). The government has now declared the plan unworkable and intends to promulgate standards for Chicago. See discussion p. 18 supra.
229. A summary of the Philadelphia Plan figures is included in the opinion in Eastern Contractors at 159.
231. See discussion pp. 20-22 supra.

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ters 12%. These figures may be contrasted with the goals applicable to non-signatory crafts, such as sheet metal workers, 26.9%; operating engineers, 48.3%; roofers, 50.1%; and tile setters, 50.1%. The analyst of these figures should keep in mind that blacks comprise only 9% of the population of Allegheny County, in which Pittsburgh is situated.

C. Recruiting and Interviewing

The portions of the affirmative action plan dealing with recruiting must be linked to the deficiency categories and to the goals. It is recommended that the writer of a company’s plan attempt to explain the conditions which have generated the deficiencies and the steps being taken to reverse some of those conditions. A whole range of techniques are available. Those with most credibility among compliance officers are direct dealings with minority manpower sources. Because these centers do not have active, alert staffs, it is the employer’s responsibility to prod and cultivate the centers. Each contact, whether by letter or by telephone, should be documented.

The employer should also send recruiters into high schools and trade schools with heavy minority concentrations. The minority media are still another fertile source of minority applicants. It is recommended that the employer temporarily suspend those recruiting activities which have normally produced non-minority applicants.

Interviewing techniques should be elaborately covered in the plan. The plan should indicate how the interviewers are chosen and what special steps they take in order to build self-confidence in minority interviewees. While employment application forms may not reveal race, OFCC now requires a notation of the race of each individual interviewed. This notation preferably should go on a separate card to

232. Order No. 4 §§ 60-2.11, 2.24.
233. Id.
235. Order No. 4 §§ 60-2.11, 2.24.
236. Id. § 60-2.25(a)(1).
237. Id. § 60-2.25(a)(7).
238. Id. § 60-2.25(a)(10).
239. Id. § 60-2.23(a)(3).
240. Id. § 60-2.23(a)(2). A technical disparity between OFCC and the Equal Employment Opportunity Commission arises from the positions of the agencies regarding records of the race of applicants for employment. An employer cannot maintain the applicant flow data required by OFCC without noting and recording race. EEOC officially discourages such records. In order that an employer can complete the racial breakdowns of existing employees required by Form EEO-1, EEOC recommends visual
be maintained in a separate confidential file of interviewees. It is to be remembered that when compliance reviews occur, OFCC asks for racial breakdowns of interviewees.

The affirmative action plan must identify the role played by the interviewer in the ultimate decision on hiring and must identify all other officials involved in that decision.\textsuperscript{241} If minorities are a disproportionately low percentage of persons interviewed, the employer must have an explanation at the time of a compliance review.\textsuperscript{242} If minorities are a disproportionate percentage of interviewees accepted for employment, the employer must likewise have an explanation at the time of a compliance review.\textsuperscript{243}

D. Career Motivations; Programs for the Hard-Core

Career ladders are essential to affirmative action plans. In the great bulk of American companies minority workers are clustered in the lower-paying classifications. One of the aims of affirmative action is their dispersion throughout the work force and their advancement into the higher-paying ranks. In this phase of the affirmative action plan and its implementation, charts and statistics are critical.\textsuperscript{244}

Order No. 4 recommends stimulation of the minority employee through periodic interviews by informed and sensitive personnel managers.\textsuperscript{245} Each interview should be documented and the report sheet retained for the compliance review. The employer’s personnel section should consult periodically with minority employee’s foreman and department head in order to ferret out potential and to ascertain problems.\textsuperscript{246} Among the recommended records are monthly or quarterly transfer reports, in which the employer logs each movement within the plant and notes the race of each transferee.\textsuperscript{247} In addition minority workers should be encouraged to participate in company-sponsored training and improvement programs and should be encouraged to enroll in training programs outside the plant walls.\textsuperscript{248}

\begin{itemize}
\item \textsuperscript{241} Id. § 60-2.25(d).
\item \textsuperscript{242} Id. §§ 60-2.11(c), 2.23(b)(3),(8).
\item \textsuperscript{243} Id.
\item \textsuperscript{244} Id. §§ 60-2.11(c), 2.25(f)(2).
\item \textsuperscript{245} Id. §§ 60-2.22(b)(6), 2.25(b)(6).
\item \textsuperscript{246} Id. §§ 60-2.22(b)(4),(5), 2.25(f)(3).
\item \textsuperscript{247} Id. § 60-2.26(a).
\item \textsuperscript{248} Id. §§ 60-2.23(b)(9), 2.25(e)(8).
\end{itemize}
Larger companies should devote several pages of their affirmative action plans to special programs for the hard-core. In this area of endeavor it is possible to produce some most revealing graphs and statistics. For example, an employer with a strong counselling program can, by graph, show fall-offs in absenteeism and tardiness. Other graphs can show the increasing adaptability of hard-core recruits to production processes and other stresses. The documentation may cover such specialized matters as detection of drug addiction and programs for cure.

E. Community Relations

Order No. 4 frequently refers to an employer's relationships with community civil rights organizations without suggesting the mechanics of such relationships. A smart employer will cultivate the interest of two or three such organizations and their leaders through modest financial contributions to their programs and through attendance at some of their functions. Competent community action organizations will produce minority applicants, provide counselling for minority employees and, on a very practical basis, support an employer before a skeptical compliance officer.

F. The Negotiated Plan

Employers and unions often call on their attorneys to represent them in meetings during which affirmative action programs are negotiated. The most celebrated instances have occurred at city-wide negotiations involving the construction industry. Such talks go on in the shadow of Executive Order 11,246, because so many institutional building programs are federally-assisted construction contracts.

Acceptance by the employer of civil rights spokesmen in such discussions is entirely voluntary. The OFCC Regulation requires only that the employer design his own affirmative action program, keep community action agencies informed and submit the program to a federal compliance review. Many employers have, nonetheless, submitted their affirmative action plans to the negotiating process. Frequently, the techniques, of protest, picketing and denunciations in the media influence an employer to acquiesce in this procedure. The em-

249. Id. § 60-2.25(e)(8).
250. Id. §§ 60-2.12(h), 2.21(b)(3), 2.22(b)(2), 2.25(e), 2.27.
ployer may or may not be the holder of a federal contract or subcontract or an applicant for assistance in a federally-assisted construction contract.

The minority group may represent a substantial block of the employer's customers or may dominate the neighborhood in which the employer's facility is located. Sometimes a local government agency, by authority of its own human relations ordinance, becomes involved and steers the protagonists to the bargaining table. Again, the employer may or may not be within the coverage of the Executive Order.

An employer's counsel faced with such a situation must inform his client that they are operating in a medium distinct from typical collective bargaining and commercial negotiations. The proponents of the minority group cause are representing people who are justifiably frustrated and who have grown instinctively skeptical. Their principal weapons are picketing, publicity, consumer boycott and the invocation of assistance from OFCC.

The employer should seek to involve all of his labor unions directly in these discussions and should require the unions' concurrence in any agreements. Some unions decline to attend and attempt to take shelter in the fortress of the collective bargaining agreement. Others prefer to attend in order to keep the employer mindful of obligations under the national labor policy and in order to protect the rights of their constituents.

The minority spokesmen will try to extract agreements from the employer to vary some collectively bargained institution, such as plant-wide seniority or the union shop clause. The employer who acquiesces in such a demand without the concurrence of the union must realize that all the rhetoric and compulsion of minority leaders will not help him in selling the proposition to the union or in overcoming an unfair labor practice charge before the National Labor Relations Board. No federal agency will help the employer in convincing the union and rank and file to approve the proposition.

251. An ordinance (Pittsburgh, Pa. Ordinance No. 75, § 7(e)(f), February 28, 1967) authorizes the Commission on Human Relations to study and investigate conditions having an adverse effect on intergroup relations in the city and to conduct programs to promote understanding among persons of different groups. When a dispute exists in the minority relations field, the Commission does on occasions foster deliberations between the protagonists and make its staff available in a mediative role. Participation by the Commission is not dependent on its receipt of a formal complaint.

252. The absence of compassion on the part of the Labor Department for the em-
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During negotiations, the employer should seek to keep local government officials informed, but prevent them from steering the parties into a purely political settlement. The employer and his counsel and the union and its counsel must be prepared to draw on resources of patience, ingenuity and tact.

Above all, it is the job of counsel for the employer to assure that the solution of the minority issue will do the least possible damage to productivity, that it will not vitiate the few management prerogatives which the employer has retained during collective bargaining with the union, and that it contains workable goals and programs capable of achievement. To fulfill some typical affirmative action plans would entail creating unnecessary positions, penalizing existing employees and jumping unit costs. Finally, because the supply of minority group labor is often limited, the plan should commit the employer to good-faith efforts rather than to inalterable goals.

X. Administration and Enforcement

Section 201 of Executive Order 11,246 lodges administrative responsibility in the Secretary of Labor. By order of Labor Secretary Willard Wirtz, the responsibility for carrying out the provisions of the Executive Order, as amended, was assigned to the Office of Federal Contract Compliance. That Office has, in turn, vested administrative authority in special civil rights sections created by most governmental departments and some executive agencies. They regulate employers by the machinery of compliance reviews and complaint investigations.

ployer trapped between affirmative action and the national labor policy is shown by the facts in Crown Zellerbach Corp. v. Wirtz, 281 F. Supp. 337 (Dist. D.C., 1968). In 1967 Crown, a federal contractor subject to the Executive Order, was under a threat of debarment because of the government's dissatisfaction with the negotiated seniority provisions. Since 1967 was a union contract expiration year, Crown took the opportunity to propose the revisions which the government had declared to be conditions to avoiding debarment. According to the court's findings, the government made no efforts to assist Crown in its dealings with the union, and collective bargaining resulted in an impasse on the seniority issue. Following the impasse OFCC announced an intent to impose sanctions. Both Crown and the union applied for an injunction against the government. In awarding a preliminary injunction, the district court made specific note of Crown's obligations under the National Labor Relations Act. The order restrained the government from taking any action under the Executive Order until Crown and the union were afforded a full evidentiary hearing on the question of compliance with equal employment opportunity.

254. Secretary's Order No. 15-68 (August 8, 1968).
255. 41 C.F.R. § 60-1.6 (1970).
A. The Compliance Review

When the amount of a government contract outside the construction field exceeds $1,000,000, the federal department or agency responsible for the grant must clear the affirmative action credentials of the successful bidders prior to award.\textsuperscript{256} In those cities with construction industry programs covered by government bid conditions or by voluntary hometown plans, the minimum is typically $500,000.\textsuperscript{257} Some employers are failing to qualify because their collective bargaining agreements limit their ability to take the initiative in upgrading the minority's share of work. This disqualification also penalizes the workers customarily attached to that employer and the union which represents those workers. In such cases awards may go to a second or third low bidder which is non-union or which has found some technique for building minority participation in the work force.\textsuperscript{258}

Whether or not a given employer is required to fulfill pre-award clearances, that employer can expect periodic compliance reviews by a civil rights office of the department with which the employer's work is most frequently allied.\textsuperscript{259} The civil rights office typically affords the employer ten days to two weeks warning and requests the assembly in advance of rather elaborate records and statistics.\textsuperscript{260} During the review the compliance officer examines the statistics, interviews minority employees chosen at random, inspects personnel records, studies the affirmative action plan and checks compliance with certain formal requirements, such as posting of the government's equal opportunity posters, inclusion of the equal opportunity legend in recruitment advertising and securing of equal opportunity documentation from subcontractors.

Various types of deficiencies may be noted. An industrious compliance officer will note statistical imbalances in certain parts of the work force and will require the employer to pledge specific remedial steps, sometimes accompanied by timetables. These recommendations may

\textsuperscript{256} Id. §§ 60-1.7(b), 1.20(d).
\textsuperscript{257} E.g., Philadelphia Plan as described in Eastern Contractors at 168; St. Louis Plan as mentioned in 167 BNA FAIR EMPL. PRACTICES 1, Summary of Latest Developments, July 15, 1971. In the early summer of 1971, OFCC issued guidelines to assist in the federal reviews of construction contractors. The guidelines were not available to the author at the time of this writing.
\textsuperscript{259} 41 C.F.R. § 60-1.6(a) (1970).
\textsuperscript{260} Id. § 60-1.7(a). A normal requirement is an updated compilation of the data required by Form EEO-1.
require action at variance from a collective bargaining agreement.\textsuperscript{261} They may require actions which, while not in conflict with the agreement, would be more feasible if the employer were free from collective bargaining entanglements.

B. The Complaint Investigation

When a complaint has been received from an aggrieved employee, from a civil rights organization, or from another spokesman,\textsuperscript{262} the responsible government agency is to initiate a prompt investigation.\textsuperscript{263} It is no secret that the compliance offices regard complainants as clients for whom results must be shown. On a complaint investigation, Regulation 60-1 charges the compliance officer with the examination of the facts of the complaint and with the formation of a judgment as to the employer's violation of the Equal Opportunity Clause.\textsuperscript{264} If the investigation indicates a violation, the government normally attempts resolution by conciliation during which remedial action is recommended. Because compliance reviews and complaint investigations are intertwined, the steps recommended by the government may include broad affirmative action programs as well as specific relief to the aggrieved individual. For the employer who resists, the hazard is subject to a hearing.\textsuperscript{265} It must be recognized that the government does not have the authority to order specific correctional action but does have the authority to impose sanctions if the recommended action is not taken.

During a compliance review instigated by a complaint, the employer finds himself caught in an unfamiliar game. In the author's experience, the compliance officer normally withholds the name of the complainant and refrains from disclosing the contents of the complaint. The rationale, of course, is that once armed with the information, the employer can make short-term, artificial improvements. If the issue proceeds to

\textsuperscript{261} Id. § 60-1.9 instructs the Director of OFCC to take steps to persuade labor unions to cooperate in the revision of collective bargaining agreements which impair compliance. The Director is empowered to hold hearings concerning the powers against unions tantamount to the power to debar nonconforming employers, the Regulation does instruct the Director to refer to enforcement agencies such Equal Employment Opportunity Commission the conclusions and recommendations of the Director respecting uncooperative unions.

\textsuperscript{262} Id. § 60-1.21 states filing may be by an employee of a contractor, an applicant for employment or the complainant's authorized representative.

\textsuperscript{263} Id. § 60-1.24.

\textsuperscript{264} Id.

\textsuperscript{265} Id.
hearing, the governing rules are those applicable to hearings preceding debarment for noncompliance and discussed in the following sub-chapter.

C. Sanctions and Compulsion

A hearing may follow an unsuccessful attempt at conciliation of a complaint, or a finding of deficiencies by a compliance office, or a denial by an employer of data demanded by a compliance officer.

The last of the three involves a direct challenge by the employer to the power of the compliance office. As a practical matter most employers with government contracts or subcontracts cannot afford to challenge the investigatory methods. The Equal Opportunity Clause, to which employers must subscribe in order to qualify for government work, contains a commitment (Paragraph 5) to permit inspection of the employer's records. There is no requirement in Paragraph 5 for the preparation of records, but compliance offices typically expect lists to be available. An employer who decides to object to the scope of the review or the techniques used hazards exposure to a hearing at which the only issue is the government's power to interpret its authority under the Executive Order.

When the issue is unremedied deficiencies, the Director of OFCC or the head of the contracting agency must, by written notice, afford the employer at least ten days to comply or to request a hearing. If the contractor elects a hearing, the Director of OFCC may, in his discretion, suspend the contractor's contracts pending the hearing. If the contractor does not request a hearing, the Director or the head

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266. Paragraph 5 of the Clause reads:
The contractor will furnish all information and reports required by Executive Order 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

267. 41 C.F.R. § 60-1.7(a)(3)(4) provides that OFCC may require a contractor to keep employment records and to furnish, in the form requested, such information as OFCC deems necessary for the administration of the order. An employer concerned that data voluntarily submitted may be disseminated to other agencies should take account of the provision that "Reports filed pursuant to this section shall be used only in connection with the administration of the order, the Civil Rights Act of 1964, or in furtherance of the purposes of the order and said Act." Id. § 60-1.7(c).

268. Id. § 60-1.26. As a matter of practice a conciliation period, typically thirty days in duration, precedes the issuance of this notice.

269. Id. § 60-1.26. This option, in the author's view, gives the government strong leverage. A short suspension of eligibility can disrupt a company's relations with its customers on both government and civilian work.
of the agency may cancel, suspend or terminate contracts and declare the contractor ineligible for future work. Hearings are convened by the Director or agency head and conducted by a hearing officer appointed by the convening authority. If the issue of compliance relates to a collective bargaining agreement, the labor organization may be present. Recommendations of the hearing officer shall be referred to the authority which convened the hearing, and that authority shall make the final decision. The Director of OFCC must approve a final decision by an agency head.

In some quarters the enforcement methods under the Executive Order are decried as slow and ineffective. These comments overlook the leverage of the OFCC in encouraging compliance without formal remedial action. The employer or union charged with a violation of Title VII of the Civil Rights Act of 1964 can anticipate an EEOC investigation and conciliation procedure before the complainant gains the right to sue. If a federal court action is initiated the union and the employer have the rights of litigation defendants. By contrast, the employer who is unable or unwilling to comply with a citation of deficiencies under the Executive Order hazards an agency hearing within a few weeks, a possible suspension of eligibility pending the hearing, and penalties of suspension, termination or ineligibility following the hearing.

One illustration is a recent agency hearing involving a second-tier subcontractor on a federally-financed college project. The hearing examiner found the subcontractor to be subject to the Philadelphia Plan, found that it had adopted no minority hiring goals, and found that it had hired no minority workers during the project. On these grounds the hearing officer recommended that the subcontract be cancelled, that the respondent receive no pay for work done, and that it be declared ineligible for other government work.

270. It has been noted that from 1965 to mid-1968 no contracts were cancelled, suspended or terminated and that “even today,” although notices of proposed ineligibility have been issued and hearings held concerning three contractors, no sanctions have been applied. Comment, Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109, at 1286 (1971). The OFCC results have been labeled “the thin record of agency enforcement.” Chayes, Kaufman, and Wheeler, The University’s Role in Promoting Minority Group Employment in the Construction Industry, 119 U. PA. L. REV. 91, 108 (1971).


D. Stimulation to Other Agencies

Stimulation is in the form of information and advice referred to federal enforcement agencies in the civil rights field, and in the form of inspiration to other agencies, both state and federal, which conduct compliance reviews of organizations within their jurisdiction.

The Executive Order and implementing regulations provide for notifications to the Department of Justice, Equal Employment Opportunity Commission and other appropriate federal agencies. Some of the subjects of notification are unions which by policy or practice impede equal employment opportunity, employers against whom complaints are received by OFCC or one of the contracting agencies, and employers who fail to agree to remedial action recommendations following a compliance review. The decision to refer information is discretionary with the Director of OFCC or the agency responsible for compliance.

The contact of state enforcement agencies with affirmative action is twofold. In the first instance, some of them, acting under authority of the enabling legislation of the state or municipality from which they derive their power, are administering affirmative action standards governing contracts with the state or municipality. In the second instance, the state and local civil rights agencies also conduct investigations, conciliations and adjudications of conventional complaints of bias under the ban against discrimination in the enabling legislation. In the author's experience, some agencies are fusing the two realms of activity, and the affirmative action approach is becoming the dominant one.

Insofar as the public contractors are concerned, these agencies evaluate the employer's positive performance on the rationale that the sovereign can fix the terms on which it purchases goods and services, and the contractor may refrain from selling to the sovereign. When they adjudicate conventional complaints, the criterion, in the context

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275. Id.
277. Id.
279. Discussion pp. 23-25 supra.
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of the statute, is whether the employer has refrained from proscribed conduct. That the agencies have blurred the distinction is shown by the scope of interrogatories issued during complaint investigations and by questions propounded at hearings. Employers not subject to affirmative action requirements have been asked to identify the steps taken by the employer to inculcate line supervision in affirmative action; grants by the employer to minority neighborhood projects; and the employer’s efforts to stimulate promotional objectives among minority employees.280

XI. PREEMPTION

A. The National Labor Policy

Preemption issues arise in two settings. First, there is the question explored in an earlier chapter of the ability of OFCC and the contracting agencies to require action which necessitates an employer’s violating the duty to bargain with the union which represents the employer’s employees. Second, there is the conflict between programs under the Executive Order and proceedings before Equal Employment Opportunity Commission or a state or local agency.

To the chagrin of attorneys for unions and management, it has become clear that the national labor policy does not preclude orders in Title VII cases even when they upset collectively bargained provisions or limit the options and alternatives available to the parties during collective bargaining.281 Similarly, the Eastern Contractors282 and Southern Illinois Builders283 cases hold that minority hiring and advancement programs instituted by the federal government under Executive Order 11,246 take precedence over such terms of employment as an employer may have negotiated with the union. Stated differently, the

280. A possible rationalization for this approach may be in the wording of that clause of the underlying statute or ordinance which provides for the form of relief in the event the finding is that the respondent has engaged in a discriminatory practice. Some state and local enactments have used language similar to the following in Section 706(g) of Title VII 42 U.S.C. § 2000e-(5) (1964).

[T]he court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees with or without back pay. . . .


282. 442 F.2d 159, 175 (3d Cir. 1971).

government can disqualify a contractor on account of policies adopted by him and the union in fulfillment of their obligations under the national labor policy.

There had been good reason for union and company attorneys to anticipate that the national labor policy would remain preeminent. In a series of rulings, highlighted by San Diego Building Trades Council v. Garmon, the courts have held that the National Labor Relations Act and the regulatory system administered by the National Labor Relations Board oust federal courts, state courts and state labor boards of jurisdiction. The rationale has been the necessity for a symmetrical, consistent and comprehensive field of regulation. Title VII and the Executive Order contain no relief for employers or unions from their obligations under the national labor policy. It is entirely conceivable that an employer or union could be charged under the National Labor Relations Act with a refusal to bargain in good faith on account of unilateral action taken under the compulsion of affirmative action. In brief, the government can compel a wide range of steps by the employer in the employment arena, but the employer must gain the union’s concurrence to those steps which are collectively bargainable subjects.

The dilemma of the unionized institution is shown by an arbitration award entitled Hotel Employers Association. According to the arbitral findings, an association, representing various San Francisco hotels and subject to a labor agreement with the grieving union, entered into a hiring and advancement agreement with various minority rights organizations dated July 16, 1966. The negotiations leading to this agreement were the result, according to the opinion, of marches, protests, threats and governmental persuasion. The Board of Arbitration by order dated November 17, 1966, sustained the union’s grievance, declaring the civil rights agreement to be in derogation of the labor agreement’s recognition clause, to be a supplantation of the authority of the union under the National Labor Relations Act, to be in conflict with seniority and other collectively bargained provisions, and to constitute a scheme for unlawful discrimination in favor of Negroes. The Board ordered the employers to refrain from complying with the

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civil rights agreement and to refrain from dealing with the various minority group organizations.

B. *Equal Employment Opportunity Commission*

Preemption is also an issue when employment matters regulated under the Executive Order are the subject of proceedings under Title VII or under state or local civil rights enactments. It is not known whether the respondent in a Title VII case or in a state or local proceeding has argued preemption by OFCC. There are numerous cases, helpful by analogy only, dealing with the power of a federal district court to entertain a complaint instituted under Title VII when the subject matter of the complaint is also the basis of a proceeding before the National Labor Relations Board, an arbitrator appointed pursuant to the labor agreement, or a state civil rights commission. As to those controversies, the doctrine is in its formative stage. A premise gaining acceptability is that Title VII's jurisdiction is not exclusive and does not preempt the other tribunals in the sense that the jurisdiction of the National Labor Relations Board preempts other tribunals.

Since the Executive Order provides for referrals from OFCC to EEOC, no contention can be made that filing of a complaint with OFCC precludes redress under Title VII or that the Executive Order preempts EEOC and the federal courts insofar as complaints against government contractors are concerned. The Executive Order and the implementing regulations do not provide a self-sufficient complaint mechanism, for the only corrective action available to OFCC is the imposition of sanctions against a contractor found to have violated the Equal Opportunity Clause.

287. Tipler v. DuPont, 443 F.2d 125 (6th Cir. 1971). (Prior conclusion of NLRB unfair labor practice proceeding adverse to complainant does not preclude Title VII action).
288. Dewey v. Reynolds Metal Co., 439 F.2d 324 (6th Cir. 1970), aff'd, 401 U.S. 932 (1971). (Submission of the grievance to arbitration under the labor agreement was a binding election).
289. Voutsis v. Union Carbide Corp., 321 F. Supp. 830 (S.D. N.Y. 1970); Marquez v. Sales Office, Ford Motor Co., 313 F. Supp. 1404 (D. Neb. 1970). From these cases emerges a doctrine of limited concurrent jurisdiction. Although the complainant has recourse to both the state civil rights procedure and the Title VII procedure, the complainant will be deemed to have made a binding election when either is concluded. In the Voutsis case it was held that the adoption of a conciliation agreement proposed by the state agency constituted the conclusion of the proceeding and an election which precluded furtherance of the federal court proceeding.
290. See discussion p. 46 *supra*.
291. See pp. 44-45 *supra*. 

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In 1970 OFCC and EEOC entered into a memorandum of understanding establishing certain experimental procedures designed to reduce duplication of activities and to facilitate exchange of information. Among the various measures, OFCC was to transmit to EEOC all complaints filed under the Executive Order and EEOC was to investigate them as charges under Title VII. EEOC was to transmit its decision as to probable cause and its findings to OFCC. In the case of complaints against government contractors filed initially with EEOC, that agency was likewise to notify OFCC of its decision and findings in order that OFCC could inform the contractor of possible vulnerability under the Executive Order as well as under Title VII. The effectiveness of the memorandum was to be evaluated at the conclusion of the first 90 days of operation. In the experience of the author some regional offices of EEOC and some civil rights offices of the contracting agencies are unaware of the memorandum.

C. OFCC v. State Agencies

If a company or union attorney is to advocate a preemption theory for the Executive Order, it might deal with proceedings before state and local civil rights bodies concerning matters regulated by the Executive Order. Title VII contains a disclaimer by Congress of any intent to free employers from their obligations under state legislation. There is no such disclaimer in the Executive Order. The grounds for arguing exclusivity against state and local regulations are twofold. The first contention is that the Executive Order and the implementing regulations provide a complete and demanding system, which must require all of the employer’s and union’s energies in the equal opportunity realm. The second is that the quotas and goals which are the heart of the affirmative action require steps in conflict with the basic ban of state and local legislation on discrimination in employment. For the practitioner interested in marketing the first proposition, there is some very mild inspiration in Farkas v. Texas Instruments, Inc. and Farmer v. Philadelphia Electric Co. Each case held that the

293. This disclosure would seem to contravene the requirement of confidentiality applicable to EEOC investigative files, Title VII § 709(e), 42 U.S.C. § 2000e-8(e) (1964).
296. 329 F.2d 5 (3d Cir. 1964) (civil action for damages incurred as a result of alleged violation of nondiscrimination provision in Executive Order).
complaint mechanism established by the Executive Order and by the implementing regulations is the exclusive channel for the processing of complaints that a government contractor or subcontractor has violated its commitments under the Executive Order. A federal district court does not have jurisdiction of such a claimed violation. It must be noted that a government contractor located in a state with a civil rights statute is subject to both the prohibition on discrimination in that statute and the covenant to refrain from discrimination in Paragraph 1 of the Equal Opportunity Clause. If an aggrieved individual claims a violation of the covenant in Paragraph 1, his only recourse, according to the *Farkas* and *Farmer* decisions, is to the complaint procedure in the Executive Order. If the grievant frames the complaint as a violation of the state statute and omits any reference to the Executive Order, the question arises as to whether this mere change in form saves the complaint from the preemption ruling in *Farkas* and *Farmer*.297

As to the second proposition, that the incompatibility of state statutory requirements with affirmative action, necessitates a preemption, there is some support in *Eastern Contractors*. In that case one of the grounds of constitutional invalidity asserted by the plaintiffs was that affirmative action requirements in the Philadelphia Plan conflicted with the ban in the Pennsylvania Human Relations Act on the use of quotas.298 The Third Circuit also noted in its opinion that the Plan required the recording of the race of applicants for employment and of racial breakdowns in the work force itself. In the event of conflict, the court held, the terms of the Executive Order must prevail. While this holding does not give birth to a doctrine of preemption, it does suggest an incapacity in the state tribunal to order action at variance from the Executive Order. By footnote the Third Circuit interjected that state courts might approve “benign quotas” as being within the framework of the state legislation.299 In view of the growing infatuation of state and local regulatory agencies for affirmative action,300 this

297. In *Farmer* the Third Circuit recognized and deliberately declined to decide whether the doctrine of exhaustion of administrative remedies precludes a suit for discharge damages pursuant to a state anti-discrimination statute independent of the provisions of a contract. 329 F.2d at 10. The court quoted the following from Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc., 372 U.S. 714, 725 (1963); “It is impossible for us to believe that the Executive intended for its orders to regulate air carrier discrimination among employees so persuasively as to preempt state legislation intended to accomplish the same purpose.”

298. See p. 28 *supra*.

299. 442 F.2d 159, 166 & n. 14 (3d Cir. 1971).

300. See pp. 46-47 *supra*.
prophecy may well be accurate. As the state and local tribunals gravitate towards the standards of affirmative action in their adjudications, the areas of conflict with the Executive Order are narrowed, and the possibilities that a court in a future case will pronounce a preemption doctrine are lessened.

XII. The Deadlock and a Proposal

It is predicted that the national labor policy will remain vital and husky, notwithstanding some loss of prestige to affirmative action. Congress and the courts have made no significant moves to diminish the realm of subjects within the purview of compulsory collective bargaining or to weaken the tactical devices available to unions in winning their collective bargaining demands. It is predicted that government contractors and subcontractors who are confronted by conflicting demands in the arenas of collective bargaining and of affirmative action will normally bow to collective bargaining and take their chances on affirmative action.

As a consequence there will not be a significant dislodging of the labor contract provisions which have handicapped employers in fulfilling affirmative action requirements. There are various standard contract clauses which are depressing affirmative action. The most obvious is seniority because of its regulation of promotions and transfers and because, when layoffs occur, it causes the more recently hired employees to go out the door first. When a minority worker recruited through affirmative action enters a unionized institution, he typically must begin at the bottom and await the long crawl upwards as he slowly accumulates seniority. When economic conditions cause a reduction in force, the more senior employees normally have the right to bump the recently hired ones. One should also take account of that institution called superseniority, which in the typical contract accords to the union officers the kind of preferential treatment which some affirmative action partisans would urge for minority hires.

In the construction industry employers often blame collectively bargained hiring hall clauses for their ineffectiveness in minority hiring programs. Because of the disassociation of the employer from the intake process, the employer has little influence on such factors as recruitment, registration for work and referral.

There should be awareness of some other normal contract clauses
which can, under some circumstances, impede affirmative action progress. In this analysis it should be kept in mind that hirees recruited through affirmative action programs are often culturally disadvantaged individuals in need of special counselling and surveillance. Sometimes they are persons who need special acclimation to the work environment and to the responsibilities of maintaining union membership.

A compulsory union membership clause can have a stultifying affect because for some recruits the employer may not be able to promise permanent or regular work. In this connection collectively bargained clauses, which by express prohibition or by practical implication inhibit the employer in the use of part-time and casual workers, narrow the opportunities to extend working experiences to the disadvantaged. If the contract establishes a probationary period for new hires, the length or brevity of that period can affect the employer's capacity to perform affirmative action undertakings. The preference of unions has been to eliminate the probationary period altogether or to shorten it. An employer is less likely to take a risk on an inexperienced individual if the probationary period is too short for a full manifestation of work potential.

Many contracts provide that on transfer from the bargaining unit into a foreman's position or into any position outside the bargaining unit an employee loses all accumulated seniority. Unless the employer can guarantee permanent status in the new position, members of the rank and file think long and hard before gambling on such a forfeiture. Since management-level careers are part of affirmative action, employers need the flexibility to try out minority members of the bargaining unit in management jobs on an experimental or training basis.

If the nation is now prepared to set a first priority on affirmative action, one can conceive of measures in both the public and private sectors which would ease the destructive competition with the national labor policy. The premise to the recommended measures is a common commitment to the goals of affirmative action by Congress, the Executive, management and unions.

Initiatives of management—The astute employer should now recognize that the issues debated at the bargaining table are interdependent with programs emanating from the Executive Order. When evaluating union proposals an employer should judge whether embodying certain proposals in the contract would limit the employer's responsiveness to affirmative action requirements. When the employer frames its own
counterproposals, it should include items which, if approved by the union, would increase the employer's effectiveness as an affirmative action vehicle. The employer should take account of deficiencies previously cited during compliance reviews and anticipate new measures which may become necessary or efficacious during the term of the collective agreement. Even though bargaining table proposals may perish in the face of union opposition, the effort should alert the union to the employer's sense of responsibility in the affirmative action arena. In addition, it should impress the responsible compliance officer as to the employer's good faith in pursuing minority goals. The employer's initiatives are more likely to succeed if unions and the government adopt certain initiatives discussed below.

Initiatives of unions—Although labor organizations are not the direct targets of compliance reviews and sanctions, the sophisticated union leader should recognize that policies which expose the employer to debarment also expose the membership to unemployment. By reforms in hiring halls, seniority systems and other valued institutions, unions can modernize them to withstand attacks by the civil rights agencies. More importantly, if affirmative action is truly a new dynamic of economic life, shouldn't unions capitalize on it as they have capitalized on the pension movement, on the national alarm for health and safety and on training, testing and apprenticeship? Instead of shunning the subject, a union can bring its own portfolio of affirmative action proposals to the bargaining table. Again the success of union initiatives would be dependent in large measure upon reform by management and government.

Initiatives of the Executive—Agencies which interpret and administer the Executive Order must open their eyes to the majesty and the durability of the national labor policy. During the term of the labor contract an employer simply cannot institute practices at variance from it, and during negotiations a union's defense of entrenched clauses is almost unshakeable. As a result it is believed that the Executive must

301. The August 1, 1971, Settlement Agreement between the United Steelworkers of America and the Coordinating Committee Steel Committees includes an "Appendix Dealing with Testing" (Appendix I), which by its terms evinces a sensitivity to the principle of job-relatedness developed in regulations and adjudications dealing with minority rights.

302. In the 1968 steel negotiations the union demanded and won provision for a joint Committee on Civil Rights to review matters involving civil rights. Agreement between United States Steel Corporation and the United Steelworkers of America, August 1, 1968, marginal paragraph 25.2.
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innovate inducements and penalties which impinge on unions as well as on employers. Some suggestions follow:

(1) Including unions representing employees of government contractors and subcontractors in the compliance network on the same basis that coverage now envelops suppliers and subcontractors;

(2) Designing an equal opportunity clause applicable to unions to be incorporated in (a) the collective bargaining agreement with the government contractor or subcontractor and (b) in annual certifications by the union to the contractor;

(3) Establishing compliance reviews of unions subject to the Executive Order;

(4) Expanding the complaint procedure under Regulation 60-1 to include complaints of bias by union members and employees against unions;

(5) Providing for referrals by OFCC to the National Labor Relations Board as well as to the Department of Justice and Equal Employment Opportunity Commission of findings deleterious to unions;

(6) Developing a staff expertise concerning collective bargaining and labor management relations;

(7) Introducing a proceeding to be initiated by either a government contractor or a union for the purpose of obtaining a ruling by OFCC as to whether an existing or proposed contract clause is detrimental to the contractor's performance of affirmative action;

(8) Establishing a mechanism for observation of collective bargaining sessions during which terms critical to affirmative action are under consideration;

(9) Furnishing, on the request of either a government contractor or its union, technical assistance in the form of model labor contract clauses or staff assistance at the bargaining table.

Initiatives of Congress—Finally if Congress desires squarely to embrace affirmative action as a national priority it might consider the following suggested amendments to the National Labor Relations Act:

(1) Adding definitive standards for nondiscriminatory hiring halls;\(^3\)

(2) Introducing a procedure for investigation and hearing of citations of non-compliance with the Executive Order referred by OFCC to the National Labor Relations Board (in accordance with the new

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303. Such an amendment would probably be an augmentation of § 8(f) of the National Labor Relations Act, 29 U.S.C. § 158(f) (1964).
procedure for OFCC proposed as item (5) above applicable to the Executive);\textsuperscript{304}

(3) Establishing a special decertification mechanism for unions cited by employees in the representative unit for discriminatory practices or cited by OFCC for non-compliance with the Executive Order;\textsuperscript{305}

(4) Adding to enumerated unfair labor practices of unions and of employers the act of bargaining to impasse to retain or gain a proposal which OFCC has, after conclusion of the proceeding proposed in item (7) applicable to the Executive, ruled to be detrimental to a government contractor's performance of affirmative action;\textsuperscript{306}

(5) Specifically excluding from the unfair labor practice of refusal to bargain in good faith, a refusal to bargain on a proposal which OFCC has ruled to be detrimental to a government contractor's performance of affirmative action;\textsuperscript{307}

(6) Establishing a procedure by which the Board can for a period not exceeding 120 days permit a government contractor to suspend a provision of the collective bargaining agreement in order to effectuate a recommendation of OFCC or of the responsible contracting agency for which a short-term departure from the agreement is necessary.

Inherent in the foregoing proposals is a call for a debate in Congress, where the issues would require a full hearing. In the present artificial situation OFCC and the contracting agencies try to influence unions by compliance efforts against employers, unions try to preserve and expand their protective systems through bargaining table pressures against employers, and the courts try to repel attacks against affirmative action by presupposing a Congressional intent to harmonize the Civil Rights Act of 1964 with the Executive Order. If an adventurous Congressman were to sponsor some or all of the suggested amendments to the National Labor Relations Act, the major issues would be debated by the interested parties. Unions would be forced to justify the perpetuation of the national labor policy in the face of the country's affirmative action needs. Supporters of the Executive Order, of the Philadelphia Plan, and of similar programs would be required to convince Congress of their proposed national priorities. Finally, those

\textsuperscript{304} This amendment would probably require an additional subsection to § 10 of the National Labor Relations Act, 29 U.S.C. § 160 (1964).
\textsuperscript{305} See Independent Metal Workers Union, Locals 1 and 2, Hughes Tool Co., 147 NLRB 1573 (1964).
\textsuperscript{306} This amendment would affect §§ 8(a)(5) and 8(b)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5), (b)(3) (1964).
who contend that the spirit of Title VII of the Civil Rights Act of 1964 can countenance color-conscious hirings and color-conscious promotions would be exposed to a strenuous philosophical interchange with the proponents of an unbiased system. If the confrontations would result in amendments to the Executive Order and to the National Labor Relations Act as proposed above, affirmative action would then truly have a chance.