



Compliance vs. Diversity in Financial Reform

Kellye Whitney, 08-10-2010

The Dodd-Frank Act, or the Dodd-Frank Wall Street Reform and Consumer Protection Act, has generated a lot of discussion, much of it heated, over the past few weeks. But Nita Beecher, chair of workplace compliance and the employment law and litigation group at Mercer, formerly ORC Worldwide, said the conversation actually began months ago with hearings held about the lack of diversity in the financial industry.

“What [the legislation] says basically is they are going to require an office of minority and women inclusion in each of the federal finance agencies, and they’re to look into management, employment and business activities,” she explained. “That includes [the] Treasury [Department], [Federal Deposit Insurance Corp.], Federal Housing Finance Agency, the Federal Reserve, the Federal Reserve Board, the National Credit Union Administration, the Office of the Comptroller of the [Currency], the new Consumer Financial Protection Bureau, and the [Securities and Exchange Commission].”

Section 342 of the act states that any financial services entity or law firm that conducts business with federal financial agencies will be held to the standards in this section. Each of these offices in federal agencies will develop standards to address the diversity policies and practices of the entities regulated by the agency; the focus is employment, not lending.

A director is supposed to create and implement standards and procedures to ensure to the maximum extent possible the inclusion and utilization of minorities, women, and minority- and women-owned businesses in all of the agencies. In proposals, service providers will have to say that they will ensure the fair inclusion of women and minorities in their workforce and in contracts.

“What’s a little tricky is ... all federal contractors already have an obligation under [Executive Order] 11246 to ensure that women and minorities are given a fair opportunity to participate in the workforces of federal contractors,” Beecher said. “That led to the creation of the Office of Federal Contract Compliance Programs, known as the OFCCP.

“The question federal contractors have is how is all of this set up in Section 342 going to tie in with what they already have to do as far as creating affirmative action plans and so forth. Are they going to ask for the same information, different information, more information? We don’t actually know the answer to that question, but there are some guideposts out there.”

Beecher said the legislation isn’t asking for affirmative action plans, but some kind of annual reporting is a strong possibility.

She said one of the reasons the legislation has been so controversial is because it was a surprise.

“I also think there’s a lot of controversy around the idea that somehow minorities and women are being treated better,” she explained. “Looking at the proposed regulations, based on the Supreme Court’s position, all the government can do is what they already do under 11246, which is insist that you prove that women and minorities have the same chance of being hired and so forth if they’re qualified, and that you actually prove that you’re doing outreach.

“That’s what 11246 is about. It’s not quotas, but whenever women and minorities are called out in regulations, there are people who believe that quotas are being required,” Beecher said.

She said it’s going to be an interesting balance between not discriminating against one group and trying to promote another. The diversity executive is in a leadership position, however, Beecher said, and is optimally positioned to help companies understand that diversity is not about picking one group over the other.

“This is not a zero-sum game,” she explained. “I believe, and I think the government believes, and I think people in diversity believe, that there are barriers out there that are very difficult for women and minorities to overcome. Those barriers are difficult to dig out, unconscious bias being one of the [Equal Employment Opportunity Commission’s] favorites right now.

“I see this as an opportunity to work with these companies that have traditionally not shown a lot of progress on how they can take a lemon and make lemon juice out of it. This is an opportunity to develop more individuals, to create more diversity of thought within organizations, and perhaps [to] save us from another economic meltdown by having people who have a broader view of the world in the organization to perhaps make better decisions.”

Beecher said research backs up the idea that a diverse group of people making decisions can lead to better decisions, even if the process or the final result is not as comfortable as one might like.

“OFCCP is really pushing for employers to show that outreach is actually accomplishing [something] — it can’t just be outreach for its own sake, she said. “You’ve got to show that it’s effective, that you’re bringing in people and hiring them. Employers can’t just create numbers and say, ‘We’re going to hire this many women and this many minorities.’ You have to set it up so you have a diverse group from which to select, and ask hard questions if you have qualified diverse candidates and they’re not selected. [It’s a] tough balancing act, I think.”

Beecher said there has always been a little competition between diversity and compliance functions, but the new legislation offers both sides an opportunity to work together — in conjunction with talent managers — to accomplish the ultimate goal of a more diverse workplace.

“It’s going to be a challenge until we see the regulations,” she said. “There are a lot of questions about contracts: ‘Is this only financial?’ ‘Are we going to be asked to give different information than we already have to give elsewhere?’ and so on.

“But it’s an opportunity to push forward in some areas where diversity has not been as successful as it has been in some others. There’s an awful lot of data and analysis that will need to be done to walk this very fine line between complying with what the government requires and not running afoul of the anti-discrimination laws.”

###