Equal Employment and Affirmative Action in Local Governments: A Profile*

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Abstract

Over the past several decades, as the legality and constitutionality of federal programs to end employment discrimination became clear, state and local governments began to enact their own programs. There is surprisingly little information about the extent of such programs at all levels of government. This study begins to fill that void by providing data on the extent of three types of anti-discrimination programs—equal employment opportunity (EEO), affirmative action (AA), and affirmative action in contracting (AAC)—at the local government level.

Our results suggest that local government programs are widespread, although there are variations across program types and across other characteristics of the sample. EEO and AA programs are more prevalent than AAC programs; there are regional differences in the prevalence of these programs; and large local governments are more likely to have these programs than are small local governments. The widespread acceptance of anti-discrimination programs is further supported by the fact that few localities reported any difficulty in or opposition to implementation.

Our findings with respect to affirmative action in contracting are particularly interesting in light of the recent Supreme Court decision in *City of Richmond v. Croson*.[1] We estimate that there are many more affirmative action in contracting programs currently in operation than is commonly believed, and that minority set-aside programs are also prevalent. Our analysis of the new requirements enunciated by the Supreme Court in the *Croson* case

* Support for this project was provided by the Center for the Study of Equal Employment and Affirmative Action, Industrial Relations Research Institute, University of Wisconsin, Madison, Wisconsin.

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1. 109 S. Ct. 706 (1989).

suggests difficulty at the state and local level in maintaining political support for AA programs with new attacks.

I. Introduction

May 17, 1989, marked the thirty-fifth year since the Supreme Court decided *Brown v. Board of Education*[2] and its companion case, *Bolling v. Sharpe*.[3] On July 2, 1989, the Civil Rights Act of 1964[4] was twenty-five years old. In between those historic occasions, President John F. Kennedy issued Executive Order 10,925,[5] the modern embodiment of the affirmative action in employment obligation. Unlike most approaches to civil rights, which simply interdicted certain conduct based on a perceived undesirable status such as race, religion, sex, or national origin, Executive Order 10,925 mandated that recipients of the federal government's contracting largess, in addition to refraining from "old fashioned" discrimination, take affirmative action to insure equality of employment opportunity.[6]

The ease with which the mandate of *Brown* and *Bolling* to desegregate primary and secondary education was frustrated predictably led to mandates requiring percentage participation in schools and busing as a vehicle to achieve such participation.[7] Despite the bitterness that has surrounded the forced integration of which the yellow bus has become a symbol, the evidence suggests that affirmative action programs in employment as well as the small business counterpart, minority set-aside programs, have enjoyed rather widespread acceptance in local governments despite their inclusion of various numerical components—such as goals and timetables.

It may well be that the success in obtaining the adoption of affirmative action plans by state and local government entities

2. 347 U.S. 483 (1954).

3. 347 U.S. 497 (1954).

4. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000a-2000h (1982 & Supp. V 1987)).

5. 3 C.F.R. 448 (1959-1963), *superseded by* Exec. Order No. 11,246, 3 C.F.R. 339 (1964-1965), *reprinted in* 42 U.S.C. § 2000e app. at 28-31 (1982), *superseded by* Exec. Order No. 11,478, 3 C.F.R. 803 (1966-1970), *reprinted in* 42 U.S.C. § 2000e app. at 31-33 (1982) (superseding Part I of Exec. Order No. 11,246 which applies to government employment).

6. *Id.*

7. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Brewer v. School Bd., 456 F.2d 943 (4th Cir.), *cert. denied*, 406 U.S. 933 (1972); United States v. Board of Educ., 417 F.2d 848 (5th Cir. 1969); Jefferson v. Board of Educ., 344 F. Supp. 688 (E.D. Ky. 1972), *aff'd*, 486 F.2d 1405 (6th Cir. 1973); Taylor v. Coahoma County School Dist., 330 F. Supp. 174 (N.D. Miss. 1970), *aff'd*, 444 F.2d 221 (5th Cir. 1971).

through the political process can be explained by the fact that, unlike school integration, the product of bitter litigation, the obligation to take affirmative action in employment, as originally articulated in the Kennedy order and retained in most plans today, carried with it no implication that the employing agency was itself guilty of invidious discrimination. The undertaking of affirmative action was thus *disassociated* from any determination of guilt or determination that any specific minority person was entitled to a benefit.

The final report of the President's Committee on Government Contracts, presided over by then Vice President Richard Nixon, suggested the tenets embodied in the Kennedy executive order.[8] Eight years after the issuance of the executive order, the Philadelphia Plan officially introduced the use of goals and timetables in ending employment discrimination.[9]

Minority set-aside programs in contracting enjoy almost as much longevity as the modern affirmative action concept of the Kennedy order. Although we have not documented the emergence of federal set-aside programs, a minority set-aside had operated as part of the small business set-aside program in the Commerce Department for years.[10] Frustrated by the ineffectiveness of the small business effort, Congress enacted positive legislation mandating a minority set-aside program.[11] The statutory program in *Fullilove v. Klutznick*,[12] under which Congress provided for a 10% set-aside for minority contractors on certain federal grants, had been preceded by an executive order program to facilitate minority participation in government contracting.

Not surprisingly, as the legality and constitutionality of the

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8. The report concluded:

> Overt discrimination, in the sense that an employer actually refuses to hire solely because of race, religion, color or national origin is not as prevalent as is generally believed. To a greater degree, *the indifference of employers to establishing a positive policy* of nondiscrimination hinders qualified applicants and employees from being hired and promoted on the basis of equality.

President's Committee on Government Contracts, Pattern for Progress 14 (1960) (emphasis in original).

9. *See* James Jones, Jr., *The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities*, 70 Iowa L. Rev. 901, 907, 921 (1985).

10. *See* Fullilove v. Klutznick, 448 U.S. 448, 460 (1980) (citing 123 Cong. Rec. 5097, 5327 (1977) (remarks of Rep. Mitchell)).

11. *See, e.g.*, Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116, 117 (codified at 42 U.S.C. § 6705(f)(2) (1982)) (amending The Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369, 90 Stat. 999).

12. 448 U.S. 448 (1980).

federal programs became clear, state and local governments began enacting their own programs. Several factors probably contributed to the growth of such programs. First, the Supreme Court's discussion in *Fullilove*, which removed the constitutional curse from affirmative action, encouraged, if not invited, the executive and legislative branches of government to adopt affirmative action programs.[13]

Second, Title VII of the Civil Rights Act of 1964[14] originally excluded state and local governments from its coverage. These entities were not brought under the jurisdiction of the federal act prohibiting employment discrimination until the 1972 amendments.[15] Once state and local governments were included under the coverage of Title VII, there was impetus for these entities to enact their own fair employment programs. As a gesture toward federalism, Section 706(c) of the Act provides for a sixty-day deferral period to state or local agencies which prohibit employment discrimination.[16] During the sixty-day period the EEOC does not have jurisdiction over the plaintiff's complaint. This, no doubt, stimulated state and local governments to enact their own anti-discrimination laws, rather than leave the matter to the distant EEOC of the federal government. As both federal and state entities tend to borrow liberally from each other, it should come as no surprise that many state and local programs were modeled after the federal programs.

Third, it seems plausible that various federal laws have tended to encourage state and local governments to enact comparable programs or to fashion programs in order to comply with fed-

13. In *Fullilove*, the Supreme Court determined that the judiciary is not the exclusive branch to address the effects of past discrimination. Rather, elected officials, such as chief executives and appropriate legislative bodies, are the more appropriate governmental entities to establish affirmative action programs to deal with the legacy of our past. *See id.* at 486; *see also* James Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. Davis L. Rev. 383, 387 (1988).

14. 42 U.S.C. § 2000e (1982 & Supp. V 1987).

15. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972). To the extent that state and local governments were recipients of federal government contracts under the Kennedy executive order program, such entities were subject to its affirmative action obligations. The growth in affirmative action plans, however, necessarily awaited developments at the federal level regarding their legitimacy. It was not until 1969 that the federal government instituted goals and timetables as part of affirmative action plan obligations. *See, e.g.*, James Jones, Jr., *The Bugaboo of Employment Quotas*, 1970 Wis. L. Rev. 341, 364-73. After the ultimate success of the goals and timetables as a part of the obligation, the U.S. Department of Labor generalized the requirement and extended it to contractors rather than restricting its use to the construction industry. *See* 41 C.F.R. § 60-2 (1988); Comment, *The Philadelphia Plan: A Study in the Dynamics of Executive Power*, 39 U. Chi. L. Rev. 723, 751-52 (1972).

16. *See* 42 U.S.C. § 2000e-5(c) (1982).

eral funding requirements.[17] The Public Works Employment Act of 1977,[18] the subject of *Fullilove*, and other such laws that require affirmative action or minority set-aside by grantees, could be the impetus for local action. Both the extent of such federal laws and their effect exceed the scope of this article.

In spite of substantial government intervention to eliminate the acts and effects of employment and related economic discrimination, there is surprisingly little information about the extent of such programs at any level of government. For example, as late as July 1980 the federal government did not know how many federal programs were subject to affirmative action obligations.[19] The best estimate was that Congress had enacted some sixty to eighty laws embodying such requirements.[20] Similarly, there were few estimates regarding state, city, or county legislative or executive action requiring affirmative action programs.[21]

To help fill that void, we conducted a mail survey of local government personnel administrators in order to determine the extent of three types of anti-discrimination programs (described in more detail below) at the local government level. The purpose of this article is to report and interpret the results of that survey. One of the motivating factors behind this study was to determine the extent to which other legislative and executive entities had responded to the Supreme Court's invitation to enter into the fray.

II. The Survey

A. Purpose

The central purpose of the survey was to ascertain the extent of three types of anti-discrimination policies—equal employment opportunity (EEO) programs,[22] affirmative action (AA) programs,[23] and affirmative action in contracting (AAC) programs[24]—

17. *See, e.g.*, H.K. Porter Co. v. Metropolitan Dade County, 825 F.2d 324 (11th Cir. 1987), *vacated*, 109 S. Ct. 1333 (1989) (remanding for reconsideration in the light of City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989)).

18. 42 U.S.C. § 6705(f)(2) (1982).

19. James Jones, Jr., *Reverse Discrimination in Employment: Judicial Treatment of Affirmative Action Programs in the United States*, 25 How. L.J. 217, 244 (1982).

20. *See id.*

21. One source for state-level programs is [8 Fair Employment Practice Manual] Lab. Rel. Rep. (BNA); *see also* Evalina Moulder, *Affirmative Action: The Role Local Governments Are Playing*, in The Municipal Year Book 1986, at 24-33 (1986) (a survey of the extent of one type of fair employment program (affirmative action) at the local government level).

22. *See infra* pp. 109-11.

23. *See infra* pp. 111-15.

24. *See infra* pp. 115-20.

enacted by local governments. For each program, we sought information about the program's history, coverage, and structure.[25] We also requested information on unionization, litigation activity, and pay equity initiatives. No effort was made to obtain information on the implementation or effectiveness of the programs.[26]

B. Sample

The survey sample included all cities and counties with populations greater than 100,000 for a total of 555 local governments and a two percent random sample of all cities and counties with populations less than 100,000 for a total of 191 local governments. The total sample size was 746 local governments. The sample was assembled by the International City Management Association (ICMA).[27] There were 389 responses, for a response rate of 52%. Table 1 provides additional information on the sample and respondents, listed by type of government, size,[28] and geographic region. Chi-square analyses[29] indicate that no statistically significant[30] dif-

25. For an analysis of federal equal employment opportunity legislation using similar criteria, see Paul Burstein, Discrimination, Jobs, and Politics: The Struggle for Equal Employment Opportunity in the United States Since the New Deal (1985). Burstein summarizes the provisions of such legislation into five categories: (i) the groups to be protected; (ii) the organizations and individuals prohibited from discriminating; (iii) the employment practices that are unlawful; (iv) enforcement provisions; and (v) the penalties to be applied to persons who illegally discriminate. *Id.* at 19-32.

26. The survey was conducted in the spring and summer of 1986. A copy of the survey is included in Appendix B.

27. The ICMA is a professional association for management officials of cities, counties, towns, and other local governments in the U.S. and Canada. They maintain an extensive data base on a variety of aspects of local government operations and can provide mailing lists with names, where available, or titles (in this case, "Personnel Director") for virtually every local government in the U.S. For a statement of the organization's goals and a description of the data base they have developed, see International City Management Ass'n, The Municipal Year Book 1986, at xi-xx (1986).

28. As already noted, the sample includes all cities and counties over 100,000 in population, and a 2% sample of all cities and counties with population under 100,000. Throughout this paper, "large" will refer to the first group, and "small" will refer to the second group.

29. Chi-square analysis is used to test whether separate samples can be said to have come from a single, homogeneous population, versus whether there are significant differences between groups. A non-significant chi-square statistic suggests that there are no real (non-chance) differences between groups. A significant chi-square suggests that there are real differences between groups. For information on calculating chi-square and testing the homogeneity hypothesis, see Donald Plane & Edward Oppermann, Business and Economic Statistics (3d ed. 1986).

30. Statistical significance is an indication that the observed differences between groups in the sample are not merely due to chance, but rather that they reflect true differences between the groups in the entire population. Specifically, statistical significance means that the probability of observing differences equal to or greater than those actually observed, if there were no real difference in the pop-

ferences exist in response rates across type of government nor across geographic regions. There is, however, a statistically significant difference across size of local government.[31] Large local governments[32] composed 74.4% of the sample but 81.5% of responses, while small local governments composed 25.6% of the sample but only 18.5% of the respondents. This difference is not surprising because larger governments are likely to have larger and more specialized staff, particularly a separate personnel specialist and/or branch available to respond to surveys such as this.

The remainder of this article reports and analyzes the results of the survey. The discussion is ordered by type of program.

III. Equal Employment Opportunity (EEO) Programs

A. Introduction

In the survey, we defined EEO programs as policies that, similar to Title VII, make it illegal for the city or county to discriminate against certain groups of people in various employment decisions.[33] The main distinction between local programs and federal programs is that the local programs may be more comprehensive, particularly in protected groups, than the federal program. By enacting their own programs, local governments may be able to tailor their policies to their own environments.

As Table 1 indicates, 319 local governments, constituting 82% of the respondents, report having a local EEO program. No significant differences exist across type of government—83.2% of counties and 80.3% of the cities report having such a program. Statistically significant differences, however, do exist across size, with 88.6% of large local governments reporting an EEO program, while only 52.8% of small local governments report a program.[34] There are also statistically significant differences across regions.[35] Slightly more local governments in the west report having an EEO program relative to the sample average, while slightly fewer local governments in the northeast report EEO programs. The percentage figures for EEO programs in the north central and southern regions are about the same as percentages for the overall sample.

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ulation, falls below some predetermined level (in this article, .10). For further information, see *id.*

31. Cities constituted 41.2% of the sample and 40.4% of responses, while counties were 58.8% of the sample and 59.6% of responses.

32. Chi-square statistic = 10.553 with one degree of freedom ($p < .01$).

33. For the exact definition, see the survey in Appendix B.

34. Chi-square statistic = 48.745 with one degree of freedom ($p = .000$).

35. Chi-square statistic = 9.950 with three degrees of freedom ($p = .019$). See Table 1 for the definition of the four regions.

B. EEO Program Characteristics

This section discusses the main features of local government EEO programs. Unless otherwise noted, the information in the remainder of this section is based on responses from the 319 local governments with EEO programs.

1. Program History

As indicated in Table 2, most of the EEO programs in this survey were adopted during the 1970s. The earliest reported program was adopted in 1950. Through the 1960s, only one or two local governments per year enacted EEO programs. Interestingly, 1972 appears to have been a pivotal year. Prior to that year, three or four jurisdictions each year enacted programs. In 1972, Title VII was amended to bring state and local governments within its scope.[36] After 1972, the number of local government EEO programs enacted jumped to twenty-two, a level which continued throughout the following decade. By the mid-1980s, however, the number of local governments enacting EEO programs declined. This may suggest that a saturation point has been reached. That is, most local governments have adopted an EEO program, and have presumably turned to other issues.

More than half, or 56.7%, of the local governments report that their EEO programs were established through legislative action by a city council or county board. Another common method, as reported by 19% of local governments, was an executive order by the mayor or county supervisor. Other methods of enactment reported include: resolutions or policy statements adopted by the city or county government body, personnel policies or manuals, city charters, state requirements, and the federal government's revenue-sharing program.

2. Program Structure

Table 3 presents selected characteristics of the EEO programs. One critical feature of any fair employment program is the determination of which groups will be protected. For the local government programs in the survey, the protected classes fall generally into three categories. Race, gender, religion, national origin, color, age, and physical handicap are protected classes in well over 80% of all the local programs. In a second tier of protected classes, 35% to 50% of local government EEO programs include the categories of marital status, mental condition, pregnancy, political affilia-

36. *See supra* note 15.

tion, and veteran status. In the last tier, less than 30% of the programs extend protection to sexual orientation or preference, arrest record, and conviction record.

The types of employment decisions covered by the EEO programs are also shown in Table 3. Ninety-seven percent of all programs cover hiring decisions and 92% cover promotion decisions. Fifty to seventy-five percent of the programs regulate placement, termination, training, transfer, rates of pay, discipline, upgrading, layoff, and reinstatement.

In addition to being applicable to the local government's own employment practices, 24% of the governments with an EEO policy report that the policy also applies to labor unions, 20.1% of the policies apply to private sector employers, and 13.2% of the policies cover employment agencies.

In terms of enforcement agencies, roughly one-third of the respondents report that enforcement responsibility lies with an EEO officer or department. Approximately another third report that enforcement lies with a personnel officer. The remaining third of the respondents indicate that enforcement responsibility lies with several different bodies: 9.4% with an EEO/civil rights/human resource commission, 7.8% with a division or department within the executive branch, and 3.1% with a committee within the legislative branch.

Table 3 also presents information on enforcement activities at the local government level. Most of the programs appear to adopt a voluntaristic approach. The most commonly reported enforcement powers include 92.8% with the authority to investigate complaints, 79.9% with the power to make findings of fact, and 70.2% with the power to mediate or conciliate. Less prevalent are stronger forms of enforcement authority: 29.2% report that the enforcement agency has authority to order prospective goals and timetables, and 26.3% report the power to issue binding orders.

IV. Affirmative Action (AA) Programs

A. Introduction

For this survey, we defined AA programs as policies that not only prohibit discrimination in employment decisions, but also require the city or county to take specific and identifiable steps to increase the number of females and minorities employed. Thus, along with the information about local EEO programs, we sought additional information about local AA programs, such as the specific efforts used by local governments to increase minority employment, the protection afforded to protected group members in

case of layoffs, and sources of difficulty or opposition to these programs. In addition, we examined two types of affirmative action policies. The first is a policy requiring the local government to improve its own employment practices. The responses of governments with such policies are reported in this section. The second type of affirmative action policy examined involves local government requirements that government contractors implement AA programs as a condition of eligibility for local government contracts. These results are reported in the next section.

As Table 1 indicates, 292 of the 389 respondents, or 75.1%, report having an affirmative action (AA) program. There is a slight difference between the percentages of cities and counties that report having AA programs, but this difference is not statistically significant. There are significant differences, however, in the existence of programs across the four regions. Those differences are not quite as great as with the EEO programs.[37] The pattern of variation is similar to EEO programs. The western region is overrepresented, the northeastern region is underrepresented, and the north central and southern regions report AA programs at about the same frequency as the overall sample. Also similar to EEO programs, the size dimension is significant because 84.2% of the large governments report having an AA program, whereas only 34.7% of small governments report having such a program.[38]

B. Program Characteristics

This section describes the characteristics of local government AA programs. Unless otherwise specified, the percentage figures are based on the 292 local governments that have AA policies.

1. Program History

Local government AA programs are similar to the EEO programs in several respects. For example, Table 2 shows that both EEO and AA programs were enacted almost simultaneously. Fewer than ten AA programs were enacted during the 1960s. Starting in 1972, the number of AA programs enacted per year increases dramatically.[39] The majority of programs were established

37. Chi-square statistic = 6.162 with three degrees of freedom (p = .104).

38. Chi-square statistic = 73.734 with one degree of freedom (p = .000).

39. It should not be surprising that 1972 was a pivotal year for the growth of affirmative action plans. In 1971, two key decisions on affirmative action programs in employment were decided by the courts. In Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 854 (1971), the first federal effort to impose affirmative action plans on contractors in the construction industry using goals and timetables was sustained against statutory and constitutional attack.

between 1972 and 1981. After 1981, the number of AA policies enacted per year declined substantially.

Also similar to EEO programs, 146 local government AA programs, or 50%, were enacted through local government legislation, and 24.3% were introduced by executive order. Other methods written in by respondents include: city or county policy, local government charter, and resolution adopted by the local governing body or a combination of agencies, offices, and governing bodies. Respondents seldom refer to pressure from the federal or state government or litigation as the impetus for local government AA programs, though one city reports a 1975 federal consent decree for hiring in the police department.

2. Program Structure

In addition to their own basic employment practices, 80.8% of respondents report that their policies specifically include their managerial employees while 75.3% include their law enforcement/ firefighting personnel.

As with the EEO programs, the majority of AA programs are administered by either an AA officer or department or by the city/ county personnel department. Other responses include a division within the executive branch (5.8%), an EEO/AA/civil/human rights commission (3.4%), and a committee within the legislative branch.

Table 4 presents data on other characteristics of local government AA programs. In terms of how the AA plans are formulated, 82.5% of local governments report that all agencies and departments are covered under one plan. About 8% of respondents report that each agency formulates its own plan within guidelines established by the city/county policy, while about 5% report that each agency formulates its own plan subject to approval by the agency charged with administering the plan.

Perhaps the most controversial aspect of AA is the use of goals and timetables, or so-called "quotas," to increase the employment of protected groups. Of respondents reporting they have an

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Id. at 171-77. In Associated Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), the court sustained the validity of similar plans imposed by the state of Massachusetts. *Id.* at 21. In *Altshuler*, the court made clear that the federal program did not preempt the field but rather indicated that the Secretary of Labor should "use his best efforts" to encourage state and local agency cooperation and initiative. *Id.* at 15. The program under scrutiny in *Contractors Ass'n* was an initiative of the executive, *Contractors Ass'n*, 442 F.2d at 163, whereas the program in *Altshuler* was legislative enactment. *See Altshuler*, 490 F.2d at 11. The United States Supreme Court refused to review both cases.

AA program, 179 (61.3%) report that their AA policies *require* them to include goals and timetables, as shown in Table 4.[40] Where goals and timetables are required, the most frequently observed groups are women (97.8% of the 179 programs), blacks (92.2% of the programs), and Hispanics (82.7% of the programs). Other protected groups include handicapped persons (36.3%) and veterans (15.6%). Sixty-two (34.6%) also responded to the "other" option. Almost all of these responses indicate that American Indians and Asian/Pacific Island natives are included as protected classes in establishing employment goals. A few respondents indicate that "all minorities" or "all protected classes" are included in the establishment of goals and timetables.

Table 4 also presents information on the various requirements of local government AA programs. The most common requirements include outreach and recruitment efforts, review of rules, policies, procedures and practices, review of work requirements, training and career counseling, validation of tests and selection procedures, and upward mobility programs. Also included are job restructuring programs, rotation and transfer programs, and internships.

The most common enforcement authority is either an AA officer, as reported by 45.2%, or the city/county personnel officer, as reported by 31.5%. Only a few local governments indicate that other enforcement agencies, such as an AA committee (4.5%), the agency's own AA officer or division (1.0%), or the agency's own personnel officer (0.7%), act as the policy's enforcement authority.

One issue of concern regarding AA programs is how to protect the advances made in minority employment in the face of significant public sector layoffs and budget constraints in the 1980s. Local governments were asked if their AA policies provided special protection against layoffs for protected group members. Sixty-six local governments, constituting 22.6% of local governments with AA programs, report that some sort of special protection is included. The most common response is government "consideration of EEO/AA implications when layoffs occur," reported by forty-one of the sixty-six local governments. Also common among the programs are the options of using the civil service grievance procedure (twenty-six respondents), the union grievance procedure (eighteen respondents), giving credit to job performance (fif-

40. The question asks if goals and timetables are required. It is possible that those jurisdictions reporting that goals and timetables are not required might still allow their use.

teen respondents), and a special appeals committee (fourteen respondents).

The survey asked whether the local governments provided layoff protection to suspect classes by any other means, such as through court orders, collective bargaining, and voluntary agreement. Of respondents with an AA program, 55.9% report that no other protection is provided. In addition, 28.2% of local governments report that additional protection is provided through collective bargaining,[41] while 5.9% of local governments report voluntary agreements to provide additional protection, and one local government reports that a court order has been used.

Finally, the survey asked local governments whether or not they had encountered any opposition or difficulty in implementing their affirmative action policies. Almost three-quarters (71%) of those responding report no difficulties in or opposition to implementation, while 25% report they have encountered some difficulty or opposition. Table 5 provides information on the sources of difficulty or opposition to AA programs reported by respondents. The most common problems reported are budget limitations and recruitment difficulties. Less common, though still mentioned, is opposition to the programs from management, employees or the public, and seniority provisions in collective bargaining agreements.

V. Affirmative Action in Contracts (AAC) Programs

A. Introduction

Since the late 1960s a minority set-aside had operated as part of the small business set-aside program in the United States Commerce Department.[42] The statutory program in *Fullilove v. Klutznick*, under which Congress provided for a 10% set-aside for minority contractors on certain federal grants, had been preceded by an executive order program designed to facilitate minority participation in government contracting.[43] *Fullilove*, however, remains the only case in which the Supreme Court has passed judgment on the constitutionality and legality of federal affirmative action programs not the result of a court order. The Supreme Court has yet to address any case involving an affirmative action

41. We do not know how these programs would be affected by Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (striking down a plan which provided layoff protection).

42. *See* Fullilove v. Klutznick, 448 U.S. 448, 460 (1980) (*citing* 123 Cong. Rec. 5097, 5327 (1977) (remarks of Rep. Mitchell)).

43. *Id.* at 459-67.

plan mandated by the president's executive order.[44]

In the survey, we defined affirmative action in contracts (AAC) policies as those that allow the city or county to require private sector employers to submit affirmative action plans covering their own work force as a condition to obtaining city or county contracts for goods and services. Also included are minority business incentive (MBE) programs that seek to provide minority businesses with an equitable opportunity to compete for city or county contracts. This represents an even wider net of affirmative action. AACs may be the most important of the local government initiatives because they represent, essentially, the "power of the purse."

Almost 45% of the survey respondents report that they have an AAC program, as shown in Table 1. Unlike the EEO and AA programs, the AAC programs show a statistically significant difference across type of government. In this sample, counties are underrepresented with 39.7% reporting an AAC program, while cities are overrepresented with 52.2% reporting an AAC program.[45] Local AAC programs resemble the EEO and AA programs with respect to type of government and size. Large government units are overrepresented at 49.8% and small government units are underrepresented at 22.2%. This difference is statistically significant.[46] Again, there are also regional differences in AAC programs, with a pattern slightly different from the other two programs.[47] The western region again reports more AAC programs relative to the sample average or 52.7%, while the north central region reports AAC programs at 50%, about the same as the overall sample. Unlike the other two programs, however, the southern region reports fewer AAC programs (35.6%), while at 42.1% the northeast region, for the first time, is about the same as the overall sample average.

B. Program Characteristics

This section describes the central characteristics of local government AAC programs. Unless otherwise noted, the percentage

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44. In United Steelworkers v. Weber, 443 U.S. 193 (1979), however, the Court found that a voluntary program entered into by a company and a union did not violate Title VII of the Civil Rights Act of 1964 despite its requirement that training opportunities be allocated on a 50/50 racial basis. *Id.* at 197. More recently, in Johnson v. Transportation Agency, 480 U.S. 616 (1987), the Court sustained an affirmative action plan against a reverse discrimination attack as not being in violation of Title VII. *Id.* at 641-42. In neither case was the constitutional issue addressed. *See Weber*, 443 U.S. at 200; *Johnson*, 480 U.S. at 620 n.2.

45. Chi-square statistic = 4.699 with one degree of freedom (p = .030).

46. Chi-square statistic = 18.028 with one degree of freedom (p = .000).

47. Chi-square statistic = 7.307 with three degrees of freedom (p = .063).

figures are based on the 174 local governments that have AAC programs.

1. Program History

As Table 2 indicates, introduction of AAC programs follows a time trend similar to that of the other two programs, with the bulk of these programs having been enacted between 1972 and 1981. In fact, almost half of the programs were introduced in the period between 1975 and 1980.[48]

As were the EEO and AA programs, over half, or 53.4%, of local government AAC programs were initiated by local legislation. AAC programs were also enacted by executive order (17.8%), mandate by purchasing department (5.2%), and voluntary action (2.9%).

2. Program Structure

Table 6 presents selected characteristics of AAC programs. Respondents were asked to indicate the types of contracts covered by their AAC programs. The category of contract most often covered is construction contracts, with 87.9% of local governments reporting that their AAC policies cover those contracts. In addition, contracts for services are included in 75.3% of the cases, and contracts for goods in 70.1%.

Respondents were asked to indicate which groups must be included in an employer's affirmative action plan under the AAC

48. Here again, the proliferation of AAC programs, particularly those including MBEs, during this time frame should not be too surprising. Before Fullilove v. Klutznick, 448 U.S. 448, (1979), as the Court noted, there was a fair body of federal law sustaining the MBE (10% minority control set-aside requirements) starting in 1977. *See* Ohio Contractors Ass'n v. Economic Dev. Admin., 580 F.2d 213 (6th Cir. 1978); Constructors Ass'n v. Kreps, 573 F.2d 811 (3d Cir. 1978); Rhode Island Chapter, Associated Gen. Contractors v. Kreps, 450 F. Supp. 338 (D.R.I. 1978); Associated Gen. Contractors v. Secretary of Commerce, No. 77-4218 (D. Kan. Feb. 9, 1978); Carolinas Branch, Associated Gen. Contractors v. Kreps, 442 F. Supp. 392 (D.S.C. 1977); Montana Contractors' Ass'n v. Secretary of Commerce, 439 F. Supp. 1331 (D. Mont. 1977); Florida East Coast Chapter v. Secretary of Commerce, No. 77-8351 (S.D. Fla. Nov. 3, 1977). *But see* Associated Gen. Contractors v. Secretary of Commerce, 459 F. Supp. 766, 780-81 (C.D. Cal. 1978) ("10% race quota was not a constitutionally acceptable means of promoting the Congress' legitimate interest in promoting employment in the construction industry among minority group members").

As to state and local plans requiring affirmative action in employment, see Associated Gen. Contractors v. Altschuler, 490 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974). For other state and local plans, see Weiner v. Cuyahoga Community College Dist., 19 Ohio St. 2d 35, 249 N.E.2d 907 (1969) ("Cleveland Plan"), *cert. denied*, 396 U.S. 1004 (1970); Joyce v. McCrane, 320 F. Supp. 1284 (D.N.J. 1970) ("Newark Plan"); Southern Ill. Builders Ass'n v. Ogilvie, 327 F. Supp. 1154 (S.D. Ill. 1971) ("Illinois Ogilvie Plan"), *aff'd*, 471 F.2d 680 (7th Cir. 1972).

policy. The most frequent responses were: women (87.9%), blacks (86.8%), and Hispanics (80.5%). Almost half of the respondents with AAC programs report that handicapped persons are included, and about a quarter indicate that veterans are included. In addition, 32.2% of local governments responded to the "other" category. As with the AA programs, the most common "other" or additional classes included by respondents are Asian/Pacific Islanders and American Indians, which are listed by fifteen respondents. Five governments indicate that their AAC policies cover some combination of age, religion, creed, and national origin. Ten respondents simply respond that "all minority" or "all ethnic" groups are included. Three mention low-income residents as constituting a protected class in their jurisdictions.

Respondents were asked to indicate the criteria used to determine which contracts were subject to AAC policies. For fifty-five (31.6%) of those with AAC policies, the dollar-amount of the contract determines whether it is subject to AAC requirements. For thirty-four of those fifty-five governments, the dollar value criterion is $10,000 or less. Five governments report a dollar value criterion of $20,000, three report $25,000, two report $50,000, three report $100,000, and one reports $150,000. Seven governments indicate that the dollar value is the criterion, but do not provide the amount.

Eleven local governments report that the size of the potential contractor is the criterion used. Of those eleven, one jurisdiction reports that a subcontractor with ten or more employees is subject to the AAC policy, three report that employers with fifteen or more employees are subject, and three report that subcontractors with fifty or more employees are subject to the program.[49]

Twenty-nine local governments indicate that AAC requirements are determined by the combination of both the dollar amount and the number of employees. These are more difficult to summarize, but it is worth noting that for fourteen of those twenty-nine governments, the AAC policy applies to contracts of $10,000 or less and to subcontractors with ten or fewer employees.

Finally, over one-third of the respondents indicate some other measure is used in determining contractor requirements. Approximately half of this group report that "all" contracts and/or bids are included. Thirteen governments indicate that the main criterion is whether the project is funded by the federal and/or state government. Three governments report that contractors must show "good faith" efforts in their own employment and/or in

49. Four respondents did not indicate the requisite number of employees.

their use of subcontractors. One respondent explains that they have a 30% set-aside program, in which 15% of contract dollars go to small businesses, 10% to minority-owned businesses, and 5% to female-owned businesses. Although more information is needed, as a whole these responses suggest that the scope of AAC programs is quite broad. That is, the policies apply to small contracts as measured by dollar value and small employers as measured by number of employees.

Table 6 indicates various requirements respondent employers must comply with in order to be eligible for a contract under the AAC program.[50] Over half of the local governments report that employers must sign an affirmative action policy statement provided by the city or county. Also common is the requirement that the employer sign a contract that includes a provision allowing the city/county to monitor the employer, with 46.6% of respondents reporting such a requirement. Another approach requires the employer to develop an affirmative action plan within the bounds of specific criteria determined by the city or county; sixty-four respondents (36.8%) report having this requirement. The final option requires the employer to complete a formatted affirmative action plan developed by the city or county; thirty-nine local governments (22.4%) report having this requirement.

A fair amount of diversity exists in terms of which agency is charged with monitoring compliance under local government AAC programs. Thirty-one percent report that the city/county AA officer has monitoring responsibility. Twenty percent report that each individual contracting agency or department is charged with monitoring its own contractors for compliance. Thirteen percent report that a central purchasing office is responsible for monitoring. Finally, almost one-third report that some other agency is charged with monitoring. About half of this latter group of respondents indicate that a specific contract compliance officer or department has this responsibility.

Table 6 also presents information on the powers available to the city or county to enforce compliance. Slightly more than 61% indicate that the enforcement authority has the power to suspend the contract until the employer comes into compliance. A similar number, 58%, indicate that the enforcement authority may terminate the contract. Less frequently, 43.7% of the respondents report the authority to bar the employer from future contracts. Additionally, 30.5% report that the enforcement authority has the ability to modify the employer's plan without actually suspending

50. The question is framed such that there might be multiple responses.

the contract. Finally, 16.7% report the authority to impose financial penalties.

One key aspect of an AAC program is whether it includes incentive provisions designed to encourage the city/county to enter into contracts with firms and organizations owned by females and minorities. These shall be referred to as minority-business enterprise programs or MBEs. As Table 6 indicates, 123 local governments, or 70.7% of all respondents with an AAC program, indicate that the program includes an MBE component. The most common features of such MBE programs include the use of a source list of MBEs maintained by the city/county (78.9%), and the requirement that the city/county make a good faith effort to contract with MBEs (75.6%). Slightly over 40% of local governments with MBE incentives indicate that a percentage of all contracts must be awarded to female or minority owned businesses. Further MBE incentives include the waiving of performance bonds, and a program of awarding all contracts below a certain amount to MBEs, each reported by seven local governments.

As with the section on AA programs, respondents were asked if they encountered significant opposition to or difficulty in implementing their affirmative action in contracts policy. The response to this question is similar to the response for the basic AA program. Three-quarters of the respondents report no difficulty while 25% report some difficulty. Table 5-Panel B provides information on the sources of difficulty or opposition reported by respondents. The most common problems include resistance from private sector employers and budget limitations. Also listed are internal management opposition and public opposition.

VI. Additional Information and Analyses

Finally, we concluded the survey by asking respondents to provide brief information on the unionization of their employees, litigation of their AA programs, and pay equity initiatives. Unless otherwise noted, the percentage figures are based on the 389 total respondents.

A. Union Representation

First, respondents were asked whether their employees were represented by a union and if their AA policy had ever been arbitrated under the provisions of a collective bargaining agreement. Two hundred seventy-one local governments (69.7%) report that at least some of their employees are represented by a union, while 111 local governments report that their employees are not repre-

sented by a union. Of those reporting union representation, twenty-three local governments (8.5% of the 271 local governments with union representation) indicate that their AA policy has been subject to arbitration under the provisions of their collective agreement.

B. Litigation of AA Policy

In addition, each respondent was asked whether or not its affirmative action policy had been litigated in court. In response, thirty-seven local governments (9.5%) answered in the affirmative, while 321 local governments (82.5%) responded in the negative, and thirty-one (8%) responses were missing. When questioned about the outcome of the litigation, nineteen governments reported that their AA policies were upheld, and five additional governments reported that their policies were upheld with modification. Only one local government reported that its policy was determined to be illegal.

C. Pay Equity Initiatives

Finally, the respondents were asked to indicate whether they had undertaken any initiatives concerning pay equity between male and female employees, including comparable worth. Of the total respondents, 114 local governments (29.3%) indicated they had undertaken some pay equity initiative, while 62.7% reported they had not. Thirty-one local governments did not respond. Those reporting that they had undertaken some pay equity initiatives were asked to indicate what they had done. Fifty-three local governments (46.5%) indicated that they had conducted job evaluations emphasizing comparisons between "male" and "female" jobs. Thirty-seven local governments (32.5%) reported that they had established a committee to study and report on the issue. Similarly, thirty-four local governments (29.8%) reported that they had bargained over this issue as part of regular or special negotiations with the labor organization(s) representing their employees. Twenty-seven local governments (23.7%) indicated that they had allocated a specific amount of money to increase the pay of female-dominated jobs.

VII. *City of Richmond v. J.A. Croson Co.*[51]

A. Preliminary Assessment of Croson's *Impact on Affirmative Action in Local Governments*

In January 1989 the Supreme Court struck down the minority business enterprise (MBE) requirement in the city of Richmond. According to Richmond's MBE program, prime contractors awarded city construction contracts were required to subcontract at least 30% of the dollar amount of the contract to one or more minority business enterprises. Our survey results are particularly timely in that they allow us to assess the magnitude of the problem created by *Croson*. In this final section, we review the strict scrutiny standard by which the Court measured the Richmond set-aside program, we estimate the number of AAC and set-aside programs that might be affected by this decision, and we provide our view of how *Croson* will affect affirmative action in contracting at the local government level.

Perhaps more significant than the Court's determination that the city of Richmond plan was illegal, is the determination that the strict scrutiny standard applies to any plan requiring classification by race.[52] Strict scrutiny requires that a government program that classifies individuals on the basis of race may do so only if the classification is justified by a compelling state interest and the means employed are narrowly tailored to affect that interest.[53] In prior cases in which the Supreme Court grappled with the affirmative action issue, there has never been a majority agreement on which judicial standard to apply in evaluating such plans. Although *Croson* involves a multitude of opinions, it is clear that the majority supports the strict scrutiny standard of analysis.[54]

The *Croson* case had been before the Supreme Court before. Earlier, the district court for the Eastern District of Virginia had ruled in favor of the city.[55] On appeal, the Court of Appeals for the Fourth Circuit affirmed.[56] The Supreme Court granted certiorari and remanded the case for further consideration in the light of its intervening decision in *Wygant v. Jackson Board of Education*.[57] Some confusion was generated by the lower courts' applica-

51. 109 S. Ct. 706 (1989).

52. *Id.* at 721-23 (plurality opinion); *id.* at 735 (Scalia, J., concurring).

53. *Id.* at 722-23, 727-28.

54. *See supra* note 52.

55. *Croson*, 109 S. Ct. at 716.

56. J.A. Croson Co. v. City of Richmond, 779 F.2d 181 (4th Cir. 1985).

57. J.A. Croson Co. v. City of Richmond, 478 U.S. 1016 (1986), *vacating and remanding* 779 F.2d 181 (4th Cir. 1985).

tion of *Wygant v. Jackson Board of Education*,[58] in which a plurality of the Supreme Court had applied strict scrutiny. On remand the court of appeals held that the city's plan violated both prongs of the strict scrutiny standard in that (1) the plan was not justified by a compelling government interest because the record revealed no prior discrimination by the city itself in awarding the contracts;[59] and (2) the 30% set-aside was not narrowly tailored to accomplish a remedial purpose.[60]

The Supreme Court affirmed.[61] In doing so, however, the Court made clear that the court of appeals had misapplied the *Wygant* plurality opinion in the instant case. The *Croson* majority clarifies the confusion generated by *Wygant*. Although in *Wygant* the Court required that the city implicate itself in prior discrimination, that was so only because the affirmative action plan was related to employment practices of the city itself. *Croson* made clear that no such general requirement is demanded. The Court held that a state or local subdivision, with state-delegated authority, has the power to eradicate the effects of private discrimination within its own legislative jurisdiction.[62] The Court concluded as a matter of state law that the city of Richmond had the requisite legislative authority over its procurement policies and therefore could use its spending powers to remedy private discrimination, if it identified that discrimination with the particularity required by the fourteenth amendment to the United States Constitution.[63] Moreover, the Court concluded that if the city could show that it essentially had become a passive participant in a system of racial exclusion practiced by elements of the local construction industry, it could take affirmative steps to dismantle such a system.[64]

In applying the strict scrutiny standard to the *Croson* facts, however, the Supreme Court, agreeing with the Fourth Circuit, concluded that the city had failed to demonstrate a compelling government interest justifying its set-aside plan.[65] The Court found that the factual predicate supporting the plan did not establish with particularity the type of identified past discrimination in the city's construction industry that would authorize race-based relief under the fourteenth amendment.[66]

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58. 476 U.S. 267 (1986).
59. J.A. Croson Co. v. City of Richmond, 822 F.2d 1355, 1358-60 (4th Cir. 1987).
60. *Id.* at 1360-62.
61. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706 (1989).
62. *Id.* at 720.
63. *Id.*
64. *Id.*
65. *Id.* at 723-28.
66. *Id.* at 723.

With regard to the second requirement of strict scrutiny, the Court concluded that the plan was not narrowly tailored to remedy the effects of past discrimination because it entitled black, Hispanic, or Oriental entrepreneurs from anywhere in the country to an absolute preference over other citizens based solely on their race.[67] The plan's rigid 30% quota rests on an assumption that minorities would choose to enter the construction industry in proportion to their representation in the local population.[68]

Unlike the plan upheld in *Fullilove v. Klutznick*,[69] the Richmond plan's waiver system focuses on the availability of MBEs and does not inquire whether the particular MBE suffered from the effects of past discrimination by the city or prime contractors.[70] Given the fact that the city must already consider bids and waivers on a case by case basis, its only interest in maintaining a quota system rather than investigating the need for remedial action in particular cases would seem to be administrative convenience. Convenience cannot justify the use of a suspect classification under the equal protection strict scrutiny standard.[71]

Although the majority in *Croson* establishes that the strict scrutiny standard applies, we are still left with the chore of mucking around in the interstices of the various opinions, and of prior opinions of the Court, to ferret out the content of the strict scrutiny standard to be utilized in such cases in the future. The plurality in *Wygant v. Jackson Board of Education* leads to a two-pronged standard: in order to institute a program requiring classification based on race (1) any racial classification must be justified by a compelling government interest, and (2) the means chosen by the state to effectuate its purpose must be narrowly tailored to the achievement of that goal.[72]

In *United States v. Paradise*,[73] the Court recently enunciated factors to be considered in analyzing the appropriateness of race-conscious remedies as follows:

> In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the numerical goals to the relevant labor market; and the impact of the relief on the rights of

67. *Id.* at 727-28.
68. *Id.* at 728.
69. 448 U.S. 448 (1979).
70. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 714 (1989).
71. *See id.* at 727.
72. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274 (1986).
73. 480 U.S. 149 (1987).

third parties.[74]

It should be noted that a plurality at best endorses the standards in *Paradise*. In her dissent, Justice O'Connor asserts that the Court adopts a standardless view of "narrowly tailored" far less stringent than that required by strict scrutiny.[75] In *Paradise*, and earlier cases, O'Connor focused on the rigidity of the quota and the failure to explore available alternatives.[76]

Even if a majority were to adopt the multifactored analysis of *Paradise* to evaluate the appropriateness of a race-conscious remedy, it is unclear what would satisfy Justice O'Connor with regard to less intrusive alternatives. Most troublesome is the Court's concern in *Croson* with less intrusive alternatives. Justice O'Connor suggests that even absent evidence of discrimination, the city of Richmond has available a whole array of race-neutral devices to increase city contracting opportunities for all who have suffered the effects of societal discrimination or neglect.[77]

It is useful to note that Justice O'Connor dissented in *Local 28, Sheet Metal Workers v. EEOC*[78] over the extent to which the remedy was sufficiently narrowly tailored.[79] *Local 28* involved a trade union that was convicted of long term, egregious, and outrageous discriminatory conduct stretching back to 1948.[80] O'Connor again dissented in *United States v. Paradise* on the question of quota in the narrowly tailored remedy prong of the strict scrutiny standard.[81] In both *Local 28* and *Paradise*, O'Connor raised questions about the extent to which less intrusive alternatives had been exhausted before requiring quota relief.[82] Moreover, in each of the aforementioned cases O'Connor objected to a remedy imposed by court order after adjudication of egregious discrimination over long periods of time.[83] If O'Connor's views regarding the sufficiency of the showing necessary to withstand strict scrutiny are

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74. *Id.* at 171.

75. *Id.* at 196-97 (O'Connor, J., dissenting).

76. *Id.* at 197; Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 496-97 (1986) (O'Connor, J., dissenting).

77. O'Connor notes that, "[i]f MBEs disproportionately lack capital or cannot meet bonding requirements, a race-neutral program of city financing for small firms would, *a fortiori*, lead to greater minority participation." City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 728 (1989).

78. 478 U.S. 421 (1986).

79. *Id.* at 489-99 (O'Connor, J., dissenting).

80. *Id.* at 429-34.

81. United States v. Paradise, 480 U.S. 149, 196-97 (1987) (O'Connor, J., dissenting).

82. *See id* at 199-201; *Local 28*, 478 U.S. at 496-98 (O'Connor, J., dissenting).

83. *Paradise*, 480 U.S. at 168-70 (plurality opinion); *Local 28*, 478 U.S. at 429-34.

shared by a majority of the Court, all state and local affirmative action plans could be subject to attack.

B. An Assessment of the Magnitude of the Problems Created by Croson

Our assessment of the number of local governments with affirmative action in contracting (AAC) programs, including minority set-asides, is particularly relevant in light of *Croson*. In our opinion, commentators on *Croson* have seriously underestimated the number of minority set-aside programs that could be affected by this decision. For example, one widely read source suggests that there are "nearly 200 minority business enterprise (MBE) set-aside programs in 32 states and 164 localities. . . ."[84]

In our small sample of local governments, 174 affirmative action in contracting programs were identified. Of the 174 governments reporting AAC programs, 123 clearly indicated that they had MBE set-asides.

These figures are all the more striking given that our survey included all large local governments, but only 2% of small local governments. If our random sample of small local governments is representative of the larger population, it is possible to use the sample results to estimate the total number of set-aside and AAC programs that might exist. One very conservative approach to this extrapolation is to assume that the governments that were included in our survey, but failed to respond, do not have set-aside plans or other AAC programs. Based on this approach, 28% of all large and 8% of small local governments would have some form of affirmative action in contracting. Based on this assumption, we estimate that a total of 958 AAC programs currently exist.

A less conservative, but still plausible, approach is to assume that the percentage of local governments having AAC and set-aside plans is the same in governments that failed to respond to the survey as it is in those governments that did respond. Based on this assumption, we estimate that a total of 2,396 affirmative action in contracting programs exist.

The actual number of AAC programs currently in operation

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84. *Questions Follow Minority Set-Aside Ruling*, 130 Lab. Rel. Rep. (BNA) (Analysis/News & Background Information) 179 (Feb. 13, 1989); *see also Ruling Delivers Hard Blow to Set-Asides*, Black Enterprise, Apr. 1989, at 17 (". . .the action is akin to the force of a massive typhoon, wiping out and potentially sweeping away similar affirmative action programs in more than 36 states and 200 municipalities."); Focus, Jan.-Feb. 1989 (monthly magazine of the Joint Center for Political Studies) (approximately 36 states and over 200 local governments now have set-aside programs in place).

in local governments probably falls somewhere between the two estimates, that is, between 958 and 2,396. We also estimate that the number of minority set-aside programs is higher than some might expect, falling between 564 and 1,394. Clearly, those who suggest that fewer than 200 minority business enterprise programs exist underestimate the prevalence of these programs.

If one treats each plan as a separate entity, with one plan for the city's own employment, another plan for the employment practices of contractors which do business with the city, and still another plan requiring minority business enterprise set asides as a third entity, one can see the possibility of proliferation of litigation. This kind of proliferation is clearly possible because, unlike the Richmond plan, some local plans are motivated by the desire to comply with requirements imposed by federal programs from which they receive substantial assistance.

The standard applied by the Supreme Court to the federal government spending program in *Fullilove* was not strict scrutiny,[85] and it is unknown at this point whether or not the *Croson* majority eventually will reexamine the principles of *Fullilove*. We do know that *Fullilove* does not apply to state or local plans.[86]

VIII. Conclusions

This survey was fairly limited in scope. Our primary purpose was to ascertain the extent of three types of locally mandated fair employment programs. Below is a summary of the main features of these programs.

First, local government programs aimed at improving employment opportunities for women and minorities are widespread, although there are variations across program types and across

85. Chief Justice Burger's plurality opinion in *Fullilove* did not adopt either a strict scrutiny or intermediate scrutiny test. Fullilove v. Klutznick, 448 U.S. 448, 492 (1980) (plurality opinion); *see* City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 717-18 (1989).

86. *See Croson*, 109 S. Ct. at 717-20 (1989) (plurality opinion) (Although under *Fullilove* Congress need not "make specific findings of discrimination to engage in race-conscious relief" because of its authority under § 5 of the fourteenth amendment, a city, in order to remedy private discrimination, must identify private discrimination "with the particularity required by the fourteenth amendment."); *id.* at 731-32 (Stevens, J., concurring) (asserting that the judiciary rather than the legislature is the proper branch of government to remedy past discrimination); *id.* at 734 (Kennedy, J., concurring) (accepting rule that local government attempts to remedy past discrimination with use of racial preferences must be reviewed under strict scrutiny); *id* at 736 (Scalia, J., concurring) (holdings that permit the "use of racial classifications by the Federal Government to remedy the effects of past discrimination" should not be extended to the states).

other characteristics of the sample. Notable among these variations are:

(1) The numbers of local governments enacting EEO and AA programs are comparable according to our sample. Eighty-two percent and seventy-five percent of local governments have enacted these two types of programs, respectively, while less than forty-five percent of local governments have an AAC program.

(2) There are variations across regions of the country. For example, the northeastern region had less than the sample average for each of the three programs, and the south lagged behind the population average for AAC programs, but not for the other two policies.

(3) Cities were more likely than counties to have AAC programs, but there are no differences between cities and counties for the other two programs.

(4) Large local governments have more of each type of program than do small local governments. Regardless of these specific variations, it does seem that equal employment and affirmative action have become a part of the institutional environment of today's employment practices in both the public and private sectors. For issues that sparked such controversy only two decades ago, it now appears that governments at all levels in the United States have addressed these issues and have gone on to others.[87]

Second, there is some evidence that local governments do use their authority to devise programs more tailored to their specific local condition. This is evidenced by the variation in protected groups and by the variation in program structures.

Third, most local government programs seem to emphasize voluntarism over compulsion in their programs. This is evidenced by the relatively mild enforcement powers given to the administrative agencies and by the fact that a healthy minority of local AA programs do not require goals and timetables. Emphasis is placed on "good faith effort" in MBE programs, with or without goals and

87. *See, e.g.*, Nathan Glazer, *The Affirmative Action Stalemate*, 90 Pub. Interest 99, 105 (1988) (Affirmative action "has been institutionalized and has become an accepted part of the American economic scene" and has become an accepted norm in employment decisions in both the public and private sectors.). In particular, Glazer argues that this institutionalization has occurred "despite a series of kaleidoscopic political changes that many expected to lead either to a rapid reduction in the scope of affirmative action or to its unchallenged institutionalization as the way in which Americans make decisions on employment, promotion, and admission to selective institutions of higher education." *Id.* at 100.

timetables, which is in keeping with the letter and the spirit of federal affirmative action programs.

In contrast, perhaps, with the bitterness that has surrounded the forced integration in education, the evidence suggests that affirmative action programs in employment have enjoyed rather widespread acceptance in local governments. This conclusion is further supported by one fact which emerges clearly from the study: the small number of programs reporting difficulty or opposition in implementing anti-discrimination programs. For example, 75% of the local governments reporting had encountered no difficulties or opposition in implementing their affirmative action programs or their affirmative action in contracts programs. In both cases, opposition from the general public was the smallest fraction of the 25% reporting any opposition. This is strong evidence that affirmative action is yesterday's political issue and that people and their governments at the local level have turned to other issues. It is also noteworthy that affirmative action was virtually ignored as an issue in the 1988 presidential campaign.

Of what value are these local programs, especially if the same groups and rights are protected by federal and state legislation? We did not try to estimate the impact or effectiveness of these programs. It is worth noting, however, that recent studies on the effect of affirmative action programs in the private sector conclude that "a process . . . frequently criticized by various parties as either a system of draconian quotas or as an exercise in paper pushing has actually been of material importance in prompting companies to increase their employment of minorities and females."[88] There is little reason to believe that such findings would not also apply in the public sector.

Forcing cities to comply in great detail with the standard enunciated in *Croson* will inevitably have a chilling effect on affirmative action programs at the state and local levels. The Court refused to let the city of Richmond hide behind "findings sufficient to ensure that, in adopting the Plan, it was remedying the present effects of past discrimination in the *construction industry*."[89] The Court's insistence on greater specificity will require the initiating authority, whether it is executive or legislative, to name names and place blame. The Supreme Court, in condemning part of the

88. Jonathan Leonard, *What Was Affirmative Action?* 76 Am. Econ. Rev. 359, 362 (1986). Leonard also concludes that "[w]hile the projections of future employment of members of protected groups are inflated, (by roughly a factor of 10) they are not hollow: the establishments that promise to employ more do actually employ more." *Id.* at 361.

89. *Croson*, 109 S. Ct. at 723 (emphasis in original).

city of Richmond's approach, suggests we compare it with *Ohio Contractors Association v. Keip*.[90] In *Keip*, operating under the standard derived from *Fullilove*, the state had documented in substantial detail violations of employment laws and other civil rights statutes in the construction business in the state of Ohio.[91] Fortunately, the state had available substantial numbers of litigated cases and other evidence of discrimination which were of record.[92] The state also had detailed studies and was willing to put them on the record.[93]

If the city were permitted to document general conditions of underutilization of minority contractors or employees, without explicitly fixing blame or suggesting that the subject minorities were themselves specific victims of discrimination and entitled to benefit, it would be immeasurably more politically palatable. Indeed, it is the genius of affirmative action at the federal level that it has not been necessary to wash the nation's dirty linen and hang it out in public to sustain those programs. We suggest, therefore, that the greater detail required by the Supreme Court in the *Croson* case risks exacerbating local political conditions by requiring more specific evidence of past discrimination in rather substantial detail. To the extent that many local programs have been supported by coalition politics, the greater the necessity of placing blame on segments of the community for the current condition, the greater the likelihood that no such political effort will be forthcoming.

Even more difficult than establishing a sufficiently precise discriminatory predicate is the preoccupation with exhausting the less intrusive or less discriminatory alternatives. The Court has failed to enunciate the process whereby the local entity could satisfy the requirement that it explore less intrusive alternatives. If the local government entity must start with the least intrusive alternative on a trial basis before moving to a second step, one can imagine a series of steps each taking a separate legislative or executive initiative. One can also imagine that a reasonable trial period to see if the new initiative works before instituting a more intrusive one would be in order. Thus a four or five stage effort to deal with the problem of discrimination could easily be required. Even if we have another generation to give to attempting some form of effective affirmative action, it is doubtful that many local political

90. *Id.* at 725 (citing Ohio Contractors Ass'n v. Keip, 713 F.2d 167 (6th Cir. 1983)).

91. *Keip*, 713 F.2d at 720-21.

92. *Id.*

93. *Id.* at 721; *see also* South Fla. Chapter, Associated Gen. Contractors v. Metropolitan Dade County, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984).

jurisdictions could sustain the necessary majority, year after year, to exhaust all less intrusive alternatives.

Finally, the Court's emphasis that proper findings are necessary to define both the scope of the injury and the extent of the remedy[94] and of the "duty to . . . measure the recovery by the wrong" and "to distribute that recovery within the injured class in an evenhanded way,"[95] suggests an "identified victim of discrimination" approach to affirmative action.[96] This position advanced by the Justice Department under the leadership of Assistant Attorney General for Civil Rights, William Bradford Reynolds, was rejected by the Supreme Court.[97] The cases in which this narrow view was rejected were "scope of relief" cases under Title VII. One would hope that the Court is not revisiting the question of whether affirmative action programs must be limited to identified victims of discrimination.

In summary, the opinions in *Croson* provide ample ammunition for attacking affirmative action at the state and local level. Local programs will now be challenged by both court and legislative actions. Where political majorities are sufficiently stable to withstand legislative attack, we can anticipate continuing litigation to test the constitutionality of the new models. We can only hope that it will not take another twenty years for the Supreme Court to give sufficient content to its strict scrutiny standard to enable local governments to fashion their fair employment programs with confidence that the programs will withstand judicial review.

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94. City of Richmond v. J.A. Croson Co., 109 S. Ct. 706, 730 (1989).

95. *Id.* (quoting Fullilove v. Klutznick, 448 U.S. 448, 539 (1980) (Stevens, J., dissenting)).

96. *Id.* at 727-28.

97. *See* Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 516 (1986); Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 453 (1986) (plurality opinion); *Local 28*, 478 U.S. at 483 (Powell, J., concurring).

Appendix A

TABLE 1

Distribution of Sample, Respondents, and Fair Employment Programs By Type of Government, Size and Region

	SAMPLE	RESPONDENTS	PROGRAM DISTRIBUTION EEO	AA	AAC
TOTALS	746	389	319	292	174
		52.1%	82.0%	75.1%	44.7%
TYPE OF GOVERNMENT					
County	439	232	193	178	92
	58.8%	59.6%	83.2%	76.7%	39.7%
City	307	157	126	114	82
	41.2%	40.4%	80.3%	72.6%	52.2%
SIZE*					
Large	555	317	281	267	158
	74.4%	81.5%	88.6%	84.2%	49.8%
Small	191	72	38	25	16
	25.6%	18.5%	52.8%	34.7%	22.2%
REGION**					
West	143	93	84	77	49
	19.2%	23.9%	90.3%	82.8%	52.7%
South	248	118	94	89	42
	33.2%	30.3%	79.7%	75.4%	35.6%
Northeast	158	76	55	49	32
	21.2%	19.5%	72.4%	64.5%	42.1%
North Central	197	102	86	77	51
	26.4%	26.2%	84.3%	75.5%	50.0%

* "Large" refers to cities and counties with population greater than 100,000; "small" refers to cities and counties with population less than 100,000.

** "Region" is defined as follows: WEST = Alaska, Arizona, California, Colorado, Hawaii, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming; SOUTH = Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, Texas, Virginia, West Virginia; NORTHEAST = Connecticut, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont; NORTH CENTRAL = Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin.

Appendix A

TABLE 2

Fair Employment Programs Enacted Per Year By Type of Program

	EEO	AA	AAC
Pre-1950	—	1*	—
1950	1	—	—
1951	—	—	—
1952	1	—	—
1953	—	—	—
1954	2	—	—
1955	—	—	—
1956	—	—	—
1957	1	—	—
1958	—	—	—
1959	—	—	—
1960	—	—	—
1961	—	—	—
1962	—	—	—
1963	2	2	—
1964	2	2	2
1965	1	—	—
1966	2	1	1
1967	2	—	1
1968	1	1	—
1969	4	1	—
1970	1	—	2
1971	9	4	3
1972	22	22	10
1973	16	20	7
1974	28	28	12
1975	29	32	14
1976	37	32	16
1977	23	25	8
1978	28	25	18
1979	16	25	11
1980	14	19	13
1981	11	13	8
1982	10	6	2
1983	3	3	5
1984	7	5	7
1985	4	5	5
1986	2	2	2
Missing observations	40	18	27
Total Local Governments with Program	319	292	174

* One local government reported it had a AA program in 1927.

Appendix A

TABLE 3

Selected Characteristics of Local Government Equal Employment Opportunity Programs

PROTECTED GROUPS	Number	Percent*
Race	310	97.2
Gender	304	95.3
Religion	300	94.0
National Origin	296	92.8
Color	295	92.5
Age	284	89.0
Physical Handicap	281	88.1
Marital Status	166	52.0
Mental Condition	140	43.9
Pregnancy	137	42.9
Political Affiliation	133	41.7
Veteran Status	119	37.3
Sexual Orientation or Preference	86	27.0
Arrest Record	67	21.0
Conviction Record	52	16.3
Other	36	11.3
EMPLOYMENT DECISIONS	**Number**	**Percent**
Hiring	310	97.2
Promotions	293	91.8
Placement	236	74.0
Termination	235	73.7
Training	228	71.5
Transfer	213	66.8
Rate of pay	210	65.8
Discipline	208	65.2
Upgrading	206	64.6
Layoff	183	57.4
Reinstatement	159	49.8
Other	55	17.2
ENFORCEMENT ACTIVITIES	**Number**	**Percent**
Investigate complaints	296	92.8
Make findings of fact	255	79.9
Mediate/conciliate	224	70.2
Order prospective goals and timetables	93	29.2
Issue binding orders	84	26.3
Other	37	11.6

* Percentage figures are based on the 319 local governments reporting they have an EEO program.

Appendix A

TABLE 4

Selected Characteristics of Local Government Affirmative Action Programs

HOW PLANS ARE FORMULATED	Number	Percent*
All agencies/departments are covered under one plan	241	82.5
Each agency formulates its own plan within guidelines set by the policy	23	7.9
Each agency formulates its own plan, subject to approval by the administrative agency	14	4.8
Other	12	4.1

REQUIREMENTS OF AFFIRMATIVE ACTION POLICY	Number	Percent
Outreach and recruitment	216	74.0
Review of rules, policies, procedures, and practices	203	69.5
Review of work requirements	183	62.7
Training and career counseling	161	55.1
Validation of tests and selection procedures	161	55.1
Upward mobility programs	146	50.0
Job restructuring	86	29.5
Rotation and transfer programs	49	16.8
Internships	38	13.0
Other	26	8.9

GOALS AND TIMETABLES REQUIRED	Number	Percent
Yes	179	61.3
No	110	37.7
(Not ascertained)	8	2.7

GROUPS INCLUDED IN GOALS AND TIMETABLES REQUIREMENTS	Number	Percent**
Women	175	97.8
Blacks	165	92.2
Hispanics	148	82.7
Handicapped	65	36.3
Veterans	28	15.6
Other	62	34.6

* Percentage figures are based on the 292 local governments reporting they have an AA program unless otherwise noted.

** The percentage figures for this part of the table are based on the 179 local governments reporting that goals and timetables are required under their AA policy.

Appendix A

TABLE 5

Sources of Difficulty or Opposition in Implementing AA and AAC Programs

Panel A — Affirmative Action Programs

	Number	Percent*
Budget limitations	45	61.6
Recruitment problems	40	54.8
Management opposition	27	37.0
Seniority provisions in collective bargaining agreements	25	34.2
Employee opposition	19	26.0
Workforce contraction	16	21.9
Public opposition	5	6.8
Other	16	21.9

Panel B — Affirmative Action in Contracts Programs

	Number	Percent**
Private sector employers	25	56.8
Budget limitations	22	50.0
Internal management	16	36.4
Public opposition	6	13.6
Other	12	27.3

* The percentage figures in Panel A are based on the 73 local governments reporting some difficulty or opposition in implementing their affirmative action programs.

** The percentage figures in Panel B are based on the 44 local governments reporting some difficulty or opposition in implementing their affirmative action in contracts program.

Appendix A

TABLE 6

Selected Characteristics of Local Government Affirmative Action in Contracts (AAC) Programs

TYPES OF CONTRACTS INCLUDED	Number	Percent*
Construction	153	87.9
Services	131	75.3
Goods	122	70.1
Other	35	20.1
REQUIREMENTS OF EMPLOYERS TO OBTAIN A CONTRACT	**Number**	**Percent**
Employer signs AA policy provided by city/county	93	53.4
Employer must allow city/county to monitor	81	46.6
Employer develops AA plan within criteria set by city/county	64	36.8
Employer completes a pre-formatted AA plan	39	22.4
Other	30	17.2
ENFORCEMENT POWERS	**Number**	**Percent**
Suspension of contracts until employer reaches compliance	107	61.5
Termination of contract	101	58.0
Debarment of employer from future contracts	76	43.7
Modification of employer's plan (without contract suspension)	53	30.5
Financial penalties	29	16.7
Other	19	10.9
SPECIAL MBE INCENTIVE PROGRAMS IN AAC POLICY	**Number**	**Percent**
Yes	123	70.7
No	42	24.1
TYPES OF MBE INCENTIVES	**Number**	**Percent****
Source list is maintained	97	78.9
Good faith effort	93	75.6
Percentage of all contracts go to MBEs	52	42.3
Performance bonds are waived	7	5.7
Contracts below a certain amount go to MBEs	7	5.7

* The percentage figures in this table are based on the 174 local governments reporting they have an AAC program unless otherwise noted.

** The percent figures in this part of the table are based on the 123 local governments reporting they have an MBE incentive program.

Appendix B

EQUAL EMPLOYMENT AND AFFIRMATIVE ACTION IN LOCAL GOVERNMENT

A Nationwide Survey

This survey is being done to determine the extent of equal employment and affirmative action policies established by cities and counties across the country. Your response is extremely valuable whether or not your city or county has such a policy. Please answer all of the questions. If you wish to comment on any question or qualify your answers, please use the space in the margins. Your comments will be read and taken into account.

Thank you for your help.

Center for Equal Employment and
Affirmative Action
University of Wisconsin

Please return this survey
by June 1, 1986 to:

Industrial Relations Research Institute
4226 Social Science Building
University of Wisconsin
Madison, Wisconsin 53706

Appendix B

Questionnaires are anonymous and confidential.

FOR YOUR INFORMATION

This survey is concerned with three separate types of equal employment and affirmative action policies. These three policies are:

1. Equal Employment Opportunity policies
2. Affirmative Action in city/county employment
3. Affirmative Action in city/county contracts

Please use the following definitions of these policies when completing this survey.

Equal Employment Opportunity Policy - This type of policy makes it illegal for the city or county to discriminate against certain groups of people when making certain employment decisions (it may also apply to private sector firms within the city or county). It is similar to Title VII of the Civil Rights Act of 1964, except that it is a locally mandated policy (not the federal legislation) and it may be more comprehensive or less comprehensive than Title VII.

Affirmative Action in City/County Employment - This type of policy not only makes it illegal for the city or county to discriminate in employment decisions, but also requires the city or county to take specific and identifiable steps to increase the number of females and minorities employed by the city or county.

Affirmative Action in City/County Contracts - This type of policy allows the city or county to require private sector employers to submit affirmative action plans as a condition of obtaining any city or county contract for goods and services. It also may include minority business incentives that seek to assure that minority businesses have an equitable opportunity to compete for city or county contracts.

Appendix B

PART I - EQUAL EMPLOYMENT OPPORTUNITY

First we would like to ask you some questions about Equal Employment Opportunity policies your city or county may have adopted. Please remember that these questions refer to locally mandated policies; they do not refer to Title VII of the 1964 Civil Rights Act or to any other federal or state equal employment legislation.

1. Does your city or county have a locally mandated Equal Employment Opportunity (EEO) Policy? (circle one response)

   1. YES
   2. NO

If you answered NO to Question 1, please skip the rest of the questions in this section and go to PART-II AFFIRMATIVE ACTION IN EMPLOYMENT at the top of page 4.

2. How was the EEO policy established? (circle one response)

   1. EXECUTIVE ORDER BY MAYOR OR COUNTY SUPERVISOR
   2. LEGISLATED AS ORDINANCE BY CITY COUNCIL OR COUNTY BOARD
   3. MANDATED BY A CIVIL SERVICE COMMISSION OR BY CIVIL SERVICE RULES
   4. COURT ORDERED
   5. OTHER (please explain) _____
      _____

3. In what year was the EEO policy established? _____

4. Which of the following employment decisions are included in the EEO policy? (check all that apply)

   ____ HIRING
   ____ PROMOTIONS
   ____ PLACEMENT
   ____ RATES OF PAY AND OTHER COMPENSATION
   ____ UPGRADING
   ____ TRANSFER
   ____ TRAINING
   ____ LAYOFF
   ____ DISCIPLINE
   ____ TERMINATION
   ____ REINSTATEMENT
   ____ OTHER (please specify) _____

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5. Which of the following groups are protected under your city/county Equal Employment Opportunity (EEO) policy? (check all that apply)

____ RACE	____ MARITAL STATUS
____ RELIGION	____ PREGNANCY OR PREGNANCY-RELATED CONDITIONS
____ COLOR	____ SEXUAL PREFERENCE
____ GENDER (SEX)	____ POLITICAL AFFILIATION
____ NATIONAL ORIGIN	____ VETERAN STATUS
____ AGE	____ ARREST RECORD
____ PHYSICAL HANDICAP	____ CONVICTION RECORD
____ MENTAL CONDITION	____ OTHER (please specify)

6. Which of the following organizations must comply with your city/county EEO policy? (check all that apply)

____ THE CITY/COUNTY (AS THE EMPLOYER)
____ PRIVATE SECTOR EMPLOYERS WITHIN THE CITY/COUNTY
____ LABOR ORGANIZATIONS
____ EMPLOYMENT AGENCIES
____ OTHER (please specify) _____

7. What type of agency has enforcement responsibility for your city/county EEO policy? (circle one response)

1. AN EQUAL EMPLOYMENT OR CIVIL RIGHTS OR HUMAN RESOURCES COMMISSION
2. A CITY OR COUNTY EQUAL EMPLOYMENT OFFICER (OR DEPARTMENT)
3. A CITY OR COUNTY PERSONNEL OFFICER (OR DEPARTMENT)
4. A DIVISION OR DEPARTMENT WITHIN THE EXECUTIVE BRANCH (mayor's office, county supervisor's office, etc.)
5. A COMMITTEE WITHIN THE LEGISLATIVE BRANCH (city council, board of supervisors, etc.)
6. OTHER (please explain): _____

8. What enforcement activities have been given to the enforcement agency indicated in question 8 above? (check all that apply)

____ INVESTIGATE COMPLAINTS
____ MAKE FINDINGS OF FACT
____ MEDIATE AND/OR CONCILIATE
____ ISSUE BINDING ORDERS (for example, reinstatement, backpay, etc.)
____ ORDER PROSPECTIVE GOALS AND TIMETABLES
____ OTHER (please explain) _____

9. How many full-time staff are devoted to EEO administration and related activities? _____

10. What is your city or county's annual budget for EEO activities?

_____

Appendix B

PART II - AFFIRMATIVE ACTION IN EMPLOYMENT

This section of the survey asks you some questions about any Affirmative Action in Employment policies that your city or county may have adopted. This refers to locally-mandated policies that not only prohibit discrimination, but also require the city or county to take specific steps to increase female and/or minority employment.

11. Does your city or county have a locally mandated Affirmative Action (AA) policy that applies to your city or county employees? (circle one response)

    1. YES
    2. NO

If you answered NO to Question 11, please skip the rest of the questions in this section and go to PART III - AFFIRMATIVE ACTION IN CONTRACTS at the top of page 7.

12. How was the Affirmative Action (AA) policy established? (circle one response)

    1. EXECUTIVE ORDER BY MAYOR OR COUNTY SUPERVISOR
    2. LEGISLATED AS ORDINANCE BY CITY COUNCIL OR COUNTY BOARD
    3. MANDATED BY CIVIL SERVICE COMMISSION OR BY CIVIL SERVICE RULES
    4. ORDERED BY A FEDERAL COURT
    5. ORDERED BY A STATE COURT
    6. ORDERED BY A STATE AGENCY
    7. OTHER (please explain) _____

13. In what year was the AA policy established? _____

14. Which of the following city/county employees are covered by the AA policy? (check all that apply)

    _____ CITY/COUNTY DEPARTMENTAL EMPLOYEES
    _____ CITY/COUNTY LAW ENFORCEMENT AND FIREFIGHTERS
    _____ CITY/COUNTY MANAGERIAL EMPLOYEES
    _____ OTHERS (please list) _____

15. What type of agency has administrative responsibility for your city/county AA policy? (circle one response)

    1. AN EEO/AA OR CIVIL RIGHTS OR HUMAN RESOURCES COMMISSION
    2. A CITY OR COUNTY AFFIRMATIVE ACTION OFFICER (OR DEPARTMENT)
    3. A CITY OR COUNTY PERSONNEL OFFICER (OR DEPARTMENT)
    4. A DIVISION OR DEPARTMENT WITHIN THE EXECUTIVE BRANCH (mayor's office, county supervisor's office, etc.)
    5. A COMMITTEE WITHIN THE LEGISLATIVE BRANCH (city council, board of supervisors, etc.)
    6. OTHER (please explain) _____

Appendix B

16. Which of the following best describes how your city or county affirmative action (AA) plan(s) are formulated? (circle one response)

    1. ALL AGENCIES AND DEPARTMENTS ARE COVERED UNDER ONE CENTRAL PLAN
    2. EACH AGENCY FORMULATES ITS OWN PLAN WITHIN GENERAL GUIDELINES SET OUT IN THE CITY/COUNTY AFFIRMATIVE ACTION POLICY
    3. EACH AGENCY FORMULATES ITS OWN PLAN, SUBJECT TO SPECIFIC APPROVAL BY THE AGENCY THAT IS RESPONSIBLE FOR THE ADMINISTRATION OF THE AFFIRMATIVE ACTION POLICY
    4. OTHER (please explain) _____

17. Does your city or county AA policy require that numerical goals and timetables be included in the AA plan? (circle one response)

    1. YES → If the policy does contain numerical goals and timetables, which of the following groups are included? (check all that apply)

       ____ WOMEN
       ____ BLACKS
       ____ HISPANICS/SPANISH-SURNAMED
       ____ PERSONS WITH HANDICAPS
       ____ VETERANS
       ____ OTHERS (please list) _____

    2. NO ↓

18. Which of the following are required by your city or county AA policy to be included in an AA plan? (check all that are required)

    ____ REVIEW OF WORK REQUIREMENTS FOR JOB RELATEDNESS
    ____ JOB RESTRUCTURING
    ____ UPWARD MOBILITY PROGRAMS
    ____ OUTREACH AND RECRUITMENT
    ____ TRAINING AND CAREER COUNSELING
    ____ ROTATION AND TRANSFER PROGRAMS
    ____ INTERNSHIPS
    ____ VALIDATION OF TESTS AND OTHER SELECTION PROCEDURES
    ____ REVIEW OF PERSONNEL RULES, POLICIES, PROCEDURES AND PRACTICES
    ____ OTHER (please specify) _____

19. What type of agency has enforcement responsibility and monitors compliance with the city/county AA policy? (circle one response)

    1. A CITY-WIDE OR COUNTY-WIDE AFFIRMATIVE ACTION COMMITTEE
    2. A CITY OR COUNTY AFFIRMATIVE ACTION OFFICER
    3. EACH AGENCY OR DEPARTMENT'S OWN AFFIRMATIVE ACTION OFFICER OR DIVISION
    4. THE CITY OR COUNTY PERSONNEL OFFICER
    5. EACH AGENCY OR DEPARTMENT'S OWN PERSONNEL OFFICER
    6. OTHER (please explain)

Appendix B

20. Does your city/county Affirmative Action (AA) policy include special provisions regarding layoffs for protected groups? (circle one response)

    1. YES → Please indicate the type(s) of special provisions
    2. NO — that are included (check all that apply)

    ____ SPECIAL APPEALS COMMITTEE
    ____ CIVIL SERVICE GRIEVANCE PROCEDURE
    ____ UNION GRIEVANCE PROCEDURE
    ____ CONSIDERATION OF EEO/AA IMPLICATIONS WHEN LAYOFFS OCCUR
    ____ GIVING CREDIT TO JOB PERFORMANCE TO MINIMIZE THE WEIGHT OF SENIORITY
    ____ EARLY RETIREMENT BONUSES
    ____ USE OF PART-TIME EMPLOYMENT
    ____ FURLOUGHS
    ____ SENIORITY BYPASS
    ____ OTHER (please explain) _____

21. If your city/county AA policy does not explicitly provide for layoff protection, has layoff protection been otherwise provided by any of the following means? (check all that apply)

    ____ COURT ORDERED
    ____ VOLUNTARY AGREEMENT
    ____ COLLECTIVELY BARGAINED
    ____ OTHER (please explain) _____
    ____ NO OTHER PROTECTION HAS BEEN PROVIDED

22. Has your city or county encountered significant opposition or difficulty in implementing your AA plan? (circle one response)

    1. YES → Please indicate the sources of difficulty or opposition
    2. NO — to implementing your AA plan (check all that apply)

    ____ WORKFORCE CONTRACTION
    ____ COLLECTIVE BARGAINING AGREEMENTS REGARDING SENIORITY
    ____ EMPLOYEE OPPOSITION
    ____ MANAGEMENT OPPOSTION
    ____ PUBLIC OPPOSITION
    ____ BUDGET LIMITATIONS
    ____ RECRUITMENT PROBLEMS
    ____ OTHER (please specify) _____

23. How many full-time staff are devoted to AA administration and related activities?_____

24. What is your city or county's annual budget for AA activities?

    _____

Appendix B

PART III - AFFIRMATIVE ACTION IN CONTRACTS

This section of the survey asks you some questions about any Affirmative Action in Contracts policies that your city or county may have adopted. This refers to locally-mandated policies that allow the city or county to require private-sector employers to submit affirmative action plans as a condition of obtaining a city or county contract for goods or services.

25. Does your city or county have a locally mandated affirmative action in contracts policy? (circle one response)

    1. YES
    2. NO

If you answered NO to question 25, please skip the rest of the questions in this section and go to PART IV - OTHER ISSUES at the top of page 10.

26. How was the affirmative action in contracts policy established? (circle one response)

    1. EXECUTIVE ORDER BY MAYOR OR COUNTY SUPERVISOR
    2. LEGISLATED AS ORDINANCE BY CITY COUNCIL OR COUNTY BOARD
    3. ENTERED INTO VOLUNTARILY BY CITY OR COUNTY AGENCIES
    4. MANDATED BY PURCHASING DEPARTMENT OR OTHER PURCHASING REQUIREMENTS
    5. OTHER (please explain) _____

27. In what year was the affirmative action in contracts policy established?_____

28. Which of the following types of contracts are covered by the policy? (check all that apply)

    ____ CONSTRUCTION THAT IS PAID FOR WITH CITY OR COUNTY MONEY
    ____ SERVICES PURCHASED BY THE CITY OR COUNTY
    ____ GOODS PURCHASED BY THE CITY OR COUNTY
    ____ OTHER (please explain) _____

29. What determines whether a particular contractor must comply with the affirmative action requirements? (circle one response and write in the appropriate information)

    1. THE CONTRACT MUST BE OVER A CERTAIN DOLLAR AMOUNT (please specify that amount: $_____)
    2. THE EMPLOYER MUST HAVE A CERTAIN NUMBER OF EMPLOYEES (please specify the number of employees: _____)
    3. THE CONTRACT MUST BE OVER A CERTAIN DOLLAR AMOUNT AND THE EMPLOYER MUST HAVE A CERTAIN NUMBER OF EMPLOYEES (please specify both the dollar amount and the number of employees: $_____ and _____ employees)
    4. OTHER (please explain) _____

Appendix B

30. Which of the following is required of employers in order for them to obtain a city or county contract? (check all that apply)

____ THE EMPLOYER MUST SIGN A CONTRACT WHICH INCLUDES A PROVISION ALLOWING THE CITY OR COUNTY TO MONITOR THE EMPLOYER
____ THE EMPLOYER SIGNS AN AFFIRMATIVE ACTION POLICY STATEMENT PROVIDED BY THE CITY OR COUNTY
____ THE EMPLOYER IS REQUIRED TO DEVELOP AN AFFIRMATIVE ACTION PLAN WITHIN THE BOUNDS OF SPECIFIC CRITERIA DETERMINED BY THE CITY OR COUNTY
____ THE EMPLOYER IS REQUIRED TO FILL IN A FORMATTED AFFIRMATIVE ACTION PLAN DEVELOPED BY THE CITY OR COUNTY
____ OTHER (please explain) _____

31. Under your city or county affirmative action in contracts policy, which of the following groups must be included in an employer's affirmative action policy or plan? (check all that apply)

____ WOMEN
____ BLACKS
____ HISPANICS/SPANISH-SURNAMED
____ PERSONS WITH HANDICAPS
____ VETERANS
____ OTHERS (please list) _____

32. Who monitors the employers for compliance? (circle one response)

1. THE INDIVIDUAL CONTRACTING DEPARTMENT OR AGENCY
2. A CENTRAL PURCHASING OFFICE
3. THE CITY OR COUNTY AFFIRMATIVE ACTION OFFICER/COMMITTEE
4. OTHER (please explain) _____

33. Which of the following options are available to the city or county to enforce compliance? (check all that apply)

____ MODIFICATION OF THE EMPLOYER'S AFFIRMATIVE ACTION PLAN WITHOUT SUSPENSION OF THE CONTRACT
____ SUSPENSION OF THE CONTRACT UNTIL THE EMPLOYER COMES INTO COMPLIANCE
____ TERMINATION OF THE CONTRACT
____ DEBARMENT OF THE EMPLOYER FROM FUTURE CONTRACTS WITH THE CITY OR COUNTY
____ THE CITY OR COUNTY CAN IMPOSE FINANCIAL PENALTIES
____ OTHER (please explain) _____

Appendix B

34. Does the affirmative action in contracts policy include provisions to encourage the city or county to enter into contracts with firms and organizations which are owned by females or minorities? (circle one response)

1. YES ——→ If yes, what types of provisions are included? (check all that apply)
2. NO

____ PERFORMANCE BONDS ARE WAIVED
____ A SOURCE LIST OF FEMALE AND MINORITY OWNED BUSINESSES IS MAINTAINED
____ A CERTAIN PERCENTAGE OF ALL CITY OR COUNTY CONTRACTS MUST BE AWARDED TO FEMALE OR MINORITY OWNED BUSINESSES
____ CONTRACTS BELOW A SPECIFIED AMOUNT GO TO MINORITY OR FEMALE OWNED BUSINESSES
____ THE CITY OR COUNTY WILL MAKE A GOOD FAITH EFFORT TO CONTRACT WITH FEMALE OR MINORITY OWNED BUSINESSES
____ OTHER (please explain) _____

35. Has your city or county encountered significant opposition or difficulty in implementing your affirmative action in contracts program? (circle one response)

1. YES ——→ If yes, please indicate the sources of difficulty or opposition to the policy (check all that apply)
2. NO

____ PUBLIC OPPOSITION
____ PRIVATE SECTOR EMPLOYER OPPOSITION
____ INTERNAL MANAGEMENT OPPOSITION
____ BUDGET LIMITATIONS
____ OTHER (please specify) _____

36. How many full-time staff are devoted to administration and related activities of the affirmative action in contracts policy? _____

37. What is your city or county's annual budget for activities related to the affirmative action in contracts policy? _____

Appendix B

PART IV - OTHER ISSUES

Finally, we would like to ask you a few questions about other issues related to local equal employment and affirmative action policies.

38. Are any of your city or county employees represented by a union? (circle one response)

    1. YES → Has your affirmative action in employment policy ever been arbitrated under the provisions of a collective bargaining agreement? (circle one response)

        a. YES
        b. NO
        c. NOT APPLICABLE--THIS CITY/COUNTY HAS NOT ADOPTED AN AFFIRMATIVE ACTION IN EMPLOYMENT POLICY

    2. NO

39. Has your affirmative action in employment policy ever been litigated in court? (circle one response)

    1. YES → Which of the following best describes the outcome of that litigation? (circle one response)

        a. THE AFFIRMATIVE ACTION POLICY WAS UPHELD
        b. THE AFFIRMATIVE ACTION POLICY WAS UPHELD WITH MODIFICATIONS
        c. THE AFFIRMATIVE ACTION POLICY WAS RULED ILLEGAL
        d. OTHER (please explain) _____

    2. NO

40. Has your city or county undertaken any initiatives concerning pay equity between male and female employees, including "comparable worth"? (circle one response)

    1. YES → Please indicate which of the following actions your city or county has taken in this regard (check all that apply)

        ___ ESTABLISHED A COMMITTEE TO STUDY AND REPORT ON THE ISSUE
        ___ CONDUCTED A JOB EVALUATION WITH EMPHASIS ON COMPARING "MALE" AND "FEMALE" JOBS
        ___ ALLOCATED OR GIVEN A SPECIFIC AMOUNT OF MONEY TO INCREASE THE PAY OF FEMALE-DOMINATED JOBS
        ___ BARGAINED OVER THIS ISSUE AS PART OF REGULAR OR SPECIAL NEGOTIATIONS WITH THE LABOR ORGANIZATION(S)
        ___ OTHER (please explain) _____

    2. NO

Appendix B

Is there anything else you would like to tell us about equal employment policies in your city or county? If so, please use this space for that purpose.

Thank you for completing this survey. Your contribution to this effort is greatly appreciated.