

# AFFIRMATIVE ACTION UPDATE

October 2004

## OFCCP Plans New Initiatives Targeting Contractors for Audit; Investigate Potential Compensation Discrimination; Check for Adverse Impact in Selections for Hire or Promotion; and Evaluate Pre-employment Tests

The Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor has revealed its new methods to target federal contractors for compliance audits, to investigate employee compensation discrimination and to determine adverse impact in employee selection systems.

**New Contractor Targeting Plan, Advance Review Notice.** In June of this year the OFCCP began piloting a new selection procedure to identify contractor establishments for audit. The system the OFCCP has historically been using to select establishments for compliance audit includes processing information reported in a contractor's EEO-1 Report into an Equal Employment Data System (EEDS). The EEDS system compares the establishment's workforce with those of other industry establishments within the same geographic area. With the aid of Westat, an outside consultant, the OFCCP developed a new statistical model called the Federal Contractor Selection System (FCSS). The new targeting model analyzes EEO-1 and 2000 Census data to identify establishments that appear likely to have systemic discrimination. Using the new system, the OFCCP has selected 3,560 establishments for possible compliance reviews during the new OFCCP scheduling cycle which began July 2004.

The new FCSS specifically compares contractor establishments' workforce profiles to others in the same industry — and to the profile of the local labor market supply according to the 2000 Census data. Applying its new formula, the agency determines a "probability of discrimination" score. To aid in its new formula's validation process, and to get

the process underway, the agency initially plans to conduct targeted compliance reviews of over 600 establishments ranked by the formula as having the "worst" profile. According to Charles James, OFCCP Director, the names of the establishments that ranked "worst" have already been released to OFCCP field offices for scheduling.

The new OFCCP procedure also incorporates a new advance review notice which advises the targeted federal contractor that "one or more of your establishments have been selected for potential scheduling of a compliance review." The notice also explains that the OFCCP "will give serious consideration to any remedial action voluntarily undertaken by that particular establishment prior to the conduct of an OFCCP review. Such remedial action may mitigate any relief sought by OFCCP, to the extent the remedial action completely corrects the problem(s) at issue."

This advance letter will be sent to a contractor's corporate headquarters, along with a list of establishments selected for potential evaluation. Under this new system, the agency will have an annual cap of 25 evaluations per contractor. For this cycle ending in July 2005, the maximum number of 25 audits per contractor will include the contractor's open evaluations from March 23, 2004. For example, if a contractor had 16 reviews open as of March 23, 2004, then no more than 9 new scheduling letters should be received before July 2005.

**Investigating Compensation Discrimination.** When responding to an OFCCP letter scheduling a compliance review, contractors are currently required to provide only



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annualized compensation data by salary grade or job title, showing total number of employees by race and gender, and total compensation by race and gender. Compliance officers have typically conducted a median or mean analysis of these data. Average differences of \$1,000 or more may call for greater in-depth analysis.

During the recent National Industry Liaison Group annual conference, Dr. Michael Sinclair, new OFCCP Director of Statistical Analysis, shared the agency's new analytical approach. OFCCP has a plan to hire in each of its regions a statistician who will conduct regression analyses and other sophisticated statistical analyses to determine whether there are indicators of discrimination in contractors' selection and/or compensation practices. At the date of this publication, two statisticians have been hired in addition to Dr. Sinclair. Dr. Sinclair indicated that the past methods used by the OFCCP to analyze pay disparities would be supplemented by the work of these statisticians when there are indicators of discrimination. In order to conduct the more sophisticated analyses, the agency may request additional data or may research the job content of individual jobs or groups of similarly situated job titles. Because regression analysis is best utilized for groups of 30 or more and because many job titles have fewer than 30 incumbents, the OFCCP plans to combine jobs that it believes share the *same level within the same function or market level*. Contractors, therefore, should be very clear in their communication with the OFCCP about differences in the content of jobs that seem to be, but are not, similar.

**Adverse Impact Analysis.** The OFCCP is exploring ways to improve its methods of adverse impact analysis in hiring cases. The current approach typically considers one or two years of applicant selection data that is evaluated as if there were a continuous flow of applicants and hiring during the entire period. The OFCCP is now beginning to look within those periods to determine if there are distinct times of the year when hiring activity increases. The OFCCP will be attempting to match the appropriate applicant flow against such specific time frames. In this fashion, Dr. Sinclair expects that the agency will be able to more accurately pinpoint discrimination.

**Testing Expert.** At the recent Southwest and Rocky Mountain Regional ILG Annual Conference held in early October, OFCCP Director Charles James advised contractors that the OFCCP has just hired a testing expert. Contractors should expect that any pre-employment tests that they use will be reviewed by the OFCCP in the course of a compliance evaluation and if the test causes adverse impact, the validation study will be examined closely. If you have not conducted adverse impact analyses of your test results or if your tests cause adverse impact but are not validated for the specific jobs for which they are used, we strongly suggest you consider doing so. If you have questions about conducting these analyses or any other matters discussed in this Update, please contact Valerie Hoffman, Partner and Chair of Seyfarth Shaw's Affirmative Action Consulting Team at [vhoffman@seyfarth.com](mailto:vhoffman@seyfarth.com) or (312) 269-8870 or Hal Holliman, Senior Affirmative Action Advisor at [hholliman@seyfarth.com](mailto:hholliman@seyfarth.com) or (312) 739-6607.

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