



EMPLOYMENT LAW ALERT

MAY 26, 2011

## Contractors Should be Ready for New Aggressive Enforcement by the OFCCP

2011 certainly has been a busy year for the Office of Federal Contract Compliance Programs ("OFCCP"). In the first quarter alone, the agency, which is responsible for regulating affirmative action planning and prohibiting discrimination by federal government contractors, has proposed substantial changes to its regulations regarding discrimination against veterans, has replaced its Active Case Management Directive with an Active Case Enforcement Directive, and has significantly expanded the standard document and information requests that accompany its Scheduling Letter giving contractors notice that they have been selected for a compliance audit. Combined, these changes subject contractors to greater scrutiny by OFCCP, ensure more rigorous and more onsite compliance audits, and expand contractors' obligations with respect to Affirmative Action planning. They are also consistent with several recent statements by OFCCP Director Patricia Shiu emphasizing that federal contractors can expect to see a "more energized OFCCP" than in recent years with more proactive enforcement procedures. So far, Ms. Shiu appears to be making good on her promise.

### Contact Us

For more information about this update, please contact any of [Orrick's Employment Law Contacts](#).

### OFCCP has Expanded the "Itemized Listing" in its Scheduling Letter

Most recently, on May 12, 2011, OFCCP announced significant changes to the itemized listing contained in its Scheduling Letter. See Notice, *Proposed Extension of the Approval of Information Collection Requirements; Comment Request*, 76 Fed. Reg. 27670 (May 12, 2011). The Scheduling Letter provides a contractor with notice of its selection for a compliance evaluation, and the itemized listing requests submission of the contractor's Affirmative Action Plan and supporting personnel activity and compensation data. Although the May 12 notice provides no details regarding the proposed changes, and although OFCCP claims the revised itemized listing will be *less burdensome* for contractors because it will take fewer hours to respond, a review of the changes themselves illustrate that contractors must provide *significantly more* information in response to OFCCP audit letters. Contractors will also need to make changes in the way they maintain records regarding hiring, promotion and termination decisions. They also subject contractors' employee handbooks and other personnel policies to closer scrutiny, including policies that have nothing to do with discrimination. Finally, the changes will result in considerably more aggressive analysis by OFCCP statisticians for possible adverse impact findings in personnel actions and compensation.<sup>[1]</sup>



### A New Item 8

The newly proposed item 8 requests employment policies covering the Family and Medical Leave Act ("FMLA"), pregnancy leave, and accommodations for religious observances and practices. This new request also asks contractors to "[s]end your employee handbook or manual if these policies are a part of these documents." OFCCP claims that receipt of these policies will assist it in better determining the existence of sex or discrimination "indicators" within contractor organizations, and will enhance OFCCP's "broad authority" to prohibit sex and religious discrimination in employment. Not only is the breadth of this request surprising, but it is also noteworthy that although DOL has the authority to enforce violations of the FMLA through its Wage and Hour Division, FMLA violations (as well as many of the other employment-related laws underlying many policies contained in employee handbooks) are not enforced by OFCCP.

### Expanded Information Requests and Closer Scrutiny of Personnel Activity

Similarly, the newly proposed item 11 (formerly item 10) requires contractors to submit data related to applicants, hires, promotions and terminations by both job group and job title (the former item 10 allowed contractors to choose). Additionally, although the old request allowed contractors to break down this information by minority versus nonminority totals, the new request requires contractors to provide this data according to specific race/ethnicity groups (including African-American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaskan Native and White). This new request also requires contractors to identify the pools from which employees are selected for promotion or termination, and requires contractors to provide gender and specific race/ethnicity information for those pools. These changes will dramatically affect the way many contractors track internal candidates for promotion, as well as require changes to the records contractors keep with respect to employees selected for termination, particularly in group termination settings.

### Enhanced Compensation Review

Further, the newly proposed item 12 (formerly item 11) addressing compensation plainly illustrates OFCCP's intention to engage in a much broader analysis of pay categories. Unlike the current request, which seeks aggregate compensation data, the new request asks for detailed, precise individual compensation data. Specifically, the new item 12 seeks (in Excel format if available) "[e]mployee level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of February 1 (i.e., the data as it existed on the more recent February 1st



date)." It also instructs contractors to "[p]rovide gender and race/ethnicity information [as opposed to simply minority versus non-minority] and hire date for each employee by job title, EEO-1 Category and job group in a single file." Additionally, the compensation information must include base salary, wage rate, and hours worked. OFCCP does not define the level of detail needed for "hours worked." Contractors also must identify separately other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime. The new request also allows contractors to provide additional data on factors used to determine compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade. Finally, the request asks for documentation and policies related to compensation practices, "particularly those that explain the factors and reasoning used to determine compensation." Not only is this data far broader than the compensation data OFCCP currently requests in its Scheduling Letter, but it includes most of the information currently sought at the second stage of an OFCCP audit – after the initial information submitted indicates compensation discrimination.

#### Focus on Veterans

Finally, OFCCP has added a new item 13, which seeks copies of the contractor's Vets-100 or Vets-100A report for the last three years. OFCCP claims this data is consistent with its newly reinforced efforts to prohibit discrimination against protected veterans, as discussed below. Combined, the changes to the itemized listing demonstrate OFCCP's commitment to more aggressive review and scrutiny of employment policies and statistics.

#### **OFCCP has Proposed New Regulations Regarding Veterans**

Less than one month before announcing new changes to the itemized listing, on April 26, 2011, OFCCP published a notice of proposed rulemaking that recommends revisions to the Federal regulations implementing the Vietnam Era Veterans' Readjustment Act of 1974 (Section 4212), as amended, commonly referred to as VEVRAA. The revisions will significantly affect affirmative action planning for contractors. Among other things, they include new definitions of "protected veterans" and require changes to the specific types of outreach and recruitment that contractors must do to target veterans. For example, even if a contractor already uses a private job service to post vacant positions, the proposed rule requires contractors to provide job vacancy information to applicable state employment service delivery systems in the manner required by the service. The proposed rule also requires contractors to annually evaluate the effectiveness of their efforts to ensure that veterans have access to employment opportunities. The revisions also include new recordkeeping requirements. Specifically,



they require contractors to establish and maintain quantitative data on the number of protected veterans who have been referred by state employment services, the number of protected veterans applying for jobs, and the number of protected veterans they hire. The revisions also require contractors to establish hiring benchmarks based on availability of data, require contractors to invite veterans to self-identify both before and after receiving an offer of employment, and include new requirements regarding reasonable accommodations for disabled veterans.

Undoubtedly, these new rules require contractors to make enhanced efforts regarding affirmative action towards veterans. They also confirm that contractors should take steps now to ensure compliance in the event they are subjected to an OFCCP audit.

### **Revised Active Case Management System**

Effective January 1, 2011, OFCCP replaced its old Active Case Management Directive ("ACM"), which had been adopted in 2008, with a new Active Case Enforcement Directive ("ACE"). According to OFCCP, the old system "did not allow OFCCP to effectively use all of its investigative tools." Under the new system, OFCCP will use all of its compliance methodologies (including compliance reviews, compliance checks, focused reviews and offsite reviews of records). Additionally, all contractors selected for audit under the Federal Contractor Scheduling System ("FCSS") will be subject to a full desk audit, and every 25th contractor selected for audit will be subject to a full compliance review (including an onsite visit). Under ACM, full desk audits were conducted only for every 25th selected contractor, and onsite audits were conducted only for every 50th selected contractor. A full desk audit entails a comprehensive review of a contractor's Affirmative Action Plan and supporting documentation, as well as an in-depth analysis of a contractor's hiring, promotion and termination decisions and compensation practices.

Further, in addition the new item 12 regarding compensation, OFCCP has made other changes that indicate contractors can expect far greater scrutiny with respect to compensation. In January 2011, OFCCP published a notice stating it was rescinding its published Compensation Standards. See Notice of Proposed Rescission, *Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246*; 76 Fed. Reg. 62-64 (Jan. 3, 2011). Since 2006, those standards have advised contractors that OFCCP would evaluate compensation by comparing employees in similar situated employee groupings ("SSEGs"). Recently, OFCCP has stated that it will no longer restrict itself to this type of analysis. Instead, OFCCP will approach compensation in different ways. One way is to take the summary compensation data provided in the Desk Audit Letter under its current item 11, and regardless of how



the data is submitted (*i.e.* job group, job title, etc.), OFCCP will flag either a two percent or \$2,000 difference in the average pay between females and males or minorities and non-minorities.

Undoubtedly, contractors can expect that this new test – as well as any others used by OFCCP – will result in a greater number of perceived pay disparities, so contractors can expect more follow-up requests from OFCCP regarding compensation data.

The new ACE system, like the new itemized listing, illustrates OFCCP is serious about more rigorous and enhanced compliance audits. It also underscores the importance of ensuring that all submissions to OFCCP as part of a contractor's Affirmative Action Plan are accurate and supported by appropriate documentation.

### **Advice for Contractors in the Era of the New OFCCP**

#### Increased Technical Compliance

In light of OFCCP's new enforcement efforts, heightened scrutiny during compliance audits, and more vigorous requirements related to veteran outreach and compensation practices, contractors must ensure that their employment practices, including policies and processes related to recruiting, hiring, promotions, terminations and compensation, are fully compliant with OFCCP requirements, and are supported by appropriate documentation. Contractors also must ensure their Affirmative Action Plans and supporting documentation are complete and accurate. In light of OFCCP's new focus on veterans, contractors also must ensure they engage in appropriate outreach efforts, post jobs appropriately with state agencies, and can demonstrate these efforts to OFCCP.

#### Assessing Adverse Impact and Potential Discrimination

Make no mistake, OFCCP (with backing from the Solicitor's Office under the current Administration) is intent on becoming a second discrimination enforcement agency alongside EEOC. Just as EEOC has dramatically expanded its systemic enforcement program, OFCCP shows every intention of stepping up its role.

The best way to ensure that employment practices are compliant is to conduct internal audits. These audits should cover contractors' personnel policies and processes, statistics regarding hiring, promotions, terminations and compensation, recruiting and outreach practices, and documentation and record keeping. If a contractor finds adverse statistics or individual female or minority outliers, the contractor should conduct research to make sure it can explain such situations. Importantly, unless these audits are



done carefully, thoroughly and under the cloak of attorney-client privilege, they can be discoverable by OFCCP or in private litigation. Further, if the audit contains any adverse findings, these findings can be used as evidence against the contractor. Thus, in order to ensure that audits are done correctly and remain confidential, it is best to consult counsel before analyzing compensation data, selection decisions, or other employment policies or practices.

### **Orrick's Team**

Orrick's Global Employment Law Group deals regularly with pay and discrimination issues. We offer practical advice and expertise to help our clients chose the best options for meeting their legal obligations in this changing area of the law.

- Defending claims of systemic discrimination brought by both federal agencies (OFCCP, EEOC and state agencies) and private plaintiff's lawyers in large class actions.
- Advising on audits and other proactive measures to best position companies for class and systemic claims.
- Providing strategic advice on diversity planning and related EEO policies.
- High-level training at the executive level and senior human resource level.

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<sup>[1]</sup> [Here is a link](#) to the newly proposed itemized listing.