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OFCCP/AFFIRMATIVE ACTION NEWSLETTER

JANUARY 2005

This newsletter is intended to provide an update of developments at OFCCP since our November 2004 newsletter. This issue contains information provided by Mr. Leonard J. Biermann, National Director, Human Resource and Affirmative Action Activities, as a courtesy to those in the employment community who have utilized NELI's affirmative action training services. Mr. Biermann may be reached at NELI at 301.865.0500 or by email at neli@neli.org.

As anticipated, OFCCP sends out 10,000 Equal Employment (EO) Surveys at end of year.

Fulfilling its minimal regulatory obligation, OFCCP sent out approximately 10,000 EO surveys at the end of last year. They are to be returned to the agency by the receiving contractor establishments by the end of March 2005. Survey requests were made to contractor establishments which had not been solicited the previous year, or which were otherwise excepted. The exceptions were as follows:

1.) Contractor establishments which were given advance notice

of potential audit under the OFCCP new Federal Contractor Selection System (FCSS);

2.) Establishments that completed a Survey in 2004;

3.) Establishments that were the subject of a review in 2003 or 2004;

4.) Establishments employing fewer than 100 people; and

5.) Establishments with approved functional affirmative action programs.

Impact on Contractors.

As we reported earlier, there is presently no confidence at OFCCP that these surveys have merit in predicting contractor establishments most likely to be noncompliant with the Executive Order because of systemic discrimination problems. OFCCP, through its outside contractor, will continue to evaluate the potential correlation of the EO Survey data with systemic discrimination. Thus far no such relationship has been found, and it is likely a regulatory proposal to abandon the survey will be issued during the first half of Calendar Year 2005.

Those contractors who have received the survey, but believe they are subject to one or more of the above exceptions, may note that fact on the survey form, and return it uncompleted to the OFCCP. Contractors not subject to an exception should judiciously complete the form and return it in a timely manner. While the data submitted will have little or no bearing on future scheduling or compliance determinations at the OFCCP, failure to return the form constitutes a clear violation of the agency's regulations, and may subject the contractor to OFCCP enforcement action.

Kay Coles James, wife of OFCCP Director Charles James, announces she is leaving her post as Director of the Office of Personnel Management.

Having completed a full term as Director of the Office of Personnel Management, the agency that manages all personnel matters for civilian government workers, Kay Coles James announced she is leaving her post. What effect this will have on the Director of OFCCP, her husband, Charles James, remains to be seen. Mr. James has made no public announcement as yet.

Impact on Contractors.

Obviously, the loss of Charles James to the OFCCP would have significant impact on the contractor community. New Directors invariably bring new policies to the agency. Mr. James has made no public announcement, although speculation among the rank and file within the agency is that Mr. James will leave in a short time. In the meantime, the program continues under his leadership, and efforts to implement the new Federal Contractor Selection System and the systemic investigation initiative continue.

No significant hires or policy issuances since the last Newsletter.

Not surprisingly, there have been no substantial developments regarding hiring or policy issuances since our last Newsletter. This is a common situation during the holiday season, particularly when it is immediately followed by an inauguration. The New York Regional Director position remains open, as well as the planned compensation expert in Joe DuBray's Policy Division. No additional regional statisticians have been appointed, with the only two regions with such experts remaining San Francisco and Dallas. Further, candidates from outside the OFCCP may be hesitant to accept a Senior Executive Position without a clear understanding of who will

lead the agency during the coming term.

Contractors should expect increased policy initiatives some weeks after the inauguration, whether or not Charles James remains in office. However, new hiring may remain minimal. The agency is unable to discuss the fiscal year 2006 budget (beginning October 1, 2005) because budget discussions remain embargoed until the Office of Management and Budget is prepared to offer a proposed budget to the respective congressional appropriations committees. It is possible that the FY 2006 budget will include severe cuts to the OFCCP appropriation. If that is the case, expect the agency to be very conservative in filling positions, which, after October 1, may no longer be authorized.

Impact on Contractors.

Contractors should not expect changes in OFCCP policies as a result of any tightening of its budget. Current leadership is certain to continue its efforts to improve its audit selection techniques and to concentrate on systemic discrimination when conducting compliance evaluations. However, lack of staff, particularly regional statisticians and compensation experts, will certainly impact the number of focused audits that can be accomplished. This would be particularly true if many of these audits resulted in prolonged litigation. Contractors should look

for a continuation of the current emphasis on systemic discrimination, but should also expect a very selective and highly focused effort to enforce potentially adverse compensation or adverse impact findings. In short, the full weight of the OFCCP enforcement efforts concerning systemic discrimination will be reserved to those establishments with the most compelling evidence of discrimination. Of course, should Mr. James leave his post, the new Director could change the agency's priorities.

OFCCP is implementing a program to conduct compliance reviews of companies with functional AAPs.

For a long period after the issuance of the Functional AAP Directive, contractors had not been reviewed because there was no specific methodology in place for doing so. After considering for some time the development of a "worst-first" targeting system, similar to the formerly used EEDS and the current FCSS, OFCCP has decided to schedule these companies based on random selection. Thus far, nine functional AAPs have been subject to compliance audit, and ten additional are either underway or scheduled for initiation.

These reviews have all been started at the location of the functional headquarters, with the understanding that additional locations to be included in the

investigation if necessary. Thus far, all reviews have been completed at the functional headquarters level, and no other sites have been visited. No serious findings of violation have been made. In particular, no systemic violations have been found.

Impact on Contractors.

Of course, the most important impact is the fact that these reviews are not actually being conducted. Up to the latter part of last year, those companies with functional AAPs enjoyed an insulation from any compliance evaluation activity. Contractors should be encouraged, however, that the agency thus far has limited their investigation to the headquarters office, and has found no serious violations.

Harold Busch, Director of Program Operations, will retire effective April 1, 2005.

Mr. Harold Busch, a long time career employee of the OFCCP, who rose through the ranks to become a member of the Senior Executive Service as Director of the Division of Program Operations in the National Office, announced he will retire effective April 1, 2005. Between now and April, he will continue to divide his work between the National Office and as Acting Regional Director in New York.

Impact on Contractors.

The retirement of Harold Busch will be a serious loss to the contractor community. Mr. Busch was always available to contractors who felt they were not being treated fairly by the agency's field investigators, and knew they would have a fair and objective hearing. Harold will be missed.

Comment Period for Proposed Standards for Systemic Discrimination ends January 19, 2005.

As a reminder, contractors wishing to comment on the OFCCP proposed guidelines on acceptable self-analysis methods for compensation discrimination have only until January 19, 2005 to do so. OFCCP will accept hard copy comments by mail or FAX (202-693-1304), but electronic submission is preferred. You should e-mail your comments to *ofccp-public@dol.gov*.

Please contact Leonard Biermann if you have any further questions. He can be reached on his direct line at 301-865-0500 or by fax at 301-865-7399. You should also watch for updates concerning these and other matters on NELI's web site *www.neli.org*

Now Available 2004 Affirmative Action Workbook

This new and expanded edition has been revised in accordance with OFCCP regulations and policy initiatives currently in effect, and provides practical details on how to develop Affirmative Action Programs compliant with Executive Order 11246, as amended, together with extensive support materials. The Workbook includes dozens of recent documents regarding significant developments at OFCCP, compensation analyses, who is an applicant, adverse impact, audits, race, sex and veterans' reporting obligations (including VEVRAA), Affirmative Action "Basics," and detailed instructions for writing an AAP.

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