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OFCCP/AFFIRMATIVE ACTION NEWSLETTER

MAY 2005

This newsletter is intended to provide an update of developments at OFCCP since our January 2005 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.

Mark Your Calendars
2005

AFFIRMATIVE ACTION BRIEFING

San Francisco • October 6-7
Austin • October 20-21
Chicago • October 27-28
Washington, D.C. • November 3-4

AFFIRMATIVE ACTION BASICS

(PRECEDING THE AA BRIEFING ON
WEDNESDAY AFTERNOON)
SAN FRANCISCO • OCTOBER 5
AUSTIN • OCTOBER 19
CHICAGO • OCTOBER 26
WASHINGTON, D.C. • NOVEMBER 2

Dr. Patsy Baker Blackshear replaces Harold Busch as Director of Program Operations in National Office.

Following warm and well-attended retirement parties in both New York and Washington, D.C., Harold Busch has joined the ranks of the retired. He has already been officially replaced by the recently appointed Mid-Atlantic (Philadelphia) Regional Director, Dr. Patsy Baker Blackshear. Those of you who have received previous newsletters, will recall that we announced only last November that she had been selected as the new Philadelphia Regional Director following Joseph DuBray's transfer to the National Office to assume duties as Director of Policy and Planning. A former departmental financial director for the City of Baltimore and also employed in the Maryland school system and D. C. government, she spent a considerable amount of her time in the National Office since her Regional Directorship appointment.

Impact on contractors.

The appointment of Dr. Blackshear avoids the necessity of holding the position open awaiting lengthy clearance

processes should the agency have appointed someone not yet already a member of the Senior Executive Service. Dr. Blackshear, in her short time with the agency, has generated much support and has impressed those who have had the opportunity of working with her. Her lack of agency experience compared with Harold Busch is, of course, substantial, but she has been on a crash learning course since her appointment last Fall. It is likely Director Charles James had her in mind from the time of her Philadelphia appointment. Contractors should make the effort to meet her whenever the opportunity develops.

Her selection now leaves two regions without a Director -- Philadelphia and New York, and soon a third (see below). It is likely it will take some time to appoint new leadership to those offices.

Statistician Dr. Shirong (Andy) Leu appointed to newly created position in National Office to assist Dr. Michael Sinclair.

In a surprise move, a second statistician, Dr. Shirong Leu, who is informally referred to as "Andy," has been selected to assist Dr. Sinclair in the OFCCP National Office, and reported for

duty earlier this month. Further background information is not yet available. No action has yet been taken on the remaining statistician vacancies in the four regions other than San Francisco and Dallas. It is not likely these positions will be filled in the immediate future.

Impact on contractors.

The appointment of Dr. Leu reflects the reality of the dynamics created in the agency's effort to investigate compensation. More and more issues are reflecting policy decisions rather than straight statistical ones. These include questions regarding what kind of data to request from contractors after the initial desk audit, how to focus on limited job groups as a step in the expansion of the employer's compensation data, etc. In addition, because of the proximity of Philadelphia and New York, Dr. Leu can also be available to those regions in assisting their local analyses.

Pacific (San Francisco) Regional Director, Woody Gilliland retires on April 30, 2005.

Woody Gilliland, for the past several years the Director of the Pacific Region of OFCCP, has retired effective on April 30. The administrative process necessary to fill this position normally takes several weeks.

A second mailing of about 600

scheduling letters is expected soon.

With some District Offices advising they are running out of targets for compliance evaluations from the original 600 mailing at the beginning of the fiscal year (October 1, 2004), the OFCCP will shortly send another 600 scheduling letters to contractor establishments that were originally notified as potential targets from the Federal Contractor Selection System (FCSS) in a notification letter sent last year. It is expected another 600 or so such letters will be mailed.

Impact on contractors.

It is not surprising another set of scheduling letters is being sent. What is important is that from the first mailing, there has yet been no compliance evaluation that resulted in a significant systemic allegation of compensation discrimination. The agency is finding that these investigations are extremely time and cost consuming. Particularly difficult has been the development of "Similarly Situated Employee Job Groupings," pursuant to its own guidelines. Another difficulty has been identifying and reasonably evaluating for regression purposes the past job-related experience of employees before hire. While these difficulties were anticipated, the reality of the complexity of compensation investigations are likely to raise issues concerning the balance of these

efforts against other contractor obligations, particularly those regarding affirmative action obligations. As both the contractor selection system and the compensation initiative matures, look for OFCCP to consider supplemental methods of selection, such as reasonably large, possibly new contractors, which have not been reviewed before, or other complimentary selection devices independent of the FCSS, and not necessarily based upon the presumption of probable systemic discrimination findings.

No action on OFCCP compensation guidelines or OFCCP proposed rule on "Internet Applicant."

There has been no action as of this writing on the OFCCP guidelines of compensation analysis issued in the Federal Register on November 16, 2004, or the OFCCP proposed rule on the definition of "Internet Applicant" which would supplement the definition contained in the Equal Employment Opportunity Commission's Questions and Answers, which addressed the issue of "Internet Applicant" that was issued on March 4, 2004. The comment period for these proposals has long since expired. There is no indication when the applicant issue will be finalized, but OFCCP continues to apply the proposed definition in its day-to-day conduct of compliance audits. There is some indication the proposed guidelines on com-

compensation analysis may be finalized in the reasonably near future. Comments received from contractor groups generally raised a concern with the complexity of the development of similarly situated employee job groups, and whether the OFCCP would accept their determination of such groups, or would be second-guessed by the OFCCP's statisticians after the fact.

Impact on contractors.

Contractors should continue to submit their compensation data for desk audit in the manner they have determined appropriate, so long as it is consistent with at least the requirement contained in the OMB-approved scheduling letter and with any follow-up request for data from the OFCCP received after the initiation of the desk audit. Formation of appropriate job groupings for compensation analysis is subjective as much as it is technical, and individual statisticians may never fully agree on the formulations. OFCCP, in its initial review of compensation data at the desk audit stage, will likely use the "mean within salary grade" approach for setting investigative priorities. As contractors are aware, this approach has been formally discredited by the OFCCP in the compensation proposal. Thus this analysis will be performed only for focusing the investigation, not for making any initial finding. After identifying those salary grades with significant gender or race/ethnic

differences in average compensation, the agency will then attempt to develop similarly situated employee job groups within those suspect salary grades, requesting additional data as needed. This inquiry will then expand as data and findings merit. It is possible such an inquiry could be expanded to multiple establishments, consistent with typical class-action litigation, but none has yet reached that level.

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

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.

List price \$200

For more information or to order please call NELI at 303.861.5600 or email at neli@neli.org