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OFCCP/AFFIRMATIVE ACTION NEWSLETTER

AUGUST 2005

This newsletter is intended to provide an update of developments at OFCCP since our May 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

Twenty-Third Annual National Industrial Liaison Group Conference held August 8-11, 2005 in Dallas, Texas.

The National ILG met last week in the Texas-sized Gaylord-Texan resort hotel in suburban Grapevine, Texas. With nearly 600 participants in attendance, and with excellent service and planning demonstrated by the sponsoring Dallas-Fort Worth ILG, the conference was clearly successful. Having attended and participated in the conference, the following comments reflect my personal opinions of the content, and what impact contractors may expect as a result of the week-long meeting.

As in last year's conference held in St. Louis, the OFCCP was represented in Dallas by its Director, Mr. Charles James, and by its actual or acting regional directors and headquarters division directors. Unlike last year, however, the agency was consistently silent on making any comments regarding the two most controversial issues pending before it: the proposed definition of "applicant" and the proposed policy regarding a methodology for conducting compensation audits. Agency spokespersons would only state that the proposed applicant regulation had

been advanced to the Office of Management and Budget for consideration, and that the compensation policy was still under review. Contrary to last year's agency presentations, no statistician was on the agenda, and only one was present – Dr. Charles McGhee of the Dallas Regional Office. Dr. McGhee kept a low profile throughout the conference. Dr. Michael Sinclair, the national Director of Statistical Analysis, was notably absent.

Statistical approaches to compensation analyses were, however, well addressed by non-government speakers. Dr. Dan A. Biddle of the Biddle Consulting Groups gave an overview of the techniques used to develop a regression model, and the statistical methods used to show correlation and regression between multiple factors that may influence compensation. In the end, however, Dr. Biddle advised that caution must be taken when using regressions. They can be very date intensive, missing data can easily undermine the analysis, timeframes are important, flip-flops in disparities may mean the organization does not discriminate, and users must remember that statistics are cold and must be supported by anecdotal evidence. Dr. Biddle

advised that companies should evaluate all statistically significant differences using a non-statistical cohort analysis. In the end, if both anecdotal evidence and statistical evidence reflect discrimination, he recommended that the company should “start cutting checks.”

Obviously, in the end, Dr. Biddle endorsed a proper regression analysis supported by anecdotal evidence as the appropriate method for analyzing compensation. But a second statistician, Dr. Murray S. Simpson, Economist and Senior Consultant with Peopleclick Research Institute, did not agree. After reviewing the OFCCP proposed policy regarding use of regressions in studying compensation, Dr. Simpson used a sample “SSEG” – Similarly Situated Employee Group – composed of only one job title – junior architect. The regression incorporated base salary, increment for each year of seniority, and an increment if the employee is female. Using these factors, the regression showed that seniority was the predominant cause of differences in pay, and that the female criteria was not statistically significant. Yet, he posited, “Why are companies often sued even though their own regressions see no problem?” The reason, he argued, is that a violation of Title VII is a discriminatory decision, and such a finding could be made even though the regression proved no statistical difference based on race or gender. Taking

the same job group, Dr. Simpson then analyzed each decision which effected pay since the first employee was hired into the job group in 1995. These decisions included starting pay, promotions and merit pay. Using these factors, and applying statistical models other than regression, such as rank-sum or t-test, he demonstrated that discrimination was evident. In summary, he argued, that OFCCP’s approach, based on using regression to analyze current pay rates, does not address the question of disparate treatment, and was flawed. Pay-related decisions, he opined, made on the basis of race or gender, are what give rise to disparate treatment.

Impact on contractors.

Clearly, the OFCCP has adopted a low profile regarding both its proposed regulation concerning the definition of applicant and its proposed model for investigating for potential compensation discrimination. Differences between EEOC and OFCCP still exist, and may be more than cosmetic. OFCCP has made it clear they intend to adopt a minimum qualification standard for all applicants, not merely those recruited through the Internet, and it is not clear where the EEOC stands on that issue. Secondly, the methodology for conducting compensation analysis, if adopted by the OFCCP, will impact the EEOC as well, since both agencies use Title VII case law as the standard for enforcing their respective prohi-

bitions against discrimination. Largely, the OFCCP has decided to withdraw from the debate, and let other forces determine the eventual decision. In the meantime, OFCCP continues to apply the two standards in their day-to-day operation of the agency. One has the sense that the compensation investigations now underway by the OFCCP have been found to be more difficult than anticipated. Particularly troubling has been the creation of SSEG’s and gathering data which adequately reflect related experience prior to hire. These difficulties have resulted in reviews being held open for extended periods, at a sacrifice of time and effort that could be addressed to fostering affirmative action and continuing the glass ceiling initiative. Some adjustment in the priorities of the agency may be reasonably expected.

As to the position taken by Dr. Simpson, it is not unlike that taken by David Copus, a management attorney with Ogletree, Deakins, et al., when he addressed compensation analysis at last year’s NELI Affirmative Action Briefings. There is little case law one way or the other, although most attorneys seem to believe that the courts’ first impulse will be to follow the regression methodology. Those wishing to adopt the Simpson view may have to convince the judge of its value. Contractors may wish to consider the “series of decisions” approach as one of possibly other rebuttals to plain-

tiffs' expert findings using regressions.

We will be addressing these issues in depth at this year's Affirmative Action Briefing series during October and November.

Charles James Has No Immediate Plans to Leave. Regional Director Fred Azua Says "Good-Bye."

Referring to his OFCCP initiatives since coming to office, Charles James told the ILG audience that he wanted to stay until he "could make it happen." And he added to the list several new directions he wished to implement at the agency. Among them are:

- Develop new ways of targeting reviews by "following the contract." Believing there are many companies who fail to report on the annual EEO-1 as having government contracts, and others that are new to federal work, Mr. James said he wanted to identify these and conduct reviews at places that have not had them in the past. He also wants, he stated, to develop a "corporate compliance profile" or "scorecard" that would allow the OFCCP to identify "complying and non-complying contractors" and dedicate a portion of all scheduled reviews to those contractors who have shown poor compliance in the past;
- As an enticement to voluntary contractor compliance, he said

he would seek to send performance information to agency contracting officers so they "know how you are doing;"

- Recognizing there were several vacant positions in upper management within the OFCCP, Mr. James suggested that he would use the opportunity to mix the new placements with outside candidates along with internal promotions.

In his introduction of Mr. James, Fred Azua, the Regional Director for the Southwest and Rocky Mountain Region, said that this would be his last ILG meeting in that his retirement was imminent.

Impact on contractors.

There should be little impact on contractors resulting, at least in the near future, from the initiatives Mr. James outlined. His search for new methods of scheduling audits is, however, reflective of the now well known fact that the EO Survey has been all but discarded as having any potential to serve as a scheduling tool. (Patsy Baker Blackshear, OFCCP's Director of Operations, reported, in her presentation, that the agency's outside contractor, APT, Inc., had completed their evaluation of the EO Survey, that there was a request for additional information, that deliberations were "going forward," but that there was no prediction as to when a determination of its usefulness may be made.) But searching

for non-identified contractors has been attempted in the past and has not proven productive. Most establishments identified from sources other than the EEO-1 Report have been small in size. Lastly, notification of contracting officers of the status of a contractor's compliance may be illegal. Many will recall when the OFCCP, some thirty or more years ago, attempted to use a "pre-award notice" to advise contracting officers that there were problems with the compliance of a certain company, and the contracting officer should contact the OFCCP before awarding a contract. The courts unanimously found that such a procedure was a violation of contractors' rights to due process. All contractors are in compliance until they are found not to be after a recommendation of a hearing officer and the determination by the Administrative Review Board. No compliance officer can act on any other "notification" and the process itself would probably be enjoined.

The retirement of Fred Azua brings to four the number of regions without a permanent director, with only the Midwest Region (Chicago) and the Southeast Region (Atlanta) having a director in place. Further, with the retirement of Joe DuBray, the position of Director of Policy, Planning and Program Development is also open. Thus, with the addition of the politically appointed Deputy Director vacancy, there are now

six Senior Executive Service positions open at the OFCCP. Contractors will need to work with the acting directors until such time as the usually long process of filling SES positions is completed.

Other Matters of Interest.

Contractors will recall that on June 22, 2005, OFCCP issued a final rule revising the regulations implementing Section 503 of the Rehabilitation Act of 1973 to conform its authority to conduct various kinds of compliance evaluations, including compliance checks, with that of the rules applicable to the Executive Order and the Vietnam-Era Veterans Readjustment Assistance Act. This rule resolves an issue that many management attorneys have raised as to how compliance checks and other types of evaluations could be done under Section 503 when the regulations did not expressly provide for it.

In a slightly related matter, Patsy Blackshear stated during her presentation at the ILG Conference, that OFCCP was implementing Executive Order 13201, which requires contracts for purchases of at least \$100,000 with contractors of 15 or more employees to contain a requirement to post in a prominent place rights of union employees (commonly called the "Beck Poster"). Such employers must have a formally recognized union or a union

certified as the exclusive bargaining representative of the prime contractor. Further, the contractor cannot be located where state law forbids enforcement of union-security clauses ("right-to-work" states). The poster provides that employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs relating to collective bargaining, contract administration, and grievance adjustment. The poster further advises that employees who feel they have not been provided this right, may be entitled to a refund and future dues adjustment, and may contact the National Labor Relations Board. Ms. Blackshear stated that OFCCP would begin to check to assure the posters were in place if they were required.

Impact on contractors.

Some have interpreted the June 22, 2005 rule as indicating there would be a resurgence of compliance checks. That is not believed to be the case. NELI's understanding is that OFCCP will likely back away from compliance checks as done in previous years, as they have not proven to be worthwhile for any purpose. Designed originally to be used to schedule full audits, there has been no initiative to further implement that goal.

Further, the check which OFCCP will perform to assure the Beck Poster is in place is

planned to be conducted in concert with onsite reviews. There would be a telephone check only in the event the location of the facility is not in easy commuting distance. Thus, the Beck Poster audit will increase the number of onsite visits. NELI understands that if a desk audit is conducted of a contractor establishment that does not result in a need to undertake an onsite review, an onsite will nonetheless be conducted to check for the Beck poster, provided the location is within easy commuting distance, i.e., within a short drive from the District Office. This effort is apparently in response to a strong desire within senior levels of the Administration to enforce Executive Order 13201.

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

2005 Affirmative Action Workbook

This new and expanded edition has been revised in accordance with OFCCP regulations and policy initiatives currently in effect. The Workbook will be available in November. Please visit our website at www.neli.org for more information.