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OFCCP/AFFIRMATIVE ACTION NEWSLETTER

MAY 2006

This newsletter is intended to provide an update of developments at OFCCP since our December 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
2006

AFFIRMATIVE ACTION BASICS/BRIEFING

CHICAGO • OCT. 4-6
AUSTIN • OCT. 11-13
SAN FRANCISCO • OCT. 18-20
WASHINGTON, D.C. • OCT. 25-27

We have incorporated some major changes into our AA Briefing agenda. Please visit our Affirmative Action Briefing webpage for more information. The brochure and detailed agenda will be available in July.

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Consideration of the discontinuation of the Equal Opportunity Survey is still underway at OFCCP.

OFCCP continues to review comments received from its publication of a proposed regulation to rescind the use of the Equal Opportunity Survey, a device created during the Clinton Administration. The agency is unable to make any comments regarding its action until the proposed regulation has either been adopted or rejected. Comments have been clearly divided, with the contractor community supporting the proposal to rescind, and civil rights organizations opposing it. However, this writer's opinion is that the agency will very likely adopt the proposal and rescind the use of the survey. In any event, agency action is expected soon.

OFCCP continues to apply its proposed guideline on appropriate investigative techniques in auditing contractors' compensation practices for possible systemic discrimination. Long investigations continue.

As reported earlier, OFCCP, in its daily conduct of audits of contractor establishments, is undertaking substantial

effort to follow its own proposed guideline for conducting such investigations. However, the agency continues to have difficulty in reaching finality in such investigations, and many audits have been open for many weeks or even months. Development of adequately constructed "similarly situated employee groups" and appropriate weighting of "prior related experience" seem to be the cause of most of the delays. However, the agency is moving ahead with its plans to finalize not only the proposed guideline applicable to its own investigations, but also the proposal that creates a similar standard for contractors' own self-audits. At one time this writer believed that the contractor standard might be dropped as a guideline, but that position has apparently changed at the OFCCP. Contractors should understand, however, that the self-audit guideline is just that – it affords a "safe harbor" for those employers wishing to use it, and OFCCP will not challenge the methodology if the guideline is strictly applied. However, while other methodologies may be used, the OFCCP would be free to challenge them. Like the EO Survey, action on these proposals is also expected in the near future.

OFCCP is now reviewing results of recent compliance reviews where the validity of tests has been used as a defense for a statistically significant disparity in selection resulting from the use of such tests.

Since the OFCCP's testing expert, Dr. Richard Fisher, was hired some time ago, the OFCCP had been preoccupied with looking at the backlog of cases awaiting expert review in which the principle issue was the alleged validity of a test in defense of a finding of adverse impact. Recently, however, the agency has begun to look at the result of investigations conducted since Dr. Fisher was hired, and since the agency has had additional training in investigations of adverse impact. Compliance officers are now using more refined statistical tests as proffered by its statisticians, but also can directly discuss validation questions with Dr. Fisher. Notably, one of the issues being raised in OFCCP's conciliation meetings with contractors is the transportability of validation studies from one location to another. This is not a new issue. The agency's past position has been that it is the contractor's burden to show that a validation study at one location has applicability at another. The success of the contractor's argument has usually turned on the employer's ability to show the similarity of the two tests, their similar application, and the demographic sim-

ilarity of the actual pool and potential of job seekers. Contractors should assume this standard will continue to be applied, and should be prepared to explain any defense of adverse action which relies on the transportability of test validation studies.

OFCCP plans for full enforcement of its Internet Applicant regulation as the 120-day grace period for completing record-keeping requirements ends next month. Agency also plans to offer guidance on the rule's application to employees seeking promotion or transfer.

While the Internet Applicant rule became effective on February 6, contractors who were making good faith efforts to meet its recordkeeping obligations were given 120 additional days to fully comply without fear of enforcement. In practice, OFCCP has restrained from enforcing the rule against any contractor until the extension time period ends in June. There are no plans to extend that moratorium, and contractors should expect that the agency will fully enforce the rule's recordkeeping requirements in early June.

In addition, the OFCCP plans to offer advise to contractors regarding the application of the rule to internal applicants for promotion. While the OFCCP has not commented as to what specific guidance may be given,

this writer expects the agency to adopt its thus far informal position – that if current employees concurrently apply for promotions to positions that are also advertised in a manner which causes external job seekers to meet the first prong of the Internet Applicant definition, and such job seekers are considered along with employees seeking promotion to such positions, the entire pool must be treated pursuant to the requirements of the Internet Applicant regulation. Should the contractor utilize a two step bidding process, however, and bifurcate the applicant pool between internal and external candidates, such internal promotion seekers would not be subject to the regulation, in that two distinct applicant pools would be created. Contractors should look for guidance in the coming weeks.

The National Employment Law Institute will continue to monitor developments and issue additional newsletters as warranted.

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