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# OFCCP/AFFIRMATIVE ACTION NEWSLETTER

SEPTEMBER 2006

This newsletter is intended to provide an update of developments at OFCCP since our July 2006 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](mailto: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 to download the brochure.*  
[www.neli.org](http://www.neli.org)

### **OFCCP adopts a new procedure for the scheduling of some on-site audits.**

The Office of Federal Contract Compliance Programs, in order to randomly schedule a proportion of their on-site visits after desk audits, has adopted a procedure in which District Directors are required to schedule an on-site visit of every 20th desk audit they perform. These visits will be scheduled whether or not the findings in the desk audit (and possible review of subsequent information that may have been provided off-site) would ordinarily have merited an investigation at the location of the contractor's establishment.

It is understood this random selection process was adopted to further evaluate the agency's Federal Contractor Selection System (FCSS) to assure contractors cannot assume they will not be audited during the course of a fiscal year, and also to provide additional opportunities to observe whether the Beck Poster has been properly posted.

Readers of past newsletters will recall that the institution of the Federal Contractor Selection System was intended to promote

the selection of contractor establishments for review which would most likely be in violation of the Executive Order, particularly violations which involved systemic discrimination in compensation or selection. The previous system for selection, the Equal Employment Data System (EEDS), which relied exclusively on EEO-1 data, was found not to adequately predict likely offenders. Unfortunately, it is understood that the FCSS has not been shown to provide any better predictive value, and, as in the past, a large majority of desk audits have not been followed by on-site investigations. Further, advance notification to contractors of their potential selection for audits may have resulted in those contractors who were not so notified becoming lax in their monitoring of affirmative action and nondiscrimination requirements.

In addition, the Department of Labor has expected the OFCCP to observe, during on-site audits, whether the Beck Poster is properly displayed. (NOTE: The Beck Poster implements Executive Order 13201, which requires that a Notice to Employees is posted by non-exempt contractors and subcon-

tractors stating that no portion of union dues may be used for purposes other than collective bargaining without the union member's permission. See also 29 CFR Part 470, which provided, *inter alia*, that the Department would observe compliance with the posting requirement when conducting reviews under other laws, Executive Orders, or regulations. The Department has designated the OFCCP as one its agents to observe compliance regarding the poster's presence when conducting its compliance reviews on-site.) The "every 20th" selection process will assure additional on-site reviews are conducted, thus aiding in the enforcement of the Beck requirement.

#### Impact on contractors.

The impact on contractors will mainly consist of inconvenience. Those contractors who would be audited on-site, based upon preliminary off-site findings of potential discrimination, will be scheduled in any event. In some cases, the 20th contractor audited may be subject to an on-site for both reasons, since the selection criteria can overlap. In those cases where the on-site is scheduled solely because of the random selection, it is anticipated that these on-sites will be brief and not include extensive investigation for systemic investigation. In the few cases brought to this writer's attention, this has proven to be the case.

#### **OFCCP Issues Final Rule Rescinding Equal Opportunity Survey.**

As most readers are by now aware, on September 8, 2006, the OFCCP issued a final rule rescinding the often maligned Equal Opportunity Survey. The action was anticipated, and brought no surprise to most of the contractor community. The determination to rescind the survey was based on studies by two outside contractors as well as the direct experience of the OFCCP through the conduct of its compliance reviews. The agency found that the Survey did not predict contractor establishments that would be more likely to have discriminated against women or minorities.

Interestingly, the publication of the final rule resulted in very little public reaction. One or two minority and women's organizations vowed to use the rescission, likely in the coming Congressional elections, as a demonstration of the Bush Administration's continuing failure to properly enforce the Executive Order.

#### Impact on contractors.

As most contractors will agree, the survey, instituted during the previous Administration, was a significant burden to the contractor without any demonstrated program utility. Contractors should be pleased with the action taken.

#### **Executive Positions Remain Open at OFCCP.**

No change has taken place in filling the open executive positions at OFCCP, nor have any additional statisticians been selected for regional offices. Thus, the Director of Policy, Planning & Program Development in the National Office and the Regional Director positions in San Francisco (Pacific Regional Office) and Philadelphia (Mid-Atlantic Regional Office) continue vacant, as well as statistician positions in Chicago, New York and Atlanta. National Deputy Director David Frank is now also acting as the Director of the Division of Policy, Planning & Program Development. Patsy B. Blackshear, the National Director of the Division of Program Operations, continues to also act as Regional Director in Philadelphia. William D. Smitherman, a long term senior regional and district office manager, is the Acting Regional Director for San Francisco.

There appears to be no immediate plan to fill additional statistician positions. The four statisticians currently employed continue to train field managers and compliance officers as well as continuing their involvement in specific investigative issues arising from compliance audits. Although there has been no official comment about future plans for the executive level vacancies, there may be an eventual effort to

merge the Northeast and Mid-Atlantic Regions. Of all the vacancies, an appointment to the Pacific Regional Director vacancy seems the most imminent.

Impact on contractors.

While there will continue to be some inconvenience for contractors in regions without a permanent local regional director, contractors should continue to develop good relationships with the acting directors and other managers in the regional and district offices. While Philadelphia Acting Director Blackshear is geographically removed, both she and San Francisco Acting Regional Director Smitherman are highly competent and effective managers. Contractors should not be reluctant to call them should the need arise.

The National Employment Law Institute will continue to monitor the OFCCP and report newsworthy developments in this Newsletter. As well, these issues will be fully analyzed during NELI's annual Affirmative Action Briefing series this October.

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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](http://www.neli.org)