



Published by:
NATIONAL EMPLOYMENT
LAW INSTITUTE
www.neli.org

OFCCP/AFFIRMATIVE ACTION NEWSLETTER

FEBRUARY 2007

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

Mark Your Calendars
2007

AFFIRMATIVE ACTION BASICS/BRIEFING

CHICAGO • OCT. 3-5
AUSTIN • OCT. 10-12
SAN FRANCISCO • OCT. 17-19
WASHINGTON, D.C. • OCT. 24-26

*Please visit our
Affirmative Action Briefing
webpage to download the
brochure after July 15.
www.neli.org*

Questions continue to arise concerning contractor responsibilities for filing the new EEO-1 Report.

Contractors continue to raise questions concerning the timing of their obligations to file the new EEO-1 Report. As most contractors are now aware, the new report will include the identification of two additional minority groups – Native Hawaiians or Other Pacific Islanders and those of Two or More Races. Such identification takes place only after the answer to the threshold question of whether the employee is Hispanic or Latino is negative. In addition, there is a new obligation to break out Executive/Senior Level Officials and Managers from other managers working at the establishment.

The EEOC may issue guidelines early this year regarding the filing of the new report. Included in those guidelines may be a discussion of the methods which may be used to identify current employees, particularly with regard to the “two or more races” classification. The Commission will likely show a preference for self-identification of the workforce. The first revised EEO-1

Report is due to be filed in September 2007, and it is clear that covered employers and contractors must use the new EEO-1 form. However, in its 2005 final notice advising the public that it had submitted the revised EEO-1 format to the Office of Management and Budget for approval, the EEOC noted that to give both itself and employers an opportunity to minimize the burden to implement the new form, the “Commission will not mandate that employers resurvey their workforce before submitting the *first* (emphasis added) EEO-1 form in the new format.” (See Federal Register, Vol. 70, No. 227, Monday 28, 2005/Notice, p. 71300.) Thus, the Commission has at least implied that a survey would eventually be required, likely before the 2008 submission. In the meantime, the EEOC encourages employers and contractors with EEO-1 filing obligations to take reasonable efforts to use routine updates of employees’ personal information to obtain updated EEO-1 data. Also, since most employers can easily partition its managers into two categories rather than one, such partitioning will be expected in the 2007 filing.

The OFCCP is now developing a

regulatory proposal discussing how these new categories will be incorporated into Affirmative Action Programs for minorities. While the agency is obviously unable to make any comment prior to the official publication in the Federal Register of its proposal (possibly this Spring), some predictions of possible agency action may be useful to the readers of this Newsletter. Note that these predictions are ours alone and OFCCP has not endorsed them.

1. Like other employers, contractors will be expected to use the new management job categories beginning with the filing of the EEO-1 Report in September 2007. EEOC has the sole responsibility for the communication of this policy.

2. Contractors may expect that the OFCCP's proposed rule will not require that they survey their workforces to reflect, in their Affirmative Action Plans for minorities, the new minority group classifications now prescribed by the Office of Management & Budget for census and other purposes.

3. Contractors will have identified the race (including multi-racial and Hawaiian/Pacific Islanders) of its recently hired employees through traditional means, i.e., through self-identification of those individuals who choose to do so, and visually of those who choose not to self-

identify. It would be understood that visual identification would not generally be possible for those who regarded themselves as multi-racial.

4. Contractors may be encouraged to afford the opportunity to current employees, after advising them of why the opportunity is offered, to self-identify as multi-racial if they choose to do so. For those not self-identifying as multi-racial, their racial identification would continue as it had been historically recorded.

5. For purposes of utilization analysis and goal setting, OFCCP will continue to require only two groups for analyses and goals: total women and total minorities. Thus, all multi-racial categories (with the possible exception of Hawaiian and Puerto Rican) may be combined for the purpose of determining the need for placement goals and for the goals themselves.

6. While the OFCCP prescribes that individual minority and ethnic groups must be identified within gender for the development of the Organizational Profile of an affirmative action plan, it is doubtful the agency will require use of the OMB racial categories (e.g., African-American/Asian Female). It is most likely that OFCCP will prescribe the use of the generic "multi-racial" term for any combination of the four major protected minority groups, using

perhaps the abbreviation (in the above example) "MRF," consistent with the EEO-1 categories.

7. Lastly, the OFCCP requires that contractors evaluate and analyze their selections for hiring and promotion. Usually this is done using adverse impact analysis. Ultimately, such analysis, to be legally sufficient, must be done by specific minority categories. It is questionable that the courts would allow a plaintiff to seek class action status for a general "multi-racial" category, and will require a more specific identification of the alleged class. Technically, therefore, individual multi-racial groups (e.g., African-American/Asian Female) would need to be identified in any statistical showing of discrimination in selection from applicant pools. However, it is doubtful that such an explicit grouping would ever be statistically significant. Therefore, contractors should assume OFCCP would be content to see adverse impact analysis conducted using the traditional racial categories, as appropriate to their representation in the applicant pool.

NELI will continue to monitor OFCCP's activities related to the filing of EEO-1 Reports and other issues involving the new minority categories.

Impact on contractors.

If, as we expect, OFCCP will take a pragmatic position regarding a contractor's obliga-

tion to identify multi-racial employees, and in the construction of affirmative action plans, contractors should welcome this development. We shall need to await, however, the possible publication of a proposed OFCCP regulation in the Spring of 2007 and further guidelines from the EEOC. Contractors are advised to await the further guidance from both EEOC and OFCCP before initiating any significant changes in their practices.

OFCCP Has Sent Its Corporate Scheduling Announcement Letters.

On November 27, 2006, the OFCCP regional offices began scheduling compliance audits based upon a new scheduling list. As in the past, OFCCP generated the list from the Federal Contactor Selection System (FCSS). That list has gone through some revision. Specifically, the new list includes contractor facilities OFCCP identified through external federal contract databases as part of OFCCP's "Contracts First" Initiative. OFCCP also excluded from the audit list those establishments currently under review and those which it has reviewed in the past 24 months, as well as those contractors which OFCCP had awarded either the Secretary of Labor Opportunity Award or an Exemplary Voluntary Efforts Award within the last three years. OFCCP sent the so-called "Notice Letter" to the Chief

Executive Officer or other designated point of contact of each parent company with more than one establishment targeted on OFCCP's list. OFCCP will not conduct more than 25 new evaluations of any one contractor during the fiscal year, and it is not likely that OFCCP will audit all establishments listed in the Corporate Scheduling Announcement Letter.

Other contractors may also be scheduled, in some cases on a random selection basis, or as part of the monitoring of conciliation agreements.

Impact on contractors.

The important difference is that the OFCCP's scheduling of contractor establishments in this fiscal year will be through the application of additional, unspecified criteria the agency is using for selection. Included will likely be the past history of compliance audits of specific industries.

OFCCP Now Is Targeting Universities for Audits Based on its Federal Contractor Selection System.

In a change from its previous system, OFCCP has now incorporated university locations into its Federal Contractor Selection System ("FCSS"). Since universities do not file EEO-1 Reports, most of these additions are resulting from the agency's "Follow the Contract" initiative.

Once a contract is determined to exist at a university, and that university has not been audited in the past two years, it now stands as a strong contender for inclusion into the OFCCP's scheduling list. In addition, the OFCCP will continue to schedule pre-award audits based on pending contracts of ten million dollars or more.

Impact on Contractors.

Higher education can expect more audits in the fiscal year that began on October 1. They should be prepared to engage in some training of the Compliance Officers, who have not had extensive experience conducting university reviews. Issues such as use of faculty search committees, policies regarding tenure, forming of reasonably sized job groups of faculty members, and understanding the type and content of availability data should all be discussed with the Compliance Officer to assure that individual understands the unique issues which surround a university's hiring and promotion practices.

NELI will Continue to Offer Consultation Services for the Development of Affirmative Action Plans in Higher Education.

Many of our clients from the higher education community have suggested that NELI should give greater attention to the particular needs of colleges and uni-

versities in our Affirmative Action Briefings. While this is difficult given the industry representation at our programs, we are prepared to conduct programs in which the special interests of the university community are addressed. One of the particular issues facing higher education is proper sources of demographic data that reasonably portray availability of minorities and women for faculty positions. *As a service to our clients from higher education, I have included a listing of data sources that may be used for this purpose (these listings may be found on the last page of this newsletter).* I have found the National Science Foundation and the Commission on Professionals in Science and Technology to be particularly helpful. We are prepared to offer additional assistance in such university-specific issues such as job groupings, development of a compliant narrative reflecting self-analysis of placement and compensation, and other matters of specific interest to the university-contractor.

Texas A&M Receives the Secretary of Labor's Opportunity Award.

Congratulations to Texas A&M University in College Station, Texas, on receiving the coveted Secretary of Labor's Opportunity Award. Given to only one contractor a year, the award recognized that the university main-

tained comprehensive workforce strategies to ensure equal employment opportunity. NELI offers its own special congratulations to Dr. Joni A. Baker, the university's Manager of Equal Opportunity, for her work in the development and management of this fine program. The OFCCP also awarded three Exemplary Voluntary Efforts ("EVE") awards to other government contractors – Armed Forces Bank, Goldman Sachs and Company and Roy Anderson Corporation. Our congratulations are extended to those companies as well.

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

University Data Sources

College & University Professional Association for Human Resources Management
www.cupahr.org/surveys/salarysurvey2006-07.html

U.S. Census 2000 EEO Data Tool
www.census.gov/cgi-bin/broker

National Center for Education Statistics – IPEDS Web Based Collection System, DOE
<http://surveys.nces.ed.gov/ipeds/>

National Opinion Research Center
<http://norc.org/>

National Research Council, National Academy of Sciences
<http://www.nap.edu/readingroom/books/researchdoc/>

Diversity in Science Association
<http://cheminfo.chem.ou.edu/faculty/djn/diversity/top50.html>

National Science Foundation
<http://nsf.gov/statistics/about.cfm>

Commission on Professionals in Science and Technology
<http://www.cpst.org/hrdata/pages/HRDatabase.cfm>

NCAA – 2001-2 Race Demographics of NCAA Member Institutions
<http://ncaa.org/wps/portal>