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OFCCP/AFFIRMATIVE ACTION NEWSLETTER

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This newsletter is intended to provide an update of developments at OFCCP since our February 2007 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.

2007

AFFIRMATIVE ACTION BASICS/BRIEFING

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

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In recent weeks, the OFCCP, in concert with the Department of Labor's Solicitor's Office, has been working steadily to fulfill its commitment to clarify several policy issues which have been the concern of many contractors. On August 8, 2007, the first of what will likely be additional issuances took place. On that date, the agency published its much awaited final rule regarding the amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Act ("VEVRAA") that were included in the Jobs for Veterans Act, enacted in 2002. A review of this regulation and the status of other pending issues follow.

Final Rule Amending VEVRAA Is Issued.

After issuing proposed regulations on January 20, 2006, the OFCCP, on August 8, 2007, issued its final rule incorporating the revisions to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA") that are contained in the Jobs for Veterans Act ("JVA") enacted in 2002. In doing so, the OFCCP created an entirely new regulation, now codified at 41 CFR 60-300. Because

the revisions required under JVA apply only to contracts entered into or modified on or after December 1, 2003, the present regulation (41 CFR 60-250) remains intact, and will continue to apply to those contracts entered into prior to December 1, 2003, providing such contracts have not been modified after that date. The new rule becomes effective on September 7, 2007. The principal changes are as follows:

1. The coverage threshold of VEVRAA is raised from a contract of \$25,000 or more to a contract of \$100,000 or more (note that it must be a single contract that meets the threshold - Contracts are not aggregated).
2. The JVA amendments changed the categories of covered veterans under VEVRAA. The JVA eliminated the category of Vietnam era veterans from coverage. However, many Vietnam era veterans will remain covered because the JVA added as a new category of covered veterans - those "veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces Service Medal or a Campaign

Badge was awarded.” Further, the JVA expanded the coverage of veterans with disabilities, removing certain restrictions for the coverage of disabled veterans, namely, the 10% to 20% serious employment handicap, or a disability rated 30% or more by the Department of Veterans Affairs. Coverage is now extended to include all veterans with service-connected disabilities. Lastly, the coverage of “recently separated veterans” was extended from one to three years after discharge or release from active duty.

3. The JVA modified the mandatory job listing requirements for covered contractors. The previous regulation allows contractors to satisfy their job listing obligations by listing employment openings either with the appropriate local employment service office or with America’s Job Bank. The new regulation no longer allows contractors to meet job-listing requirements by filing with America’s Job Bank (now abolished), or any other subsequent national electronic job bank or delivery service entity. However, they may do so in addition to filing with the state employment service if they so choose. (Under the new rule, covered contractors must use a delivery system as offered in accordance with the Wagner-Peyser Act, which established the Employment Service, the nationwide system of public employment offices.) However, in a

change from the 2006 proposed regulatory language, the final rule specifically provides that listing employment openings with the state workforce agency job bank or the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment delivery system.

Those contractors that hold covered federal contracts that pre-date December 1, 2003 as well as covered federal contracts awarded on or after December 1, 2003, will be subject to both regulations. Hence, until such time as the pre-December 1, 2003 contracts are ended or amended, the old rules will concurrently apply, including the dollar coverage thresholds which applied to the pre-December 1, 2003 contracts, and the definitions of covered veterans, so that no currently covered veteran loses VEVRAA benefits while these older contracts are open and un-amended. Of course, a contractor with a contract dated December 1, 2003 or later will be obligated to follow the new regulation for all job vacancies beginning on September 7, 2007. However, contractors will be required to complete only one affirmative action plan for covered veterans. The application of the plan will depend upon the execution or amendment dates of contracts held at the time the plan is written. OFCCP has also provided that all contractors may continue

to use the sample invitation to self-identify form as contained in 60-250 until the final rule becomes effective on September 7, 2007. At that time, contractors having contracts subject to both sets of rules may choose to combine the two sample invitation to self-identify forms contained in 60-250 and 60-300 such that the contractor extends to applicants a single invitation to self-identify which lists all of the categories of veterans protected each regulation. At the completion or amendment of all pre-December 1, 2003 contracts, the contractor will use the 60-300 invitation to self-identify form exclusively.

Impact on Contractors.

Clearly, the greatest impact on government contractors will be the loss of a national job bank for listing job vacancies. During the comment period, the most negative responses concerned this issue. Reacting to these comments, the OFCCP, in the final rule, allows contractors to file with individual state workforce agency job banks for all jobs filled through any recruiting throughout the state, rather than with each local employment service office in discrete areas where recruitment occurs. While this is still a significant additional burden from the previous process of filing only with American’s Job Bank, it constitutes a substantial reduction from the original proposal that would have required contractors to file at potentially hundreds of

employment service offices. The OFCCP website (www.dol.gov/esa/ofccp) now includes a link to all State Workforce Agency Job Banks where contractors may list job vacancies. In addition, contractors will also find a link to the specific Armed Forces Service Medals and Campaign-Expeditionary operations that afford coverage under the revised regulations.

Compensation Investigations.

Nearly 14 months have passed since the OFCCP issued standards for the investigation of systemic compensation discrimination and its companion piece, the voluntary guidelines for contractors' own self-analysis of their compensation systems. During this time, OFCCP officials, in concert with agency statisticians, have been training compliance officers and field managers in the implantation of the investigative standards and how to apply them to identify systemic discrimination in compensation practices. Most desk audits now consist, in large part, of efforts to identify preliminary indications of such problems, and some have been followed by repeated requests for additional, more refined, compensation data. However, so far as is known, no case of systemic compensation discrimination resulting from the use of these investigative standards has yet been brought either to settlement or to the initiation of enforce-

ment action. Further, and not surprisingly to either the contractor community or to the OFCCP itself, I know of no contractor who has adopted the voluntary guidelines in order to obtain an assumption of compliance with 41 CFR 60-2.17 (b) (3).

During the first months after the effective date of the investigative standards, OFCCP experienced considerable difficulty gathering sufficient data to perform a regression analysis. Constructing appropriate similarly situated job groups (SSEG's) and identifying and evaluating certain elusive but potentially important independent variables, such as starting salary, earnings and experience prior to hire and comparable employee performance ratings, have proven to be a substantial challenge as well.

Since May 29th of this year, however, the OFCCP has been facing the most difficult challenge of all. On that date the Supreme Court decided *Ledbetter v. Goodyear Tire & Rubber Co., Inc.* As most readers of this Newsletter are now aware, this case involved an employee who alleged that several supervisors had in the past given her poor evaluations because of her sex, and that as a result, her pay had not increased as much as it would have if she had been evaluated fairly. Thus, she argued, those pay decisions affected the amount of her pay throughout her employment, and

constituted a "continuing violation," which resulted in her pay, by the end of her employment, to be significantly less than her male colleagues. The Supreme Court affirmed an earlier decision of the Eleventh Circuit, holding that a Title VII pay discrimination claim cannot be based on allegedly discriminatory events that occurred before the limitation period of the Act, or 180/300 days prior to the filing of the charge. The Court further held that there was insufficient evidence to prove that Goodyear had acted with discriminatory intent in the two pay decisions that were made by the company within the liability period. Those decisions denied a pay-raise in 1997 and 1998.

Charles James, the OFCCP Director, addressed this issue on August 22nd before the National Industry Liaison Group's annual conference, held in New York City. He read a short statement that represented the Agency's position regarding the applicability of *Ledbetter* on OFCCP's policies and practices as they relate to systemic compensation investigations. The essence of his statement is as follows:

Nothing in *Ledbetter* affects the OFCCP's right to collect compensation data. Beyond Item 11 of the Itemized Listing attached to the Scheduling Letter, OFCCP will continue to gather legitimate data that might impact a contractor's compensation compliance.

OFCCP will continue to follow its practice of investigating class-wide employment discrimination. *Ledbetter* is about timing, and only applied to the 180/300 day limitation period under Title VII. Such a limitation period does not apply to the Executive Order. In any event, Congress must now take action. There is a bill, passed in the House, and now pending in the Senate, which would reverse the *Ledbetter* decision. The Administration has gone on record as saying the President will veto the legislation if passed by Congress. We will need to wait and see if supporters of the legislation have sufficient votes to over-ride the veto.

Consistent with Mr. James' announced policy, the OFCCP is continuing to apply, during desk audits, its screening methodologies of contractor's compensation data to identify the most appropriate contractors to select for partial or full regression analysis as a means of identifying systemic compensation discrimination.

As our readers know, the National Employment Law Institute does not render legal opinions, but it may be helpful for contractors if we frame the issues as clearly as possible.

The *Ledbetter* Issues.

The OFCCP has always taken the position that the nondiscrimination mandate of Executive Order

11246 is identical to the mandate contained in Title VII. Thus the definition of "employment discrimination" is prescribed by Title VII case law, and as that case law evolves, is evolves similarly for the enforcement of the Executive Order as it does for the enforcement of Title VII. While contractors have the additional burden of taking affirmative action of "assure nondiscrimination," the ultimate condition is the same. This is not speculation – it is a long established tenet. That being the case, what ground might the OFCCP have to argue that *Ledbetter* does not impact systemic investigations of compensation that consider salary decisions made outside of the statute's limitation period? The following arguments are likely those the agency will use if required to defend their policy in litigation.

Like *United Airlines v. Evans*, in which the Court made a similar ruling (although involving seniority) as long ago as 1977, *Ledbetter* is a case pertaining to a single plaintiff, and does not impact systemic cases. Further, the Eleventh Circuit, in discussing *Calloway* and *Bazemore*, noted that "... it remains an open question whether a disparate-pay plaintiff, in contrast to a pattern-and-practice pay plaintiff, should be able to challenge any decision made outside the limitations period. We need not address that question today, however." Thus, the circuit court clearly recog-

nized a potentially different limitation standard for plaintiffs seeking a systemic finding. Further, if *Ledbetter* does apply to systemic discrimination investigations, what impact will that have on adverse impact analysis of selection from applicant pools? As statisticians will avow, proper adverse impact analysis, unless there are very large applicant pools, should involve a period of hiring or promotion decisions made over a much longer period of time than 180/300 days to be significant. Assailing the adverse impact principle would probably require reversal of the Court's own precedent in *Griggs v. Duke Power*.

While the OFCCP agrees that the definition of discrimination is the same for both EEOC and OFCCP, it does not agree that the enforcement *process* need be the same. The 180/300 day limitation period is written only into Title VII. There is no limitation period written into the Executive Order. If there is such a limitation, it should be subject to contract law, the under-pinning authority for the contract compliance program. To be consistent with the agency's informal policy of liability extending two years prior to the notice of an audit, as first announced in 1982, the OFCCP would likely continue to limit back pay to that prior two year period, and extending to the time of resolution.

Impact on contractors.

It will be interesting to watch for lower court decisions that follow the Supreme Court's decision in *Ledbetter*, particularly any in which the facts are principally based on multiple-regressions involving employment decisions beyond the 180 day limitation period. As the OFCCP intends to continue applying its investigative standards to compensation analyses, it will probably be in the best interests of contractors to continue to cooperate in these investigations, and furnish the OFCCP whatever additional data they request. Contractors may also want to conduct their own analysis using mean averages within salary grades or affirmative action plan job groups in the expectation that OFCCP may do so before deciding on a more intensive investigation. By so doing, the contractor should be able to better defend any threshold disparities the OFCCP may identify, and perhaps rebut the OFCCP's allegations using the agency's own analysis.

Adverse Impact Investigations and the Internet Applicant Regulation.

As recipients of our Newsletters are well aware, OFCCP is focusing in almost all of their compliance reviews on two major systemic issues: first, compensation, as described above; and second, adverse impact on minorities or women in selection from applicant pools. While no cases

have progressed to enforcement, OFCCP has had a few large settlements involving selection.

In some of these investigations, the OFCCP preliminarily found that the contractor was not maintaining suitable applicant pools and selection records for the agency to properly analyze the selection rates. As a result, the OFCCP cited the contractor for failure to keep adequate employment records, and then applied demographic availability data for the appropriate recruiting area for use as a comparator to the selection rate. It should be noted that the OFCCP has not cited the contractor for failure to comply with the Internet Applicant Regulation, but used only the generic citation of "failure to keep adequate employment records." From that perspective, the agency has not been citing contractors with the threshold finding of violating a regulation. Thus contractors who have adequate records to show applicant flow and reasonable race and gender identification will probably not be charged with violating record keeping requirements even if their records or their processes are not compliant with the complex obligations contained in the Rule itself.

Impact on contractors.

Adverse impact determinations have been the vehicle for OFCCP to collect back pay for systemic discrimination. Contractors should be aware of

that, and keep necessary records to defend any allegations of a pattern or practice of discrimination in selection. However, at least for now, a contractor will probably not face an on-site audit if its selection rates are clearly within the recruiting area's appropriate census data percentages or the contractor's pool of qualified and available candidates in its internal feeder groups. Having said that, since the Internet Applicant Rule has the effect of law, contractors should make a reasonable effort to comply with its requirements.

The Continuing Saga of the EEO-1 Report.

With the month now upon us when contractors will file their EEO-1 Report, there is continued concern and some trepidation among contractors regarding the government's requirements. Are contractors required to survey employees? Do contractors need to include "Two or More Races" in their EEO-1 report this year? Are contractors required to divide the Officials and Managers category to separate Senior and Executive levels from other managers? How are contractors to deal with multi-racial employees in the development of their affirmative action plans? How does one conduct an adverse impact analysis of hires and promotions when the pools include multi-racial applicants? These and similar questions con-

tinue to escalate in the contractor community. No certain answers are yet available to many of these questions. Clear guidance must await an expression, likely a regulation, from the OFCCP. In the interim, our best advice follows.

First, contractors should understand that the OFCCP has not assumed any role in the issue of filing the EEO-1 Report, and will not do so. EEOC has the sole responsibility to determine the content of the EEO-1 Report to be filed in September 2007. These facts are clear: contractors do not need to survey their workforce in order to determine the minority status under the 12 categories for the continental United States and 15 categories for Hawaii and Pacific Island Territories. Contractors may choose any payroll between July and September 2007 and use the identification of race and gender as reflected in current records for the EEO-1 filing. However, EEOC encourages contractors to resurvey their workforce “as soon as possible.” So contractors have the option. Further, contractors may opt to resurvey only those employees who were previously counted as “Asian/Native Hawaiian or Other Pacific Islander” into either “Asian” or “Native Hawaiian or Other Pacific Islander” if they wish, but it is not required. If they do not, they would continue to be counted only as “Asian.”

Contractors must use the new management job categories when filing the 2007 EEO-1 Report. All contractors who filed last year should have received a Job Classification Guide in the summer of 2006. Further information can also be found at www.eeoc.gov.

All contractors should already be using the multiple race categories when identifying applicants for jobs, using the “two-question” format. Thus, applicants and new hires should be identified by the 12/15 categories, with Hispanics standing alone and not combined with any race(s). In completing the EEO-1 form, however, contractors should combine all new employees who filed as multi-racial into the one EEO-1 category called “two or more races.” The original identification made by the employee must be retained, however, as an employment record.

The EEOC has issued no clear guidelines concerning surveying the workforce in preparation for the filing of the 2008 EEO-1 Report.

Regarding the Affirmative Action Plan, OFCCP promises to issue guidance as soon as possible. The agency’s original plan was to do so in the spring of this year, but other issues preempted that target. Here is what I believe the OFCCP guidance will provide:

1. The Organizational Profile (either option) will need to show “multi-racial” in addition to the previous racial groups. Contractors will not be required to show each minority combination (i.e., Asian-African American);

2. Adverse Impact and other statistical investigative techniques used to identify systemic discrimination will seldom have sufficient incumbents in applicant pools who identify as members of specific racial combinations to be statistically significant. “Two or more races” will not meet legal standards for defining a disadvantaged group. Obviously, Native Hawaiians will be an important disadvantaged group in Hawaii; and

3. No change will be made in utilization analysis or goal setting in that the agency will continue to require only total minorities in the statistics and goals. Again, an exception will likely be made in Hawaii, where native Hawaiians and Other Pacific Islanders will be the focus group for utilization analysis and goal setting.

Impact on Contractors.

The only requirement for filing the 2007 EEO-1 report is to assure that the individuals who were hired after the contractor began to ask applicants and new hires to self-identify using the new multi-racial categories are counted as “Two or More Races”

in the EEO-1 Report, and secondly, that the Officials & Managers category is divided pursuant to the new Job Classification Guide. Anything else is optional. Regarding the AAP, until OFCCP issues further instructions (probably through rule making) contractors need do nothing differently. Continue to count all employees and applicants who are not white as minorities for utilization analysis and goal setting purposes; do not have an adverse impact as you have in the past; and make no change in the racial categories in your organizational profile until the OFCCP finalizes its position.

William D. Smitherman appointed Regional Director of Pacific Region.

William D. (Bill) Smitherman was appointed last April to the Director of the Pacific Region, with offices in San Francisco. Bill had been the Acting Director for some period of time, and his appointment will assure continued professional management of that region. He has over twenty years of experience in managing EEO and Affirmative Action, and rose through the ranks of the OFCCP. Our congratulations to Bill and best wishes in his role as a senior manager of the agency.

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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