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OFCCP/AFFIRMATIVE ACTION NEWSLETTER

AUGUST 2009

This newsletter is intended to provide an update of developments affecting federal contractors. This issue contains information provided by Mr. Leonard J. Biermann, NELI's 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*.

While mixed signals exist, mandatory E-Verify for Federal Contractors is imminent.

As our readers are aware, on July 8, 2009, the Department of Homeland Security (DHS) publicly endorsed E-Verify, an Internet-based system that provides a link to federal data bases to determine, through Social Security numbers and other information, that an employee or a person considered for employment meets eligibility requirements to be employed in the United States. The mandate for Federal contractors to use the E-Verify system was originally created by an Executive Order of President Bush on June 6, 2008. This Order was designed to preempt a Congressionally enacted program for the voluntary use of E-Verify by employers. The legislation which created E-Verify requires regular re-authorizations and, without Congressional action, the E-Verify program will expire in September 2009.

The Department of Defense, NASA and the General Services Administration (Federal Acquisitions Regulatory Council) in the Bush Administration issued implementing regulations for President Bush's Executive Order on November 14, 2008. Since the Obama Administration has taken office, it has consistently expressed support for the Bush Order and its implementing regulations. In her July 8 statement, for instance, DHS Secretary Janet Napolitano said that mandating the Bush-era regulation was important in that, "E-Verify is a smart, simple and effective tool that reflects our continued commitment to working with employers to maintain a legal workforce."

The regulations are facing a legal challenge brought by a coalition of business groups who filed suit against an earlier proposed start date for the E-Verify mandate. The litigation is pending in Maryland federal court, and had been stayed while awaiting DHS' announcement. That announcement, now made by Secretary Napolitano, will likely allow the case to move forward.

In the meantime, the House and Senate have passed legislation to fund and continue the E-Verify program, but still need to resolve differences before any legislation becomes final.

Impact on Contractors. It is doubtful that Congress will allow

E-Verify to expire in September, as noted above by the fact that Congress is taking the necessary action to fund and continue the program. It is also unlikely that the Maryland federal court will rule on the pending litigation by that time. So the announcement by Secretary Napolitano to require contractors to use E-Verify on September 8, 2009, appears reasonable. Contractors should be preparing now to meet the requirements of E-Verify. It is for this reason that NELI has scheduled an E-Verify Teleconference in August, giving contractors the choice of two dates: August 20 or August 27. Importantly, DHS, U.S. Citizenship and Immigration Service, has made a commitment to have a senior staff member of the Verification Division as a participant on both dates. Contractors who wish to join the teleconference should contact our office or visit our website at *www.neli.org/teleconferences.*

OFCCP joins the Wage & Hour Division's Prevailing Wage Conference - Discusses requirements of Federal Contractors that receive funds under the American Recovery and Reinvestment Act.

In two identical sessions, each lasting 2 1/2 days, the OFCCP joined its sister agency, the Wage and Hour Division, and participated in conferences intended for new government contractors who are receiving American Recovery and Reinvestment Act (ARRA) funds. The ARRA authorizes up to $787 billion in Federal spending through September 30, 2010. Potential Federal spending includes funding for construction projects in all 50 states, the District of Columbia, and U.S. territories, as well as the procurement of supplies and services. The intention was to explain the basic compliance requirements of the laws enforced by the two agencies for these first-time federal contractors. The conferences were held on July 20-22, 2009, and repeated on July 22-24. OFCCP plans to have their own conference, covering the same materials, on September 9, 2009. Entitled "Good Jobs for Everyone," contractors may register, free of charge, by e-mail to: *OFCCP-NationalARRA-Conference@dol.gov*. I attended parts of the first conference and my discussions with OFCCP management there may be of assistance to you, as noted below.

ARRA contracts will be subject to the same OFCCP coverage as any other contract. There has been a rumor circulating that OFCCP planned to require companies receiving federal assistance monies to meet the same obligations as service and supply contractors receiving direct contracts or subcontracts. This is not the case. Most of the ARRA money will be in the form of federal assistance, and, as such, will only cover those employers who are doing construction work. The OFCCP has advised that such funding will constitute a large portion of ARRA funding. There will be some direct contracts and subcontracts for supplies and services covered under the same dollar thresholds as any other direct federal contract, which will include the requirement to develop affirmative action plans, but they will be a small percentage of the total dollar volume of ARRA funds.

OFCCP will continue to investigate discrimination, but a change in emphasis is likely. During the past administration, OFCCP spent a large portion of its staff time and budget on investigations of systemic discrimination. Two major targets were involved: first, investigations of adverse impact related to selection from applicant pools for hiring or promotion; and second, investigation of systemic compensation discrimination through the employment of statistical analysis using multiple regression analyses. The former has been reasonably successful, in that the agency has concentrated its attention on blue-collar jobs where relative qualifications of applicants are less stringent, and collected most, if not all, of its financial settlements from this activity. The agency's compensation investigations have been far less successful, mostly due to the complexity of conducting regression analyses which meet professional and evidentiary

standards. This was primarily felt in the creation of similarly situated employee groups (SSEGs) and in identifying and properly weighing the many variables that might correlate to compensation.

The present management of OFCCP seems to recognize this, and also recognizes that the considerable time spent in investigating systemic discrimination may have been at the expense of the OFCCP's unique authority, i.e. encouraging affirmative action to increase the representation of minorities and women in higher paying, non-traditional jobs. This would be particularly true of the last administration's lack of giving any recognizable priority to the "glass ceiling initiative," which was begun in the George H. W. Bush administration. In my conversations with OFCCP managers, my judgment is that contractors can expect the agency to attempt a more balanced approach, seeking to enforce both the nondiscrimination as well as the affirmative action requirements of the Executive Order. I believe you will find them trying to find ways to investigate discrimination in employment in a manner that will be more efficient and less costly in terms of staff and budget. This may result in an increase of specific individual disparate treatment analyses in discrimination investigations, such as comparing individuals working in the same job title (cohort analysis), rather than statistical approaches. As one manager stated: "We will be looking for discrimination, wherever and however we find it." What was clearly stated, however, was that OFCCP has no intention of returning to the "DuBray Method" (simple comparisons of averages of favored v. unfavored groups in the same salary grade). Contractors may also expect added emphasis on affirmative action in recruitment and training, and some return to the original glass ceiling audit approach - seeking to change corporate practices towards greater inclusiveness of women and minorities in its executive searches, rotational appointments, and succession planning.

Impact on Contractors. Impact on our clients should be negligible. Most non-construction companies receiving ARRA funds will likely already be under the OFCCP umbrella. That will likely be true of most prime, or general, construction contractors, although some small construction sub-contractors may be covered for the first time. Most of our clients should welcome a more realistic view of the dimensions of a systemic compensation investigation, reduced demands for extensive compensation data, and compliance reviews that have a timely conclusion.

Department of Labor FY 2010 budget request includes $109.5 million dollars for OFCCP, which compares with FY 2009 budget at $82.1 million dollars. The staff request for OFCCP for FY 2010 is 798 full time employees compared to 585 in FY 2009.

If approved by Congress, this will end the long decline in OFCCP's budgets, which began in the fiscal year following consolidation through President Carter's Executive Order in 1976 and which has continued, uninterrupted, since. Today the employee total is one-third of the total just after the Carter consolidation order. At that time the OFCCP had 1750 full time equivalent positions, although 200 were soon surrendered to the Solicitor of Labor's office for legal support. President Obama has announced that he supports the Department of Labor increases.

Impact on contractors. Contractors will be the benefactors of the budget increase if the additional staff will result in better trained investigators, more efficient investigations and timely reviews. OFCCP has indicated that, in addition to the increase in staff, money will be spent to train its field staff. If that happens, contractors should appreciate the extra funding.

Department of Labor is under a reorganization. Employment Standards Administration is abolished. Its subordinate parts (including the OFCCP) will report directly to the Secretary.

The Department of Labor has announced that the Employment Standards Administration is being abolished. The OFCCP, Wage and Hour Division, the Office of Workers' Compensation Programs, and the Office of Labor-Management Standards will now report directly to the Secretary of Labor. The effective date will be November 8, 2009. I understand that the Acting Deputy Assistant Secretary for Contract Compliance (OFCCP Director), Lorenzo D. Harrison, is already meeting directly with Secretary Hilda Solis. The titles of the heads of each of the agencies have not been announced. It is reported that the Secretary has the authority to implement the reorganization without obtaining permission from Congress or the White House.

Impact on contractors. This is certainly an upgrade for the OFCCP, although when the agency first began under President Johnson (then the "OFCC") it reported directly to the Secretary. It will remain to be seen if Secretary Solis will need to place others, such as a Deputy Under-Secretary, to assist her in the management of the wide-ranging activities of the four previously subordinate agencies. Contractors may receive more prompt and reliable responses to concerns over compliance activities by the OFCCP in that the Secretary will be directly involved.

NELI's 2009 Affirmative Action Briefing Series.

We will address each of these issues in our 2009 AA Briefing Series in October. I also want to point out that we have *again revised our agenda so that at the Wednesday AA Workshop we will cover AA fundamentals and the writing/updating of AAPs. Thursday and Friday will be devoted to all of the advanced-level issues.*

Has an "Untimely Obituary" been written for Affirmative Action? (A non-lawyer's appraisal.)

Like me, most of you have been inundated with "talking heads" discussing what impact the Supreme Court's Decision in the New Haven Firefighters case *(Ricci v. DeStefano)* will have on affirmative action. In addition, you had no choice but to witness at least a cumulative day of the Senate confirmation hearing for Justice Sotomayor in which hours were spent discussing her Second Circuit opinion in that case. A large portion of the Sunday, July 26th edition of the Washington Post devoted six full columns to the impact of *Ricci*. Juan Williams, a highly respected African-American Washington Post editorial writer and news analyst for National Public Radio, described the decision as "Affirmative Action's Ultimate Obituary," and further said that it was a "stark reversal of the Supreme Court's position in 1979, when it upheld a company hiring policy of 'one black for one white' in *United Steelworkers v. Weber."*

As all our readers know, I am not an attorney. But having spent forty-six years attending to the the difference between affirmative action, as practiced by government contractors, and discrimination, I think I understand one from the other. I have been struck in recent days about how little some attorneys and respected commentators do not. For what it is worth, allow me to "carry on" for a bit.

Since at least the Supreme Court's 1971 decision in *Griggs v. Duke Power*, the Court has recognized two kinds of employment discrimination: disparate treatment and disparate impact. In a treatment case, the burden is on the plaintiff to show that the employer intended to discriminate against one or more individuals based on race, ethnic origin or gender. The defendant then must show only a nondiscriminatory reason for the action (hire, promotion, etc.). In response, the plaintiff has the burden to

show that the employer's reason was pretextual, and that the real reason was race, etc. In a disparate impact case, a prima facie finding of discrimination can be made if a test or other selection standard, neutral on its face, had a statistically adverse impact against minorities or women. Intent to discriminate is not required. The burden continues on the employer until the employer is able to show that the test properly predicts job performance, and is "necessary" to the conduct of business. Doing that, the employer has established the required defense against the plaintiff's allegation.

One of the problems that has consistently bothered me since the courts began to use the term "necessary" is that the courts have never clearly defined that term. Industrial psychologists with whom I have worked in the past, and who have validated tests to meet Division 14 standards of the American Psychological Association, have also been troubled by that term. For testing specialists, a test is either valid or it is not. If it is valid, it reasonably (within statistical probabilities) has a correlation to job performance. The better one does on the test, the better the individual will likely perform his/her job. However, the Uniform Guidelines on Employee Selection Procedures suggest that an employer "may choose" to seek an alternative testing procedure when adverse impact is found, but many testing professionals question this approach. If a test is valid it is valid. Seeking other alternatives is usually futile.

The issue that is raised in the *Ricci* decision has nothing to do with the *Griggs* decision and, in my view, <u>does not</u> attack the legal precedent regarding an employer's requirement to assure that tests which have adverse impact are job related. What it does raise is this: If an employer has a well-studied and applied test, that has been shown to properly predict job performance, may that employer, relying on the suggested language of the Guidelines, refuse to accept the test, not hire the nonminority employees who passed it, and seek another device? In other words, once the employer has developed a test that can be defended against charges of discrimination, can that employer then not use that test's results in order to find an instrument that will not expel as many minorities or women from consideration? The Supreme Court, limited to that question, said <u>that the employer may not.</u> Doing so puts the employer in the position of committing disparate treatment, that is, intentionally discriminating against non-minority candidates who passed a non-biased, fair and job related test. I agree. *Griggs* proffered its decision based on a neutral test, which had not been shown to be job related, and which had a disparate impact against minorities. Shouldn't then the reversal of that rule apply when a similar test, <u>shown to be job related</u>, has a disparate impact against minorities? It seems to me one must conclude that such a test has shown that, for whatever reason (failure in recruitment, training, chance, interest, etc.) the minorities in the applicant pool are less qualified than the white applicants in that same pool. Has that not always been the rule governing affirmative action? Once the effort to expand the pool of applicants has been taken, and efforts have been made to prevent discrimination in the processes governing employment practices, the final selection must be made without regard for race, gender or national origin.

Those familiar with the *Weber* case know that is exactly what the court has said. Preferences, in the form of hiring quotas set slightly above availability, such as those imposed by the court in *Weber*, were not the application of affirmative action. They were remedial preferences to correct strong evidence of years of discrimination against African-Americans into craft jobs. The Court went out of its way to note that such remedial actions were acceptable only where there is a clear finding or showing of discrimination, when the remedy is narrowly applied, is temporary, lasting only until the correction of the specific

issue identified, and does not trammel the rights of others. The affirmative action required by the Executive Order, and which has been consistently applied since the Kennedy Order of 1961, has never been based on a showing of discrimination, such a showing is not antecedent to the setting of goals, and such goals are only targets, and do not allow contractors to use racial preferences in selections.

So, while you will read a lot to the contrary, my own, very humble opinion is that affirmative action under the Executive Order has not seen its obituary, and contractors should continue to develop their AAPs and audit their decision-making to assure nondiscrimination in selections as they have been doing for many years. The road has not yet turned. But a little of the fog has been removed.

My Retirement.

On a personal note, after 15 absolutely wonderful years with NELI, I have decided to retire at the end of this year. John Fischer, his wife Alexis, his daughter Sascha, and son-in-law Todd, and the entire NELI staff have been the kindest and most generous employers any one could hope to find. My relationship with NELI began far before John offered me a position with his organization upon my retirement from government service in 1994. I had already spent several years, in my capacity as an OFCCP manager, speaking at NELI conferences around the country. During that time my respect for the Institute never ceased to grow, and my friendship with John and his family has been a cherished one. I look to its continuance in the years ahead. But after a total of forty-six years of involvement working with the contractor community on issues of affirmative action and non-discrimination, I think it is time to spend more time with my wife and family, visiting my grandchildren more often, and perhaps even making some small advancement in the reduction of black spot, mildew and the hated Japanese Beetle in my rose garden.

To all of the loyal friends of NELI, I wish you the very best. Over the years, many of you have come to mean so much more to me than being NELI clients. Never hesitate to give me a call - even if it's just to say "hello."

And finally.....

Last year John Fischer suggested that I write a book about my involvement in the history of the development of affirmative action. He said that NELI would be proud to publish it. Thus fortified with a sudden rush of self-importance -- inflated as it may certainly have been -- I agreed to do so, and have been working on it since. Obviously I am not a speed writer. But looking back to the beginning of my career, starting with my joining the staff of the President's Committee on Equal Employment Opportunity as a management intern turned political appointee in 1963 - a year before the Civil Rights Act was passed and two years before Title VII became effective -- I have come to the conclusion that perhaps I have something to say about the evolution of equal employment in America which may be of some value to some people. What I have discovered in the development and writing of this book is that it takes a whole lot longer to remember and verify what you think you know and to recall what you may have forgotten than to exercise the keys of my computer keyboard. My admiration for professional writers who publish one respected work after another has grown considerably. But I am moving forward, musing more than writing, and hoping that in the end it will be at least an entertaining read.

Looking at where we were as we judge where we are is, I think, an essential ingredient to understanding. For instance, when I joined the Committee, no one on the staff knew what Kennedy's Executive Order meant when he wrote that contractors must take "affirmative action." But it soon became clear to me that it didn't matter -- because discrimination in 1963 was so egregious and

widespread that affirmative action was a luxury to be addressed in some future time. So my story begins in Southern kraft paper mills, where the highest paid Negro (the accepted term at the time) earned less than the lowest paid white, and in Carolina textile mills, where most Negroes worked only in jobs that were previously held by slaves, and in steel mills, where Negroes worked only in the "hot jobs," such as the open hearth, while whites worked in the cool end of the mill where steel was rolled and fabricated rather than made.

There is also the story of the beginning of the Department of Labor's requirement for contractors to set minority and female employment goals. I was directly involved in that initiative, occurring in the early days of the Nixon Administration, when contractors set such goals, first in construction (The Revised Philadelphia Plan) and later in service and supply industries (Order Number 4). The opposition to what we were doing was immense, both from within the government and from outside of it. The leadership taken by Secretary George Shultz, Assistant Secretary Arthur Fletcher, OFCC Director John Wilks, and by the President himself, were absolutely essential to the development of the now universally prepared "Affirmative Action Plans." How that all fell together is a story in itself. Looking back, how many thousands (millions?) of minorities and women have benefited from the development of plans with employment goals set as corporate targets for their good faith efforts no one can ever know. I hope the book will add some new perspectives to that tale, including the unique and important contributions to equal employment opportunity of every President since Kennedy, every Secretary of Labor since Wirtz, every Assistant Secretary since Fletcher, and from each of the thirteen Directors of OFCC/OFCCP (of whom I worked for twelve and was Deputy to five).

But I'm getting ahead of myself. I have a book to complete. I am aiming for its publication by the end of the year when my retirement becomes official, or soon after. Let me know how you like it.

Best regards,
Len