

2010 National ILG Update

- **OFCCP Keynote - Patrick Shiu, Director OFCCP**
 - First half of her speech focused on pay equity
 - pay equity
 - is a family issue
 - female wage earners are often primary wage earners
 - female wages often necessary for family to survive
 - economic recovery issue
 - wage gap for females persists
 - females who are paid less
 - earn less over lifetime
 - fewer resources for families and affects:
 - where families live
 - what the families eat
 - time with family (working more = spend less time with the family)
 - impacts access to extracurricular activities, college
 - ultimately receive less social security and retirement income
 - talked about Lilly Ledbetter and her situation
 - Discussed the graduation rates of minority groups citing the lower high school graduation rates of Hispanics as well as African Americans and Native Americans
 - Unemployment rate highest among those with disabilities, black men and Native Americans especially in this economy – plug for ARRA (recovery act money) and creation of jobs
 - So what is OFCCP doing in light of these concerns?
 - Pay Equity
 - OFCCP is member of White House Task Force on Pay Equity, leadership role, includes EEOC, DOJ, OPM. Federal Government is also holding itself accountable through OPM.
 - OFCCP will rescind 2006 Interpretive Guidelines on Systemic Compensation Discrimination
 - OFCCP will issue an Advanced Notice of Proposed Rulemaking about the new wage data collection instrument
 - EO Survey revival; also in Fair Pay Act pending in Congress
 - Partnership and leadership with EEOC
 - Referred to EEOC Chair Jackie Berrien as “dear colleague”
 - Share philosophical belief in the importance of work to each individual
 - implementing White House pay equity initiatives affords our respective agencies the unique opportunity to work in concert on these and other pressing issues
 - OFCCP earlier this summer issued Advanced Notice of Proposed Rulemaking (ANPRM) soliciting comments on:
 - Employment practices effective for recruiting, hiring, advancing and retaining qualified individuals with disabilities
 - Data that could be used to establish hiring goals and conduct utilization analyses of individuals with disabilities
 - How to strengthen linkage agreements between contractors and organizations that focus on employment of qualified individuals with disabilities

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- Efforts to strengthen affirmative action for protected veterans and for women/minorities in the construction industry
 - Enforcement – working to transform enforcement procedures to be
 - More effective , More efficient, More pro-active
 - OFCCP staff across country stepping up investigations and audits
 - Ensuring accuracy, thoroughness and quality outcome
 - “Excellence is the standard”
 - Shiu has different views of how to resolve audit issues
 - Comes to these cases with view of attorneys
 - Not just money
 - Use injunctive systemic relief
 - Conciliation Agreements are not the only way
 - No more sweetheart deals
 - She is a litigator by training but litigation last resort...
 - Functional AAPs are being re-evaluated to determine whether to continue this program
- **EEOC Keynote - Jacqueline Berrien, Chair EEOC**
 - “look forward to working with my friend Patricia Shiu”
 - “many miles before we sleep”
 - EEOC has gotten some increases to help restore past cuts
 - Plan to announce new regulations soon on GINA and Lilly Ledbetter
 - EEOC and OFCCP plan to be working closely
 - Equal pay act enforcement
 - Wage discrimination in workforces
 - Important to speak with united voice

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- **Compensation Analysis – Dr. Javaid Kaiser, Director of Statistics, OFCCP**
 - Pay divisions to use for analysis
 - Departments, EEO-1, grade – these are not similarly situated
 - Job titles -- most likely similarly situated
 - Validation of Similarly Situated Employee Groups (SSEGs), etc.
 - Invited contractors to include additional information beyond those typically asked by OFCCP
 - Performance ratings
 - Work shifts
 - Job location
 - Speedy disposition if
 - Assurance from contractor data is complete and accurate
 - Not piecemeal submissions
 - Adhere to deadlines
 - Other factors that could trigger request for additional data
 - Significant differences in average salaries of favored/non-favored groups
 - No definition provided on what is significant
 - Three prong trigger test (tipping point) no longer to be used by District Offices
 - Lots of discretion in the interim period
 - Complaint
 - Large amounts of missing data
 - Accuracy of data is suspect
 - Data unnecessarily splintered into smaller groups
 - Disparity findings
 - Initial low salary keeps non-favored group averages lower
 - Non-favored part-time workers receive fewer work hours
 - Certain job titles have few or no non-favored workers, initial hiring, promotion or term problem
 - Non-favored groups concentrated in low salary jobs
 - Non-favored groups are assigned to products that produce low commission or yield low revenue for employer
 - Future directions
 - Ask for employee level data earlier – job title, SSEG, hire date, part-time/full-time, exempt/non-exempt, race/ethnicity, gender, salary (fewer data elements)
 - Allow employees to submit and justify other compensation factors OFCCP should consider. It will be to employer's advantage to submit additional data to explain any disparity.
 - Modify Item 11 question (yes he thought this is the culprit). Committed to change the scheduling letter (but no timeline)
 - Other notes
 - OFCCP's desire for more employee data earlier, elimination/rework of Item 11, EO survey return, push on compensation – all interrelated!
 - Dr Kaiser informally acknowledged that the trigger test was not predictive and might as well have been random
 - Dr Kaiser unable/not willing to define what was a significant difference in average salary comparisons – up to local district office, they have the discretion
 - 12 item analysis is done in national office

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- **OFCCP Midwest Region Compliance Focus for Veterans and Disabled Workers – Sandy Ziegler, OFCCP Regional Director Midwest**
 - Not just looking for systemic discrimination, broadening focus
 - Section 503 (workers with disability) Onsite Reviews
 - Significant increase in reviews
 - OFCCP is investigating outreach efforts to community of individuals with disabilities
 - OFCCP expects contractors to prepare and have available evidence of outreach efforts and measureable results of those efforts
 - How many referred
 - What happened to them
 - What accommodations
 - Build relationships even if no openings
 - See separate questionnaire/checklist
 - OFCCP may want to interview employees with disabilities, applicants with disabilities, officials responsible for hiring, developing and administering AAP and individuals responsible for providing reasonable accommodations
 - Online accessibility
 - Is contractor's website compatible with most common assistive software
 - What are avenues for applicants and employees to request accommodations if there are electronic barriers – where to call if having problems
 - VEVRAA/JVA - Veterans
 - Will ask for VETS-100/100A
 - Ask for documentation/evidence of listing with job service
 - Have available evidence of outreach and recruitment thru veteran service organizations
 - Be prepared to discuss and document system to measure effective procedures
 - Language requirements
 - determine whether language-related requirements are job related
 - language related standards higher for some jobs
 - contractors have raised safety issue – need to make sure this is a basis
 - English only rules can be discriminatory unless validated
 - Enterprise wide solutions
 - OFCCP looking at how audit issues at one site might be also present at other company locations
 - Benefit of taking care of systemic issues companywide

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- **Solicitor's Office Department of Labor (DOL) Update – Bev Dankowitz OFCCP Counsel**
 - More active enforcement
 - More litigation
 - More funding available for experts
 - Continue close collaboration between Solicitor of Labor and OFCCP
 - More consistency across regions and between SOL and OFCCP
 - Continued acting on systemic discrimination
 - But not exclusive focus
 - Focus on Section 503 and VEVRAA
 - Examining OFCCP's role in individual complaints
 - Cross regional SOL and OFCCP teams (for enterprise wide enforcement)

- **OFCCP Recent Cases Update – John Fox, Attorney**
 - *OFCCP v. UPMC Braddock, UPMC McKeesport, UPMC Southside, (May 29, 2009)*
 - Issue: are these three University of Pittsburgh hospitals federal “subcontractors”
 - If so they must they comply with OFCCP's statutes and
 - must submit to OFCCP audit
 - Decision: Yes!
 - Defenses
 - UPMC did not include EEO clauses obligating compliance with three statutes (EO 11246, 503 and VEVRAA)
 - UPMC contract expressly provided that hospitals providing medical services and supplies would not be federal subcontractors or be obligated to comply with OFCCP's compliance obligations
 - Hospitals claimed provision of “medical services and supplies” was personal services – one of OFCCP's two definition of term “subcontract” covered only non-personal services
 - Tried to make same argument as 2003 Bridgeport case where subcontractor status was not found
 - In that case there was a difference between medical insurance and medical services and supplies
 - in this case clearly medical services and supplies is the prime contract as is the subcontracts
 - Conclusion
 - OFCCP prevails, contractors loses. Reasonable outcome.
 - Being appealed
 - Notes: many hospitals had come to rely on the Bridgeport ruling to claim non-contractor status
 - *OFCCP v. Bank of America (April 29, 2010)*
 - Issue (final): Did BOA select African-Americans at a lower rate in certain jobs? OFCCP says yes, BOA says no.
 - Decision: ALJ found Bank of America (BOA) had discriminated against African-American clerical, administrative and teller in 1993 and 2002 to 2005
 - Some highlights
 - 17 years since notice of desk audit
 - **Disposition codes in question and whether to include or exclude**, BOA lack of guidelines on how used and applied criteria
 - “Rejected for Credit” used which disproportionately rejected African Americans
 - “Rejected for incompatible hours”
 - **Bank failed to associate applications to requisitions and requisitions not retained – pools had to be recreated**

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- **Because BOA sometimes considered applicants for other positions other than those they expressed interest in so OFCCP combined pools**
- Offers used and not just hires
- Hiring above availability is no defense
- Judge ruled that missing data wouldn't lessen statistical disparities
- Comments
 - General lack of documentation
 - for prescreen, interview and selection protocols
 - lack of training for selection personnel in selection protocols
 - no auditing of applicant data
 - Judge appears to dislike BOA's lawyers
- Conclusion
 - OFCCP prevails, contractor loses.
 - ALJ to determine remedies (liability)
 - Then BOA can start appeal process (and most likely will)
- *OFCCP v. Frito-Lay, Inc. (July 23, 2010)*
 - Issue: whether OFCCP can extend scope of audit phase can be extended beyond date scheduling letter was received
 - Decision: ALJ ruled OFCCP has no authority to obtain employment data or expand an OFCCP compliance review to require employment transactions which occurred after OFCCP Desk audit notice
 - Some highlights
 - Contractor originally provided 18 months of employment transaction data (all 12 months for 2006, first six months for 2007) since the notice of audit was more than six months into the current AAP year
 - OFCCP requested and contractor submitted final six months (last six months for 2007) plus six months for period prior (last six months 2005)—back two years from date of Notice of Desk Audit
 - OFCCP requested, and contractor **refused**, data for 2008 and most of 2009
 - ALJ concluded based on regulations, case law, scheduling letter and Federal Contract Compliance Manual (FCCM) that desk audit phase cannot be extended beyond date contractor received its scheduling letter
 - Comments
 - Part of the endless desk audit that the OFCCP has evolved into; some contractors may relent to providing additional data out of fear of OFCCP or in self-interest
 - Expect continuing battles—OFCCP may suggest contractors submit more data in order to avoid an on-site review
 - OFCCP may amend regulations and FCCM in future to expand time period
 - Conclusion
 - Contractor prevails, OFCCP loses. Reasonable outcome.
 - OFCCP expected to appeal