



***The Triangle Liaison Group
and
Jackson Lewis LLP***

Present

**ADVERSE IMPACT AND THE OFCCP'S
NEW ENFORCEMENT STRATEGY**

Presenter:

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Introductory Statement

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About Jackson Lewis

Jackson Lewis LLP is dedicated to representing management exclusively in workplace law and related litigation. With 41 offices and more than 550 attorneys nationwide, the firm has a national perspective and sensitivity to the nuances of regional business environments.

Guided by the principle that a positive work environment results in enhanced morale and increased productivity, the firm devotes a significant portion of its practice to management education and preventive programs. This approach helps limit exposure to grievances, charges and lawsuits.

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About the Affirmative Action Practice Group

We have unparalleled experience preparing AAPs and defending them before the OFCCP in all industries and areas of the country. Our diverse team of 30 attorneys, paralegals, and support staff prepares approximately 1,700 AAPs a year.

Since 2008, we have defended more than 250 OFCCP audits, including successful defense of Corporate Management (“Glass Ceiling”) Compliance Evaluations. As a law firm, we offer more than consulting services, we offer strategic thinking and sophisticated legal representation.

About Mickey Silberman, Esq.

Mickey is the Chair of the Jackson Lewis National Affirmative Action Practice Group and is the Managing Partner of the firm's Denver, Colorado office. Mickey represents management exclusively in all areas of employment law and specializes in EEO, affirmative action and diversity.

During the past few years, Mickey has directed the defense of hundreds of OFCCP audits throughout the country and has obtained Letters of Compliance in more than 99% of those audits. He spends a significant amount of his time counseling employers about complex "real world" EEO compliance issues.

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OFCCP'S CONTINUING FOCUS ON APPLICANT-TO-HIRE ADVERSE IMPACT TRENDS

Results of OFCCP Focus on Applicant-to-Hire Trends

- The OFCCP has brought back increasingly larger monetary settlements than ever before

Year	Monetary Settlements	# of Affected Class Members
2003	\$26,220,356	N/A
2004	\$34,479,294	9,615
2005	\$45,156,662	14,761
2006	\$51,525,235	15,273
2007	\$51,780,950	22,251
2008	\$67,510,982	24,508

Adverse Impact Recent Developments

- While the OFCCP continues to spend its time and gather considerable money from applicant-to-hire adverse impact, recent developments in this area are **catching employers unaware**, including the OFCCP's focus on:
 - “Reverse” adverse impact; and,
 - Sub-minority adverse impact.

Traditional Adverse Impact Analysis

Analysis	Rate for Protected Group	Rate for Non-Protected Group	IRA	Standard Deviation
Minority v. Non-Minority	9/100 .09	1/100 .01	9.0	-2.596
Female v. Male	4/100 .04	6/100 .06	0.67	0.649

Traditionally, these are good adverse impact results.

OFCCP Trends: “Reverse” Discrimination

- The OFCCP is increasingly focusing on “**reverse**” **discrimination** (adverse impact trends against whites and males)
- While the OFCCP has run these analyses in the past in more diverse areas of the country, we are seeing an increased focus on reverse discrimination in even less diverse areas of the country
- The OFCCP increasingly investigates compensation disparities that affect whites and males
- *Of course, discrimination is discrimination -- this is just a way of characterizing the OFCCP’s interest in “going where the numbers take them” when the trend is against whites or males*

Sample Adverse Impact Analysis

Analysis	Rate for Protected Group	Rate for Non-Protected Group	IRA	Standard Deviation
Minority v. Non-Minority	9/100 .09	1/100 .01	9.0	-2.596
Female v. Male	4/100 .04	6/100 .06	0.67	0.649

Traditionally, these are good adverse impact results. Now, the OFCCP would further investigate the **-2.596** standard deviation above as evidence of **adverse impact against non-minorities**

OFCCP Trends: Sub-Minority Analyses

- The OFCCP is increasingly focusing on sub-minority adverse impact analyses (Black v. non-Black, Black v. White, Black v. Hispanic, *etc.*)
- While the OFCCP has run these analyses in the past in more diverse areas of the country (Hawaii, California, Florida, *etc.*), the OFCCP is increasingly focusing on sub-minority analyses in other areas of the country as well
- The OFCCP is essentially “*going where the numbers take them*”

Sample Sub-Minority Analyses

Analysis	Rate for Protected Group	Rate for Non-Protected Group	IRA	Standard Deviation
Minority v. Non-Minority	9/100 .09	1/100 .01	9.0	-2.596
Female v. Male	4/100 .04	6/100 .06	0.67	0.649
Black v. All Others	1/80 .01	9/120 .08	.17	1.987
Black v. Hispanic	1/80 .01	8/20 .40	.03	5.416

Adverse Impact Analyses Per Job Group

- 4 Traditional Analyses:
 - Male v. Female
 - Female v. Male
 - Minority v. Non-Minority
 - Non-Minority v. Minority

- 8 “All Other” Analyses
 - Black v. All Other
 - Hispanic v. All Other
 - Asian v. All Other
 - Native American v. All Other
 - All Other v. Black
 - All Other v. Hispanic
 - All Other v. Asian
 - All Other v. Native American

Adverse Impact Analyses Per Job Group (cont.)

20 Sub-Minority Analyses

White v. Black

Black v. White

White v. Hispanic

Hispanic v. White

White v. Asian

Asian v. White

White v. Native American

Native American v. White

Black v. Hispanic

Hispanic v. Black

Black v. Asian

Asian v. Black

Black v. Native American

Native American v. Black

Hispanic v. Asian

Asian v. Hispanic

Hispanic v. Native American

Native American v. Hispanic

Asian v. Native American

Native American v. Asian

OFCCP Adverse Impact Analyses

- That's 32 ways to trigger in each job group!
- This number will increase with additional race codes (new race codes, Two or more races, etc.).
- Take a moment to think about how many job groups you have... If you have ____ job groups, the OFCCP will run:
 - 5 job groups: 160 analyses
 - 10 job groups: 320 analyses
 - 15 job groups: 480 analyses
 - 20 job groups: 640 analyses!!

Examples of Recent OFCCP Sub-Minority Investigations

- **Non-Pacific Islanders:** Adverse impact against Non-Pacific Islanders in an employer's hiring process in Utah
- **Non-Blacks:** Adverse impact against non-Blacks in an employer's hiring process in Chicago
- **Black v. White/Hispanic v. non-Hispanic:** Adverse impact against Blacks and non-Hispanics in an employer's hiring process in Miami

Legal Support for Sub-Minority Analyses

- **Uniform Guidelines on Employee Selection Procedures**

*“A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the **group with the highest rate** will generally be regarded by the Federal enforcement agencies as evidence of adverse impact....”*

- Existing case law

Failure to Run Sub-Minority Analyses May Mask a Potential Issue and Liability

- Employers should proactively run sub-minority analyses to identify potential sub-minority trends
- If employers solely run traditional minority v. non-minority and female v. male analyses, they may fail to identify adverse impact against sub-minority groups and potential monetary liability (the OFCCP will likely catch as part of its desk audit)



STRATEGIC DISPOSITION CODES

Importance of Strategic Disposition Codes

- Now, more than ever, as “red flags” occur more frequently, employers must focus on **explanations** of statistical adverse impact
- Employers can effectively do that through the use of ***strategic*** disposition codes

Purposes of Disposition Codes

- Strategic disposition codes should help employers clarify:
 - **When?** What stage did the candidate fall out?
 - **Why?** Why did they fall out?
 - **Who?** Who made the decision?
- This is especially helpful for employers undergoing an audits several years later

Disposition Codes

- Examples of bad disposition codes:
 - More qualified applicant selected
 - Not chosen
 - Interviewed/screened
 - Applicant disqualified
 - Blank

Disposition Codes (cont.)

- Examples of strategic disposition codes:
 - Resume Screen - Does not meet basic qualifications – education – Recruiter D. Black
 - Resume Screen - Not willing to work for compensation – Recruiter M. Smith
 - Phone Screen - Did not return calls – Recruiter J. Segall
 - Phone Screen - Not willing to work hours – Recruiter L. Anderson
 - Test – Failed Test – Employment Manager P. Barry
 - Interview - No show to interview – Hiring Manager S. Perez
 - Drug Test – Did Not Show for Drug Test– Employment Manager N. Moore
 - Background Check – Failed Background Check – HR Administrator W. Barnes



ELIMINATION OF THE EMPLOYMENT STANDARDS ADMINISTRATION (ESA)

Elimination of the Employment Standards Administration (ESA)

- The DOL has announced that ESA will be abolished as of November 8, 2009.
- The four sub-agencies (including the OFCCP) will instead be reporting directly to the Office of the Secretary of Labor as stand-alone agencies.
- This reorganization provides the Secretary and the Deputy Secretary with greater control over these agencies, including more direct oversight of enforcement activity.

INCREASING FOCUS ON PAY DISCRIMINATION

Increasing Focus on Pay Discrimination... and This Time We Really Mean It

OFCCP INCREASING PEOPLE AND ENFORCEMENT

- OFCCP's Fiscal Year 2010 budget request includes a program increase of over \$25M to fund 213 full-time employees and a new case management system.
- The additional employees are requested to support OFCCP's enforcement efforts.
- The employees are specifically requested to support efforts related to compensation as well as improving the various approaches and investigative techniques used to evaluate compensation.

QUESTIONS?

Thanks for attending!

If you wish to discuss OFCCP trends, disposition codes or any other area of EEO compliance, please contact:

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