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In Like a Lion, Out Like a Lamb?

The Office of Federal Contract Compliance Programs has entered March like a lion. Although we hope the Agency will adhere to the weather proverb and go out like a lamb, that does not seem likely. The month began with the the issuance of Corporate Scheduling Announcement Letters, identifying facilities that may be scheduled for compliance evaluations during the fiscal year, which closes September 30, 2008. The OFCCP identified approximately 5,000 facilities for possible review in this scheduling cycle, using its Federal Contractor Selection System. This is on the heels of the OFCCP's collection of \$51,680,950 in back pay and benefits last year for 22,251 workers. According to the OFCCP, 98% of its enforcement cases involved systemic discrimination where the Agency found a significant number of workers or applicants subjected to discrimination because of an unlawful employment practice or policy.

We are often asked to "predict" which industry and/or regions the OFCCP will target. Candidly, we don't know. We have seen, however, an increase in the number of hospitals, health care facilities, and diagnostic centers selected for review. The assumption that health care facilities are required to develop AAPs because of Medicare and Medicaid funds received is incorrect. Health care entities are generally captured by affirmative action regulations because of compensation received from the Veterans Administration for services rendered to patients, direct contracts with the Department of Defense or related agencies for health care services performed or to be performed through programs such as the Civilian Health and Medical Program of the Uniformed Services, or contracts to perform testing for agencies of the U.S. government. Given the many organizational, compensation, and functional issues unique to the health care industry, it is imperative that strategic AAPs are developed that accurately reflect the contractor's workplace, selection processes, and compensation structure, and avoid creating the appearance of discrimination.

Regardless of industry, all federal contractors and subcontractors should prepare now for an eventual audit. The OFCCP's selection methods are far-reaching and consider information that was previously unavailable or under-used, such as the Agency's "Contracts First" initiative, pre-award notifications, and conciliation agreement monitoring. Under the Contracts First initiative, the OFCCP gathers information from the various federal agencies regarding companies that are directly or indirectly doing

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business with them. This allows the OFCCP to go beyond the universe of companies that have self-identified as federal contractors on EEO-1 Reports. Thus, many companies who don't even know that they are required to comply with affirmative action requirements will be receiving scheduling letters from the OFCCP. Ignoring these letters would be a mistake – rather, recipients should thoroughly research whether they are federal contractors or subcontractors within the meaning of the regulations because the OFCCP is not sending out scheduling letters without some basis for believing that coverage exists.

In addition, the “new and improved OFCCP” screens contractors’ AAPs for potential discrimination indicators using its Active Case Management system, seeking to effectively and efficiently use its resources to get the biggest “bang for its buck.” Therefore, it’s more important than ever to have an accurate and strategic AAP, so that the OFCCP “lion” will leave your audit like a “lamb.”

Improve Your Disposition! Use Disposition Codes

As further evidence of the OFCCP’s focus on discovering and remedying systemic discrimination, its methods for investigating adverse impact in the hiring process have changed. Gone are the days of comparing individual applicants with individual hires. Instead, the OFCCP is concentrating on contractors’ overall selection processes. After all, if a selection *process* has a discriminatory impact, the number of “victims” grows exponentially.

The OFCCP relies on the Uniform Guidelines on Employee Selection Procedures for this approach. The UGESP provide that if an analysis demonstrates that “the total selection process for a job has an adverse impact, the individual components of the selection process should be evaluated for adverse impact.” Thus, if adverse impact exists, contractors should be prepared to analyze the various segments of their hiring processes to determine whether any one aspect is creating adverse impact – because the OFCCP is certainly going to do so.

Such an analysis, however, is difficult (if not impossible) without detailed recordkeeping on each applicant. We generally recommend that employers use an itemized list of “disposition codes” to track the reasons for non-selection for each applicant. This information will allow the employer to pinpoint the stage in the process at which each unsuccessful applicant “fell out,” or was affected by the process. Each stage can then be analyzed to assess its impact on females and minorities. If a contractor does not have such information available, it can expect the OFCCP to come on-site and spend a significant amount of time reviewing applications and personnel files, and interviewing personnel to try to “recreate” this data. Obviously, such an undertaking would produce an imprecise result, at best.

Constangy’s Affirmative Action Practice Group is experienced in analyzing contractors’ selection processes and tailoring appropriate disposition codes for our clients’ unique and individual needs. If you need assistance in this area, please contact one of our practice group members or the Constangy attorney of your choice.

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