Are You Ready to Rumble?
The Latest Regulatory Updates

Sonia Chapin, SPHR, CCP
October 9, 2012
Agenda

Current State of the OFCCP
Looking back
Who are they?
Audit Trends
Right Now
Political Climate
Lying Low
Looking Ahead
‘Two Roads Diverged in a Yellow Wood’
Fearless Predictions
OFCCP Goals

The Office of Federal Contract Compliance Programs is an agency of the DOL and supports four new goals:

- Breaking down barriers to fair and diverse workplaces so every worker’s contribution is respected
- Narrowing wage and income inequality
- Helping workers find a path into middle class jobs
- Serve as a voice in the workplace
OFCCP Mission

The purpose of the Office of Federal Contract Compliance Programs is to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the federal government.
But I don’t have Federal Contracts…

Section 503 of Rehabilitation Act of 1973
Americans with Disabilities Act of 1990

Federal Acquisition Regulations require Federal Contractors to use E-Verify
Federal legislation introduced to make mandatory for all employers, state efforts include:
But I don’t have Federal Contracts...

Source: https://www.numbersusa.com/content/learn/illegal-immigration/map-states-mandatory-e-verify-laws.html
Enforcement of Affirmative Action

- Active Case Enforcement protocol
- Every 25\textsuperscript{th} audit is an automatic onsite
- FAAP plans are still being approved
- Focus on:
  - individual cases of discrimination
  - compensation related matters
  - outreach & recruitment of individuals with disabilities
  - outreach & recruitment of Veterans
OFCCP Audit Trends

**General Trends**

- Audits are taking longer to complete
- Some audits are being handled by other districts within the region
- “No issue left unturned” approach
- Projected to last 730 days (yes, two years!)
- New auditors are being assimilated and operating independently
- Closure letters are harder to come by than in the past
## OFCCP Audit Trends

### Audit Closure Statistics

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total # of Reviews</th>
<th>Notice of Compliance</th>
<th>Conciliation Agreement</th>
<th>Consent Decree</th>
<th>Financial Agreement</th>
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<tr>
<td>2008</td>
<td>4325</td>
<td>3701</td>
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<td>5</td>
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<td>3907</td>
<td>3204</td>
<td>618</td>
<td>9</td>
<td>76</td>
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<td>839</td>
<td>3</td>
<td>81</td>
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<tr>
<td>2011</td>
<td>4007</td>
<td>2898</td>
<td>999</td>
<td>9</td>
<td>101</td>
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<tr>
<td>2012*</td>
<td>3482</td>
<td>2322</td>
<td>1058</td>
<td>4</td>
<td>98</td>
</tr>
</tbody>
</table>

* October 2011 through August 2012
OFCCP Audits – The times they are a-changing

* October 2011 through August 2012
What a Difference an (Election) Year Makes!

OFCCP Director Patricia Shiu

2011 NILG keynote: 3800 words

“At OFCCP we are updating and revising out of date regulations - some of which haven’t been touched in almost 40 years - and we are going to put some teeth in them and strengthen affirmative action requirements for contractors.”

“At the Department of Labor, we are committed to improving the way we collect, analyze and share our data so that we can close the pay gap once and for all.”

2012 NILG keynote: 2300 words

“…we want contractors to succeed because that success is essential to the function of our government.”

“I believe that the role of the OFCCP is two-fold: to open doors of opportunity for workers and to help businesses comply with the law.”

2011 source: http://www.dol.gov/ofccp/addresses/Director_address_to_NILG_July272011.htm
2012 source: http://www.dol.gov/ofccp/addresses/Director_address_NILG_Aug302012.htm
OFCCP Right Now

THREE PROPOSED REGULATION UPDATES IN 2011

Congressmen address utility of OFCCP enforcement burdens in House HELP subcommittee hearing

Proposed Rule On Affirmative Action
Will Cost At Least $5.9 Billion
Annual Recurring Cost Will Be $2.6 Billion Per Year

September 6, 2012

The Honorable Hilda L. Solis
Secretary
U.S. Department of Labor
200 Constitution Avenue, Northwest
Washington, D.C. 20210

Dear Secretary Solis:

We remain concerned about the policies and priorities of the Department of Labor’s (the department) Office of Federal Contract Compliance Programs (OFCCP). Recently, OFCCP proposed a number of requirements relating to the collection of compensation data from federal contractors. At the same time OFCCP proposed these requirements, the National Academy of Sciences (NAS) studied the collection of employers’ compensation data by the federal government and determined federal agencies should refrain from collecting compensation data until agencies develop a clearly articulated, comprehensive plan regarding how such data would be used. In light of NAS’s study, we respectfully request information regarding the department’s actions, including OFCCP’s actions, relating to the collection of compensation data from employers.

On August 15, 2012, NAS issued a study entitled “Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin.” Commissioned in October 2010 by the U.S. Equal Employment Opportunity Commission (EEOC), at the suggestion of the White House’s National Equal Pay Enforcement Task Force, NAS was asked to “determine what [compensation] data [EEOC] should collect to most effectively enhance its wage discrimination law enforcement efforts.” To do so, NAS evaluated currently available and potential data sources, methodological requirements, and appropriate statistical techniques for the measurement and collection of employer pay data, and “consider[ed] suitable data collection instruments, procedures for reducing reporting burdens on employers, and confidentiality, disclosure, and data access.

OFCCP Right Now

Partnership for Public Service Source: http://bestplacetowork.org/BPTW/rankings/detail/DLCC

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Recap of Proposed Regulations

- Section 4212 Regulation Updates
- Section 503 Regulation Updates
- Changes to the Scheduling Letter
- Adverse Impact Changes
- Compensation Analysis Changes
  - (2006 rules status?)
- Legal Challenges
- Predictions
‘Two Roads Diverged’

If Obama wins:
   Full Steam Ahead
   Regulations will be finalized in quick succession

If Romney wins:
   Leadership Vacuum
   Independent Compliance Officers

Contractors should prepare for either outcome
Employment of Veterans
Section 4212 Regulations
Section 4212 Regulation Updates

- Self-Identification for Applicants
- Availability
  - Calculated from referrals sent from outreach services
  - Calculated referral, applicant, and hiring ratios
- Benchmarks
- Terms and Definitions
- Program Changes
- Record Retention
Section 4212 Regulation Updates

- Proof of postings with the state employment service
- Proof of positive recruitment and outreach
- Copies of VETS-100/100A reports
- Copies of policies related to Veterans
- Interview/review personnel file of Veteran employees, with notations of accommodations
- Proof of notice when and where AAP is available for viewing; where is it posted?
Section 4212 Regulation Updates

- Ensure the Veterans categories listed in forms match the VETS-100A
- Resurvey the Veteran status of workforce (if needed)
- Ensure positions are posted with state emp service
- File Vets-100A report by October 31!
- Document proof of Veteran outreach and recruitment efforts
- Build relationships with local Veteran communities, associations, organizations, and military bases
- Prepare for statistical analysis of Veterans
- Revisions to recordkeeping requirements
Employment of Individuals with Disabilities
Section 503 Regulations
Section 503 Regulation Updates

- Applicant self-ID at the pre- and post- offer stage
- Develop written procedures for handling accommodation requests
- Job posting requirement
- Linkage agreements with at least three sources
- Annual review of processes, including documentation and notification of third parties
- Record retention increased to five years
- Applicant ratio, hiring ratio, job fill ratio reporting
- Employment target of 7% of workforce at all levels
Section 503 Regulation Updates

- Proof of positive recruitment and outreach
- List of requested accommodations/outcomes
- Copies of job descriptions that have medical restrictions
- Copies of physical examination, handbook, and leave policies (including maternity)
- Questions related to accessibility of online application system
- Interview employees with disabilities
Section 503 Regulation Update

RECOMMENDATIONS

- Document accommodations
- Conduct job analysis or review job descriptions to ensure physical and mental requirements are current
  - Review list of individuals with disabilities
  - Prepare for a review of the accessibility of the facility
- Document or begin outreach and recruitment efforts
- Review website accessibility
- Develop process for responding to requests for accommodations
- Determine how to ask for disability status pre-offer
Changes to the Scheduling Letter

Item 8: new requirement, leave policies regarding Family Medical Leave Act, pregnancy leave and religious accommodations.

Item 11: revision, submit employment activity:
- By gender and by specific race/ethnicity groups
- By job group and job title

Key changes to the analysis pools
- Promotions: all those considered for promotion
- Terminations: all those considered for termination
Changes to the Scheduling Letter

Item 12: revision, submit compensation data at an individual employee level rather than as a group. The effective date for the compensation data is February 1.

Item 13: new requirement, submit last three years of VETS-100 or 100A reports, copies of accommodation policies, and records of accommodations granted.

RECOMMENDATIONS:

- Keep AAPs up-to-date, consider 6 month update plans
- Begin tracking promotion and termination pools
- Review and update leave policies and records of accommodations
Focus on Adverse Impact
So who is an applicant, anyway?

- **Submits**
  - electronic expression of interest
  - internet or related electronic data technology

- **Considered**
  - by the contractor
  - for a particular position

- **Possesses**
  - the basic qualifications
  - for the particular position

- **Withdraws**
  - does not withdraw
  - at no point prior to being made an offer
Adverse Impact

Adverse impact is an employment practice which results in a negative consequence more often for members of a protected group than for members of the non-protected group.

Example: 10 people hired for an open position

<table>
<thead>
<tr>
<th>5 women</th>
<th>5 men</th>
</tr>
</thead>
<tbody>
<tr>
<td>out of 100 applicants</td>
<td>out of 10 applicants</td>
</tr>
</tbody>
</table>
Adverse Impact

- Investigating adverse impact against any group, both protected and non-protected

- Running adverse impact analysis against any favored group and not just a non-protected group

- No geographical differentiation for who is in non-protected group

- Not consistent in the requirement that the data be broken out by subgroups
Adverse Impact

**RECOMMENDATIONS**

- Be prepared to defend all personnel decisions and actions
- Run adverse impact analysis prior to taking any large scale actions
- Complete update AAPs to monitor progress
- Investigate cases of adverse impact even if there is a small number of affected individuals or if it is against a non-traditional protected group
Focus on Compensation Discrimination
Compensation Discrimination

- Initial compensation submission: investigate pay differences of 2% or $2000
  - Not just in favor of traditional protected classes
- Most contractors are being required to send detailed compensation data since they are failing the 2% / $2000 test
  
  - Personnel & salary history for employees in question
  - Additional data required even if no indicators
  - Variable compensation
  - Unrealistic turnaround times
- Compensation Data Collection Tool
  - 2006 guidelines – in process of moving away from them
## Compensation Discrimination

<table>
<thead>
<tr>
<th>Gender</th>
<th>Race/Ethnicity</th>
<th>Location</th>
<th>Job title</th>
<th>Job group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Grade or band</td>
<td>Education</td>
<td>Time with company</td>
<td>Time in current position</td>
<td>Part-time vs. full-time status</td>
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<td>Exempt vs. non-exempt status</td>
<td>Current annual base salary or base hourly wage</td>
<td>Other paid allowances (commission, overtime, bonus, shift differential)</td>
<td>Include a list of positions in the company that are substantially equal</td>
<td>Explanation and copies of salary administration and compensation policies and practices, including shift differentials, if applicable</td>
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[SSEG, anyone?]
Compensation Discrimination

RECOMMENDATIONS

- Conduct internal pay equity analyses to monitor pay practices
- Determine what factors are used to establish compensation levels (and be willing to defend them!)
- Gather data to support differences in pay, (i.e. non-discriminatory variables such as prior years of experience, education level, or time in job)
- Identify and correct unexplainable pay disparities
- Monitor pay analysis changes from OFCCP
Outlook for 2013 and beyond
Fearless Predictions

- 2010 Census Data Released
- OFCCP Compliance Manual Changes
- Section 4212 Regulation Updates
- Scheduling Letter Updates
- Section 503 Regulation Updates
- Compensation Data Collection Tool (??)

- Mass chaos – but that might be a good thing
Fearless Predictions

- **Election**
  - Expect flurry of regulations if Obama wins
  - Expect stagnation if Romney wins

- **Policy changes and updates, court cases**
  - Focus on Veterans and ‘real’ efforts
  - SCOTUS case: *Fisher v. University of Texas at Austin*
  - Healthcare challenges
    - *OFCCP v. UPMC Braddock, OFCCP v. Florida Hospital of Orlando*
    - TRICARE: now you see it, now you don’t
    - Medicare parts A & B, Medicaid exempt – others question jurisdiction
  - *Frito-Lay*: how much data do audits cover?
Fearless Predictions

- Crawling, inching slowly to the web
  - Federal contractor spending available
  - Audit results available under ‘sunshine’ policy
  - CSAL letters published online – this month?
  - Audit submission portal
  - Online compensation collection tool

- Increasing contractor challenges

- Our only constant is change
Questions and Thank You!

White papers & webinars available, questions or connect with me on LinkedIn!
soniac@berkshireassociates.com