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# Special Report for HR Professionals

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## DHS RESCINDS NO-MATCH RULE

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In a move that had been widely forecast, the U.S. Department of Homeland Security (DHS) cancelled its regulations that outlined what steps employers were supposed to take if they received a “No-Match” notice from the Social Security Administration (SSA) after hiring a new worker and submitting their Social Security Number (SSN).

When faced with a Social Security Number that is not valid according to the SSA, employers were required to take actions that they found objectionable. More to the point, perhaps, is that the AFL-CIO and the U.S. Chamber of Commerce objected to the required procedures and filed suit in Federal court to have the process deleted from Federal regulations.

The Bush Administration had issued these final regulations in August 2007 in an attempt to control illegal immigrants from gaining employment in this country by giving guidance to employers about how to handle the No-Match letters. Two years later, in August 2009, Janet Napolitano, Secretary of Homeland Security in the Obama Administration said the government would eliminate the No-Match rule.

As an incentive for employers, the government provided that if an employer followed the No-Match Rule, there would be a “safe harbor” offering protection against prosecution for hiring undocumented aliens.

The elimination of the No-Match letter procedures will become effective on November 6, 2009.

For a copy of the Federal Register posting of this latest action, go to <http://edocket.access.gpo.gov/2009/E9-24200.htm> In part they say:

*Constructive knowledge may include, but is not limited to, situations where an employer: (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9; (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.*

Stay alert and use the Form I-9 as required. If you do, you should have no problem.

## EVER CHANGING OFCCP

Will OFCCP refocus its enforcement efforts on affirmative action plans or continue to emphasize systemic discrimination? Impact of new Director has yet to be felt.

The Office of Federal Contract Compliance Programs (OFCCP) has just acquired its new leader, Patricia A. Shiu. She reported to work a couple weeks ago and is in the process of settling in. Once that is done, we can expect there to be some actions that will clearly signal to the contractor community that she is now in charge of the agency.

Some legal experts suggest that one possibility is for Ms. Shiu to cancel the use of what has been known as the Corporate Scheduling Notice Letter. Under the Bush Administration, contractors who would receive two or more audits in the coming six months were sent the alert so they could be ready. The letter does not indicate which establishments will be reviewed, merely that there will be some involved in audits. It also conveyed the OFCCP policy that no more than 25 new audits would begin in any given year for any single contractor. Community special interest groups are complaining that the agency doesn't go far enough to enforce affirmative action with employers.

In fact, over the past few years, the OFCCP has focused more and more of its resources on issues of illegal discrimination rather than details of affirmative action. If a contractor was able to present a written set of affirmative action plans for Minorities and Women, Disabled and Veterans, there was little attention paid to miniscule content details or action plans. Most of the work done by auditors has focused on systemic discrimination questions.

If you look at the agency's single most important measurement of success (when presenting its budget request to Congress), the number of dollars recovered for applicants and employees due to settlements of discrimination problems identified by the agency take the limelight. That number has steadily increased from just under \$29 million in 2001 to over \$51 million in 2007. That still doesn't reach the cost of running the agency, but it is impressive nonetheless. So, what makes up these settlement dollars and who gets them?

The settlements go to identifiable individuals who have been "wronged" by the contractor's hiring or employee management processes. And, it appears that nearly all has come from cases involving failure-to-hire. A great big problem for contractors has been the collection and maintenance of applicant data. Failure to properly track applicants can result in automatic assumption of guilt and that begs for financial settlement.

Look for more changes at OFCCP as it grows by nearly 25% (213 FTE positions) in the 2010 FY budget. Contractor audits will be the training ground for new Compliance Officers. You will have to be very vigilant or you will be writing some big checks.

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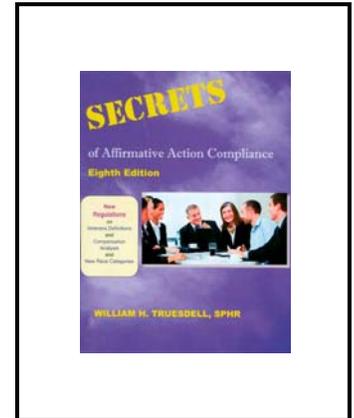
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## Secrets of Affirmative Action Compliance

If you are a federal contractor, you need this valuable reference volume. Now in its 8<sup>th</sup> Edition, it was on the best seller list at the SHRM Bookstore in September, 2009. Thousands of employers are using it to ensure they are following federal regulations. Requirements keep changing. Using an old edition of this book is like using an old edition of an income tax guide. Get your copy today!

<http://www.management-advantage.com/products/AAP8.htm>



## POTPOURI

- **Obama Administration Will Accept Elimination of “Socially and Economically Disadvantaged” Contracting Preferences**

The administration has decided not to appeal a Court of Appeals ruling supporting an injunction of the government’s preferential treatment of socially and economically disadvantaged businesses. The Court said statistics did not support continuing what was essentially a program that discriminated based on race and sex. (*Rothe Development Corporation v. Department of Defense and Department of the Air Force, 545 F. 3d 1023 (Fed. Cir. 2008)*) So, we have come full circle from Minority and Women’s Business Enterprise programs to Socially and Economically Disadvantaged programs to a conclusion that preferential treatment based on race and sex is just wrong.

- **Sometimes Employers Must Allow ADA Leave At End of FMLA Leave**

“In some instances, an employee may request more leave under the ADA even after the employer has communicated that it cannot hold the employee’s job open any longer (i.e., there is undue hardship). In this situation, the ADA-covered employer must see if it has a vacant, equivalent position for which the employee is qualified and to which the employee can be reassigned without undue hardship to continue his/her leave. If an equivalent position is not available, the employer must look for a vacant position at a lower level. Continued accommodation is not required if a vacant position at a lower level is also unavailable.”

<http://www.eeoc.gov/policy/docs/fmlaada.html> (Q 14.)

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## New Genetic Nondiscrimination Poster Requirement

On November 21, 2009, all employers with 15 or more workers, engaged in interstate commerce, will be required to post a new Equal Employment Opportunity poster from the Equal Employment Opportunity Commission (EEOC). The content of this poster has been changed to include citation of genetic information as protected from employment discrimination. That addition comes from the *Genetic Information Nondiscrimination Act of 2008 (GINA)*.

If you need a new poster, consider our All-On-One poster that has both federal and state poster content. Each state is different from all others, so you need to be sure you have current information for your work location(s).

You will find your requirements can be met by using our laminated poster products or Mobile Poster Pak for situations where employees work from home or on remote construction sites.

<http://www.management-advantage.com/products/posters.htm>

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