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OFCCP ACCESS TO HIRING DATA CAN BE RESTRICTED DURING DESK AUDIT

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In a ruling that the Office of Federal Contract Compliance Programs (OFCCP) says it will appeal, an Administrative Law Judge (ALJ) has said the agency has no right during the desk audit phase of an evaluation to access hiring data accumulated after the date on which the contractor received the audit scheduling letter.

OFCCP argued that it needed data for the two years after the audit started to determine if what it detected as adverse impact on female job applicants had continued in the time period after the audit letter was issued. It based its claim on the regulatory requirement that contractors are required to record and maintain data about job applicants and new hires.

The ALJ agreed that contractors are required to maintain the data sought by OFCCP, but said the agency has no regulatory authority to demand any data past the date the audit letter was received by the contractor. Regulatory authority permits OFCCP to require up to two years of past data for the time preceding the scheduling letter.

Then the OFCCP cited regulatory requirements that the contractor permit its access to data "as may be relevant to the matter under investigation." To that the ALJ responded that data outside the authorized period of access is not relevant to its investigations.

In the case analysis the ALJ said "OFCCP has not cited any cases where this broad power was extended during the desk audit phase to time periods after the date of the scheduling letter. Nor has it cited any cases where it has previously insisted on receiving data for periods after the current AAP year at the time the compliance review [had been] initiated."

Further, the ALJ said, "The regulations and FCCM [Federal Contractor Compliance Manual] do not speak of analyzing data going forward because that was not envisioned as part of the 41 CFR 60-1.20(a)(1) compliance review procedure when OFCCP promulgated its regulations."

The agency can get the data it seeks, however, by simply moving to the on-site stage of the audit process. Then it is entitled to virtually anything it wishes to see.

(OFCCP v. Frito-Lay Inc., DOL ALJ, No 2010-OFC-00002, 7/23/10)

WORDS FROM THE OFCCP DIRECTOR

On October 7, 2010, Patricia Shiu, Director of the Office of Federal Contract Compliance Programs (OFCCP) addressed a conference in San Francisco hosted by the National Employment Law Institute (NELI). During her presentation, Director Shiu said, “It’s not how many investigations we do but how thorough they are. We’re measuring ourselves based on outcomes. We want to be effective. We’re asking more questions and going into more detail.”

“Voluntary compliance is what we want,” she added. “But at the end of the day we will enforce the law.”

She pointed out that OFCCP covers a quarter of the American workforce with more than 200,000 establishments (work locations) with approximately \$700 billion in federal contract value.”

Revision of the “Federal Contractor Compliance Manual (FCCM) is high on the list of priorities for OFCCP according to Director Shiu.

“We are no longer focusing solely on low wage blue-collar systemic hiring cases.” That is particularly interesting because, according to attorney John Fox of Fox, Wang & Morgan P.C., as much as 95 percent of dollars recovered by the agency over the past several years as remedies for discriminatory practices actually came from that pool of hiring problems.

Speaking about affirmative action for veterans of the U.S. military services, Ms. Shiu said, “We have to engage with our veterans in a little different way than with other folks. Veterans often have multiple disabilities and are reluctant to self-identify. Many veterans returning from war have Post Traumatic Stress Disorder (PTSD). This leads employers to think that someone will be coming to work shooting up the place” when that is quite far from the truth. Ms. Shiu plans to issue new regulations “this winter” on both veterans and disabled related to affirmative action requirements. She told the audience that there will likely be goal setting requirements among the changes. Her staff is still working on the details of the proposal.

One of the largest changes she sees coming is the use of “injunctive” relief. She said they want to move away from a model involving only monetary relief to one where issues discovered during audits are resolved across the contractor’s entire organization not just at one establishment. She said it will be based on the civil rights model.

For contractors having trouble with issues of jurisdiction, OFCCP will consider requests for extension beyond the 30-day deadline for delivering materials in response to its scheduling letter.

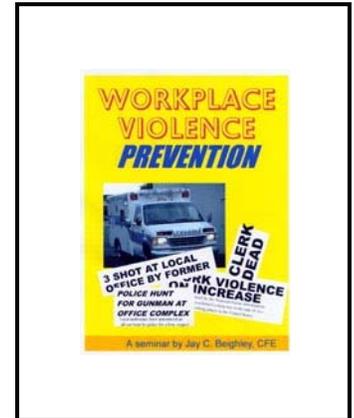
Considering how outdated the regulatory goals are for minorities and women in affirmative action for construction contractors, she says new regs are soon to be proposed there as well.

And, finally, a new “data collection instrument” is being developed that will gather pay equity data from contractors. She denied that it is a recasting of the Equal Opportunity Survey (EO Survey) used by the Clinton Administration before it was cancelled in response to strong opposition.

Workplace Violence Prevention

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ICE ARRESTS EMPLOYERS FOR KNOWINGLY HIRING ILLEGAL WORKERS

The Immigration and Customs Enforcement (ICE) arm of the U.S. Department of Homeland Security has announced the arrest of several employers on charges of knowingly hiring illegal aliens. If convicted, each individual could spend up to six months in jail.

In one case, Wayne Haddox, 67, owner of Masters in Metal, Inc. in Oxnard, California and his son, Dennis Haddox, 37, the company's vice president, were each taken into custody on September 23, 2010 by ICE agents. ICE claims that the arrests were the latest action in an investigation that began in 2007 when the agency notified the company that 16 employees has likely used counterfeit documents to obtain their jobs. The company responded with a letter explaining to ICE investigators that it had terminated the offending workers. Subsequently, the government learned that two of the unauthorized workers had remained on the payroll after the senior Haddox had told them to go out and get "good" Social Security numbers.

In another case, ICE agents arrested the manager of a Bell, California personnel agency that hires workers for jobs at area customs bonded warehouses. Luis Gasca, 33, at Parker Personnel, Inc. was taken into custody on September 14, 2010. He is accused of hiring undocumented aliens and providing those workers with counterfeit immigration documents to mask their unlawful employment. The arrest was the culmination of multi-agency inspections designed to identify security vulnerabilities at the freight forwarding companies and in bond warehouses that play a crucial role in the nation's import-export process.

From October 1, 2009 through July 31, 2010, ICE audited 1,641 employers nationwide and issued 172 fine notices totaling more than \$4 million as a result.

<http://www.ice.gov/pi/nr/1009/100923losangeles.htm>

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PREFERENTIAL TREATMENT IN HIRING

It is surprising that even today, forty-six years after passage of the *Civil Rights Act of 1964*, we still see illegal employment discrimination based on race, sex, national origin, color and religion. At the Equal Employment Opportunity Commission (EEOC), the agency charged by Congress with enforcing employment non-discrimination laws there has been a sharp incline in claims of illegal treatment from employees and job applicants. The Office of Federal Contract Compliance Programs (OFCCP) deals with similar issues in the community of federal contractors. Your attorney can explain to you why it is illegal to give preferential treatment, use set asides or quotas based on race, sex, religion, national origin or color.

Yet there are some preferences that can be used in employment decision making that are not illegal. Affirmative Action regulations at 41 CFR 60-1.5(a)(7) say that it is permissible to give preference in hiring to Native Americans when the work to be done is on or near an Indian reservation. It is also permissible to give preference in hiring to U.S. military veterans and disabled candidates. Why? Because, simply, there is no prohibition against such a preference. Non-disabled are not protected in employment laws. Non-U.S. military veterans are not protected in employment laws.

The problem, of course, is training hiring managers how to establish when it is appropriate to apply a hiring preference and when doing so would be illegal activity. It requires walking a tight rope. Be careful. And, get input from your management attorney as you go through any such process.

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