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OFCCP WANTS MORE DATA AT DESK AUDIT STAGE

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On May 12, 2011, the Office of Federal Contract Compliance Programs (OFCCP) published in the Federal Register its intention to seek Office of Management and Budget (OMB) approval for a new Scheduling Letter.

The Scheduling Letter is used to notify federal goods and services contractors that they are about to receive an audit, called a compliance evaluation. The new data submission requirements will greatly expand the information contractors will be required to submit to the agency for its desk audit phase of the evaluation process.

For example, the proposal will require contractors to send in copies of all "employment leave policies including, but not limited to, policies related to implementing the Family and Medical Leave Act, pregnancy leave, and accommodations for religious observances and practices. Send your employee handbook or manual if these policies are part of these documents." OFCCP cites its recordkeeping regulations as the authority to demand all these policies. Another new requirement is the need to send "any other documents you prepared, such as policy statements, employee notices or handbooks, etc. that implement, explain, or elaborate on the provisions of the collective bargaining agreement."

Data is currently required for employee movement during the most recent year, requiring total minorities and females be identified for new hires, promotions, and terminations. The new requirements call for reporting sub-groups of race/ethnic identification. While OFCCP wants information about African American/Black, Asian/Pacific Islander, Hispanic, American Indian/Alaska Native, white and the number of females and males, it is not asking for the two new race/ethnic categories (Hawaiian/Pacific Islander and Two or More Races) that have been built into the latest EEO-1 reporting document by the Equal Employment Opportunity Commission (EEOC). There is nothing to suggest that OFCCP will reject these reporting categories, but they are not being requested in this latest iteration of the Scheduling Letter.

A major change in data submission requirements comes in the compensation category. Currently, compensation data is only required for employees. New requirements will also require that information for contract workers, per diem and temporary workers.

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E-Verify & State Requirements

On May 26, 2011, the U.S. Supreme Court issued a 5-3 decision that states have the right to enforce mandatory E-Verify statutes tied to the issuance of state business licenses. In part the Court Opinion said:

The Immigration Reform and Control Act (IRCA) makes it “unlawful for a person or other entity . . . to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien.” 8 U. S. C. §1324a(a)(1)(A). Employers that violate that prohibition may be subjected to federal civil and criminal sanctions. IRCA also restricts the ability of States to combat employment of unauthorized workers; the Act expressly preempts “any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens.” §1324a(h)(2).

Arizona’s licensing law falls well within the confines of the authority Congress chose to leave to the States and therefore is not expressly preempted. While IRCA prohibits States from imposing “civil or criminal sanctions” on those who employ unauthorized aliens, it preserves state authority to impose sanctions “through licensing and similar laws.” §1324a(h)(2). That is what the Arizona law does—it instructs courts to suspend or revoke the business licenses of in-state employers that employ unauthorized aliens. The definition of “license” contained in the Arizona statute largely parrots the definition of “license” that Congress codified in the Administrative Procedure Act (APA). The state statute also includes within its definition of “license” documents such as articles of incorporation, certificates of partnership, and grants of authority to foreign companies to transact business in the State, Ariz. Rev. Stat. Ann. §23–211(9), each of which has clear counterparts in APA and dictionary definitions of the word “license.” And even if a law regulating articles of incorporation and the like is not itself a “licensing law,” it is at the very least “similar” to one, and therefore comfortably within the savings clause. The Chamber’s argument that the Arizona law is not a “licensing” law because it operates only to suspend and revoke licenses rather than to grant them is without basis in law, fact, or logic.”

It is clear, that for now, states have the right to revoke business licenses if employers fail to use E-Verify when directed to do so.

<http://www.supremecourt.gov/opinions/10pdf/09-115.pdf>

Currently, 15 states have some form of requirement for employer use of E-Verify. They are: Arizona, Colorado, Georgia, Idaho, Indiana, Minnesota, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, Rhode Island, South Carolina, Utah and Virginia. Some state requirements apply to public sector only or private sector only, others apply to both.

If you live in one of these state jurisdictions, you should consult with your labor/management attorney to confirm your understanding of the requirements.

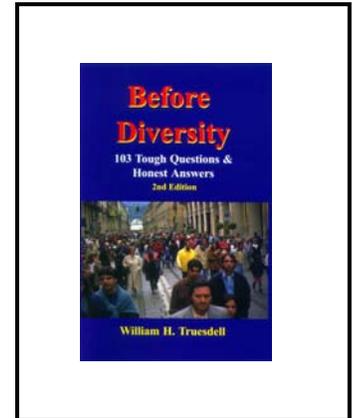
For more about the federal government’s E-Verify program, go to:

http://www.dhs.gov/files/programs/gc_1185221678150.shtm

Before Diversity: 103 Tough Questions & Honest Answers

If you plan to implement a diversity management program, you need to read this book first. There are many issues that you need to consider and understand. This book will give you the insights you require for the success you seek.

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



POTPOURRI

- **Working Mother Magazine Names 2011 Best Companies**

Representing more than 2.6 million employees in nine industries at over 44,000 worksites nationwide, Working Mother Media's 2011 "Best Companies for Multicultural Women" are leading by example.

<http://www.workingmother.com/best-companies/2010-working-mother-100-best-companies-0>

- **IMAGE Best Employment Practices**

The U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), has prepared a list of 12 "best practices" for employers who participate in the agency's "ICE Mutual Agreement Between Government and Employers – IMAGE."

<http://www.ice.gov/image/best-practice.htm>

- **Employer Support of the Guard and Reserve – ESGR**

While the program has existed for a few years, its importance is gaining attention as more and more men and women return from theatres of war in the Middle East. These veterans are looking for employment on the civilian market and those who had jobs when they left are often able to return to them. Through the program, veterans are offered customer service support at 1-800-336-4590, by email at USERRA@osd.mil, and on the web at www.esgr.mil.

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February 1st is being designated as the snapshot data date for all reporting. So, special reports will be required if your AAP year doesn't begin on February 1st each year. OFCCP's new compensation definition includes: "...compensation includes base salary, wage rate, and hours worked. Other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime should be identified separately for each employee." Contractors will be building rather large reports for each audit submission. It will also be necessary to include copies of any "Documentation and policies related to compensation practices of the contractor...particularly those that explain the factors and reasoning used to determine compensation." And, OFCCP wants this data in an Excel file.

OFCCP estimates the cost of data submission for desk audit to be \$3,749 per occurrence.

If you want more information, or wish to comment before the July 11th deadline, contact Debra A. Carr, Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW, Room C-3325, Washington, DC 20210. She can be reached by telephone at 202-693-0103.

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