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# Special Report for HR Professionals

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## NLRB LIMITS EMPLOYERS' INVESTIGATION CONTROL

The National Labor Relations Board (NLRB) oversees the *National Labor Relations Act (NLRA)* which provides for employees a right to form unions and engage in “concerted activities.” Congress passed the Act in 1935 and the NLRB has been interpreting it ever since.

On July 30, 2012, the NLRB issued its ruling in the case of James A. Navarro v. Banner Estrella Medical Center in Phoenix, Arizona. Navarro was involved in disciplinary action for a problem with his job performance. There was a complaint from Navarro following his discipline that he was being treated unfairly. The hospital had experienced a failure of its sterilization equipment in that steam and hot water were not available to perform equipment sterilization. Navarro was told to use hot water from the coffee machine to perform the sterilizations. He refused and was declared to be insubordinate.

During the course of investigating his complaint, the Human Resources consultant directed everyone who was interviewed to refrain from speaking with any other employee about the investigation. While not all employees interviewed in the investigation were given this instruction, most were. The Administrative Law Judge (ALJ) hearing the case said the company had a legitimate business interest in preventing witnesses from being influenced by one another during the investigation. The NLRB disagreed saying the company violated the NLRA by prohibiting employees from discussing the ongoing investigation. They saw it as a “concerted activity” protected under the Act.

Bottom line: Review your policy of investigation procedures to be sure you don't violate this new ruling about employee discussions during investigations. And, remember, your labor attorney should be a key member of the policy review team.

NLRB Case 28-CA-023438 - <http://www.nlr.gov/case/28-CA-023438>

## OFCCP PUBLISHES RESULTS OF EVERY AUDIT ON LINE

Here's something that falls into the "In case you didn't know" category. The results of every audit performed by U.S. Department of Labor agencies known as Office of Federal Contract Compliance Programs (OFCCP); Employee Benefits Security Administration (EBSA); Mine Safety & Health Administration (MSHA); Occupational Safety and Health Administration (OSHA); and the Wage and Hour Division (WHD) all contribute data to the database posted on a department website.

OFCCP's data is separated into two unique identifiers: Compliance Evaluation Results; and, Complaint Investigation Results. If you have a chance, visit the web site and use the map or the search feature to move into the geography or employer data you wish to see.

You can find the OFCCP's audit results data base at <http://ogesdw.dol.gov/> Drill down into specifics by using "Search"

## NATIONAL INDUSTRY LIAISON GROUP (NILG) CONFERENCE REPORT

Here is some information shared by David Cohen, president of DCI Consulting in Washington, DC at the recent National Industry Liaison Group (NILG) conference in Kona, Hawaii.

- One in four OFCCP audits ended in a conciliation agreement in FY2011.
- Rarely are Disparate Impact cases filed by OFCCP. Often, they opt to pursue Disparate Treatment Pattern and Practice cases.
- In FY2011 there were 27 OFCCP findings of compensation discrimination; 54 findings of discrimination in hiring; 2 findings of discrimination in promotions and ZERO findings of discrimination in terminations.
- There are currently 285,390 federal contractor establishments in the U.S.

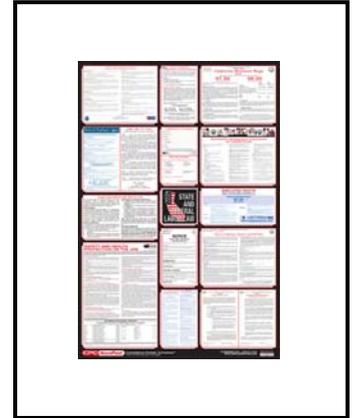
Mr. Cohen reported that issues raised by the OFCCP during an audit, if resolved during the audit, will not result in a conciliation agreement.

Mickey Silberman, affirmative action practice leader with Jackson Lewis LLP in Denver, Colorado said contractors are well advised to have at least three recruiting sources for each of the affirmative action plan targeted groups (Minorities and Women; Disabled; and Veterans). If contractors ask candidates, "How did you find out about this job?" they can get valuable information to support their outreach and recruiting efforts. Such data also allows contractors to determine if their current recruiting sources are actually providing qualified applicants. Documenting good faith efforts is critical. OFCCP is currently demanding that outreach and recruiting efforts actually produce some positive results. Consider adding the following Internet sites to your outreach efforts for veterans and disabled veterans: [www.RecruitMilitary.com](http://www.RecruitMilitary.com) ; [www.Military.com](http://www.Military.com) ; [www.RecruitVeterans.com](http://www.RecruitVeterans.com) .

## Labor Law Compliance Posters

State and federal governments are constantly adding and changing the posting requirements for employers. As things now stand, EVERY employer in the country is responsible for making available to every employee every day all of the required information. We can help with wall posters, but also with the same information in a Mobile Poster Pak for remote work locations.

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



## POTPOURRI

- **Reviving EO Survey Not Likely to Happen**

Back in the Clinton Administration, OFCCP conducted a pilot program to collect compensation data from federal contractors. There was a strong negative reaction from the employer community because the data collected were unable to prove illegal discrimination in any instance. The program was repealed by the second Bush Administration. The Obama Administration has made suggestions that it will pursue re-creating and re-issuing regulations that would reinstate a similar compensation data collection tool. Again employers objected. And, on August 15, 2012, the National Research Council's Committee on Statistics issued a paper saying, "The panel concludes that the collection of earnings data would be a significant undertaking for the EEOC [Meaning EEOC, OFCCP and the Department of Justice] and that there might well be an increased reporting burden on some employers. We also conclude that there is, at present, no clearly articulated vision of how the data on wages could be used in the conduct of the enforcement responsibilities of the relevant agencies."

According to John C. Fox, president of Fox, Wang and Morgan LLC, it will take several years to satisfy the recommendations made by this collection of scientific and statistical experts. By the way, EEOC, OFCCP and Department of Justice representatives sat on the Committee.

Soft cover book, 160 pages 6" X 9" costs \$37.80. PDF file is free.  
[https://download.nap.edu/catalog.php?record\\_id=13496](https://download.nap.edu/catalog.php?record_id=13496)

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## OFCCP REGULATORY PROPOSALS “DEAD IN THE WATER” UNTIL AFTER THE ELECTION

John C. Fox, president of Fox, Wang and Morgan LLC in San Jose, California presented a status report on OFCCP's regulatory proposals at this year's National ILG Conference in Kona, Hawaii. With the presidential election close at hand, the federal government executive branch has gone quiet. All regulatory activity at the Office of Federal Contract Compliance Programs (OFCCP) has come to a halt. Mr. Fox predicts that the regulations drafted at OFCCP will be published in final form after the first of 2013 if Mr. Obama wins the election. Mr. Fox also predicted that the regulations would not be finalized without major revisions if Mr. Romney wins the election. The most likely to receive positive attention from both political camps is the set of proposals for Veterans Affirmative Action. The final rule may well be moved forward regardless of who wins this November. OFCCP's proposals to change its scheduling letter will need to be reexamined. It has not finished work on revising its own Federal Contractor Compliance Manual (FCCM) and the new proposals for Disabled Affirmative Action will not move forward until the new year at the earliest. Some special interest groups have been pushing the OFCCP to establish pregnancy discrimination regulations, but OFCCP is not authorized to enforce the federal ban on pregnancy discrimination. That authority rests with the Equal Employment Opportunity Commission (EEOC).

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