AFFIRMATIVE ACTION UPDATE

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THERE'S A NEW SHERIFF IN TOWN AT THE DEPARTMENT OF LABOR AND THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS (OFCCP)

Since the new administration in Washington assumed power, there have been some fundamental changes in the Department of Labor and, in particular, the OFCCP. First the OFCCP was a part of the Employment Standards Administration (ESA). OFCCP's "sister" agency was the Wage-Hour Division of the Department of Labor. However, the ESA has been eliminated with the OFCCP now reporting directly to the Secretary of Labor, Hilda Solis.

Secretary Solis has gone on record as saying: "Make no mistake about it, the Department of Labor is back in the enforcement business." To that end, the new head of the OFCCP comes from a pro-employee/litigation background. Appointed as OFCCP Director is Patricia Shiu. Director Shiu, prior to her appointment, was Vice President of Programs at the Employment Law Center of the San Francisco Legal Aid Society. In that position, she focused on discrimination cases involving race, gender,

disability and sexual orientation. Director Shiu is also a former vice president/board member of National Employment Lawyers Association, a plaintiff-side group of employment lawyers.

The Agency's budget for 2010 has been increased 25% to $103 million. This increase will allow the Agency to hire an additional 200 compliance officers. Director Shiu has already stated that while OFCCP will continue to look for systemic discrimination, it "will not be exclusively focusing on systemic discrimination as we have in the past few years."

Given Director Shiu's background and the statement by Secretary Solis, contractors and subcontractors can likely expect changes in the approach to enforcement from the OFCCP than what was experienced under the former administration. Some changes we are already seeing are addressed below.

ADVERSE IMPACT FOR MALES AND NON-MINORITIES

While this was already discussed in our last newsletter, it bears repeating. Contrary to popular belief, the provisions of Executive Order 11246 do not only specify affirmative action for females and minorities. The Executive Order also functions in the exact same way as Title VII in that it prohibits discrimination. The anti-discrimination provision of the order states that:

> "(1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin."

The language is not limited to only discrimination against females or minorities. It states that the contractor will not discriminate because of race or sex. In practice, during compliance evaluations, OFCCP has not paid much, if any, attention to indicators of discrimination to the detriment of males and/or non-minorities. This occurred even where the application of an adverse impact analysis resulted in indicators of adverse impact against males and non-minorities of less than 80%, greater than Two Standard Deviations, or with a confidence level of less than 0.05 under the Fisher's Exact Probability tests.

Candidly, the OFCCP had not seen as its mission to include investigating potential indicators of discrimination against males and non-minorities. This practice, however, is changing. We are now seeing instances where OFCCP is following up with requests for additional information when adverse impact is indicated for males and non-minorities. Under the law, the anti-discrimination provisions are to be applied equally without regard to race and sex.

For example, if there is adverse impact against males in an Administrative Support job group in regards to hiring and it is statistically significant under either the Two Standard Deviation Test or the Fisher's Exact Probability Test, then employers <u>must</u> investigate to determine whether there are legitimate, non-discriminatory reasons for the difference in selection rates. Assuming such reasons exist, then there should be no problems during a compliance review.

The bottom line for covered contractors and subcontractors is that they should be fully aware of the results of their adverse impact analysis. If adverse impact is indicated against any group (females, males, minorities, or non-minorities), contractors should be making the same inquiries of their data and results to ensure that any significant disparity can be explained with legitimate non-discriminatory reasons.

ADVERSE IMPACT FOR MINORITY SUB-GROUPS

As discussed above, when looking for indicators of adverse impact, the OFCCP has focused on whether there are any issues indicated for females and all minorities in the aggregate. This broad approach is also changing. Recently, the OFCCP has settled a number of cases based on findings of discrimination against racial/ethnic subgroups (African-American, Hispanic, Asian, Native American, and Pacific Islander). In addition, the Agency has taken a "most favored" approach to determining the existence of adverse impact where the most favored group can be Pacific Islander or Hispanic and the victims are everyone else, including Caucasians.

In a case involving Mity-Lite, Inc. out of Orem, Utah, OFCCP found that the company had favored Pacific Islanders over all other racial/ethnic groups. In this matter, it was determined that there was a class of 685 non-Pacific Islanders. Mity-Lite agreed to settle the matter for $157,228 in back-pay and to hire 18 non-Pacific Islanders. In other cases, the Agency found unlawful discrimination and ordered remedial action that included specific hiring goals for each individual racial group (e.g. 40 African-American, 5 Hispanic, 3 Asian).

The implications of these settlements for contractors are significant. Going forward, it will no longer be sufficient to conduct adverse impact analyses just for females and minorities. Rather, adverse impact analyses must also be conducted on an individual racial group basis (Whites vs. African-Americans; Whites vs. Hispanics, etc.) but also on a most favored basis so that if Hispanics have the most favorable selection rate, the analysis would compare the selection rate for Hispanics against the selection rate for all other groups (Hispanics vs. African Americans, Hispanics vs. Asians, etc.).

If there is adverse impact, then contractors will have to explain the differences in selection rates. Ultimately, if the adverse impact cannot be explained with legitimate, non-discriminatory reasons, the contractor may be required to validate the selection process pursuant to the Uniform Guidelines on Employee Selection Procedures. This can be a time consuming and costly process.

FOCUS ON VETERANS AND THE DISABLED

Director Shiu has set forth some initial priorities for the OFCCP. At the top of the list is updating the regulations regarding affirmative action for veterans and the disabled as well as revising the regulations regarding affirmative action in construction.

To effectuate revisions to the veterans and disabled regulations, OFCCP scheduled two "listening" sessions the week of January 11th where contractors and other interested parties were invited to share their opinions and make recommendations regarding any revisions to the regulations. Director Shiu indicated that there would be a focus on how contractors recruit and hire veterans and the disabled.

One particularly interesting and potentially problematic comment involved the potential for setting numerical targets in regard to the employment of veterans and the disabled. Currently, to the extent there are numerical targets, they are put in place only after there is a rather complex determination of availability of minorities and females based on current census data of individuals with the requisite skills to perform the types of jobs present in a contractor's workforce. This availability calculation is compared to current utilization to determine whether there exists an underutilization of either minorities or females within a job group(s).

The obvious issue in setting numerical targets is the non-existence of availability data for qualified veterans and the disabled in the appropriate labor markets. Absent the presence of such data, a determination of availability would be largely supposition and conjecture.

Regarding veterans and the disabled, we continue to see issues with contractors believing that posting job openings with the appropriate state employment services is sufficient to meet the obligations regarding outreach and affirmative action effort. We are again stressing that:

POSTING JOBS WITH THE STATE JOB SERVICES IS NOT ENOUGH TO COMPLY WITH AFFIRMATIVE ACTION REGULATIONS REGARDING EMPLOYMENT OF VETERANS AND THE DISABLED

In three previous newsletters, we have discussed the need for contractors to take additional goodfaith efforts for veterans and the disabled beyond the job positing requirement contained in the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and the Jobs for Veterans Act (JVA). VEVRAA requires the posting of all jobs with the state employment services where the job exists with the exception of 1) executive or top management, 2) temporary positions of three days or less, or 3) jobs to be filled exclusively from within. The JVA specifies how jobs are to be listed as well as providing additional recommendations that contractors can take as evidence of goodfaith efforts.

In light of the above and based on current actions by the Agency, it must be stressed yet again that affirmative action for veterans and the disabled is more than listing the job with either the local jobs services office or the appropriate employment delivery system for the state where the job opening exists. **In fact, posting jobs only with the state job services will result in a finding of a violation.**

OFCCP is looking for evidence that a contractor is engaging in outreach efforts. They are asking for the names of the Veterans and Disabled organization(s) to which the contractor has reached out to; names and phone numbers of contact individuals, jobs listed and names of individuals hired as a result of these outreach efforts.

Recommended steps for contractors to undertake to meet their outreach obligation include but are not limited to:

- Create partnership arrangements with local and national recruiting sources for referral of qualified covered veteran and disabled applicants;
- Establish a relationship with the Local Veterans' Employment Representative or his or her designee;
- Recruit covered student veterans at educational institutions;
- Create partnership arrangements with veterans' service organizations to employ qualified covered veterans;
- Establish relationships with the Veterans Administration Medical Center job placement programs;
- Advertise job openings and recruit qualified covered veterans and the disabled during company career days and/or related activities in the local community;

- Encourage subcontractors to seek qualified covered veterans and the disabled for employment opportunities; and
- Contact the Local Veterans' Employment Representative when new Federal contracts are obtained, or when significant hiring will occur.

Many of these recommendations can only be undertaken at the local level. **Therefore, EEO Officers at individual establishments must identify the opportunities and actions available locally and implement the above recommendations.**

There are organizations at a national level providing contractors with opportunities to reach out to veterans. These include HireVetsFirst, GIJob.net, America's Service Locator, and the Department of Veteran's Affairs Vocational Rehabilitation & Employment Services.

THE CONSTRUCTION INDUSTRY TO SEE CHANGES IN GOALS

The Agency has announced that it intends to revise the regulations regarding affirmative action in construction.

Contractors working on federal construction projects or working on federally assisted construction projects with contracts of $10,000 or more are covered by E.O. 11246. Contractors working on federal construction projects are also covered by Section 503 and the Veterans regulations.

The construction regulations have not been updated for over 30 years. Under the regulations, goals for females and minorities for tradespersons working on the project are set by geographic area. OFCCP has indicated that it intends to update these goals to reflect changes in the population over the past 30 years. Proposed rulemaking is slated to start in January 2011.

REMOVAL OF CAPS ON THE NUMBER OF COMPLIANCE REVIEWS DURING ONE YEAR

Currently, OFCCP directives provide that a maximum of no more than 25 compliance reviews can be scheduled for any one contractor/subcontractor during any fiscal year. Effective November 2009, the new Corporate Scheduling Announcement Letters said that "there will be no limit on the number of new compliance evaluations" during the fiscal year of a contractor's establishments.

Practically, this means that a contractor could be subject to a review of all their establishments during any one year. So a contactor with 75 establishments could receive 75 scheduling letters. Obviously, this would mean a huge amount of work. It is yet to be seen whether massive numbers of compliance reviews of any one employer takes place.

COMPLIANCE EVALUATIONS UNDER THE AMERICAN RECOVERY AND REINVESTMENT ACT OF 2009

Contractors seeking to work on federal contracts paid for under the American Recovery and Reinvestment Act (ARRA) of 2009 may be subject to additional scrutiny by the OFCCP. OFCCP has announced that it will be conducting 90 reviews of ARRA funded supply and service contractors and

360 reviews of ARRA funded construction contractors. These reviews will be scheduled outside of the normal scheduling process. As such, just because an establishment's name is not on the CSAL lists, this does not mean that the establishment has nothing to worry about, particularly if they are actively involved in the performance of a contract.

Contractors selected for an ARRA review will receive a regular scheduling letter as well as a letter identifying this review as occurring under the ARRA. Unlike regular reviews which will in most cases only involve an onsite if there are unresolved issues arising from the desk audit, ARRA reviews will include an onsite regardless of whether or not there are indicators of systemic discrimination. Further, contractors on the preaward list may still be subject to an ARRA review if the last review was conducted more than six (6) months before the receipt of the ARRA scheduling letter.

Accordingly, contractors receiving ARRA funds should ensure that they are preparing the establishments that will be working on the contract in the same manner as they prepare the establishments on the CSAL list for an OFCCP audit.

FRANKEN AMENDMENT

Effective February 19, 2010, federal contractors with Department of Defense (DOD) contracts in the amount of $1,000,000 or more will be barred from requiring employees to arbitrate most employment related disputes with the contractor. The language is included in the 2010 Department of Defense Appropriations Act. Section 8116(a) states that covered contractors must agree not to:

(1) enter into any agreement with any of its employees or independent contractors that requires, as a condition of employment, that the employee or independent contractor agree to resolve through arbitration any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment, including assault and battery, intentional infliction of emotional distress, false imprisonment, or negligent hiring, supervision or retention; or

(2) take any action to enforce any provision of an existing agreement with an employee or independent contractor that mandates the employee or independent contractor resolve such claims through arbitration.

The Franken Amendment also provides that all prime defense contractors that receive covered contract awards more than 180 days after December 19, 2009 must certify that their subcontractors have agreed to the arbitration restrictions in the Act. This certification requirement applies to all subcontractors that have subcontracts in excess of $1 million. However, for covered defense *subcontractors*, limits on mandatory arbitration only apply to individuals performing work on a covered subcontract.

The implications for defense contractors and subcontractors who require arbitration of employment disputes are significant. It is recommended that contractors review their agreements and consult with the employment attorneys to determine whether any revisions are necessary in order to comply with the requirements of the amendment. For example, if arbitration is merely an option and is not required and an employee decides to elect arbitration, will this be sufficient to avoid a determination that arbitration is not a condition of employment?

At present, it does not appear that the OFCCP has any responsibility for enforcing compliance with the amendment. There are numerous questions regarding the amendment that are currently unanswered. It will take some time for the courts to sort through the amendment and determine the actual application of its provision.

DISABILITY ACCESS TO ONLINE RECRUITING SYSTEMS

In a previous newsletter, we discussed OFCCP's Directive 281 regarding "Federal Contractor's Online Application Selection System." On December 8, 2009, in response to a question regarding sanctions for contractors whose online job recruiting sites are not accessible to individuals with disabilities, Director Shiu stated:

> "The sanctions for violations of Section 503 of the Rehabilitation Act are contract sanctions, meaning violations could lead contractors to lose their ability to contract with the government. In addition, contractors who violate Section 503 are responsible for providing make whole relief including back pay, to victims of discrimination."

Given this response by Director Shiu, we felt it important to review the contents of Directive 281 and the obligations of contractors using online recruiting systems.

Specifically, the Directive requires all compliance reviews to include an evaluation of whether the online system is accessible and whether contactors are providing reasonable accommodations upon request, unless the accommodation would pose an undue hardship. With the new focus on individuals with disabilities and disabled veterans, it is reasonable to expect that these inquiries will be happening more frequently.

The OFCCP has published a FAQ addressing accessibility of online application systems. (See http://www.dol.gov/ofccp/regs/compliance/faqs/dir281faqs.htm). The FAQ states:

> "If a contractor routinely offers applicants various methods of applying for jobs and all methods of application are treated equally, then an employer may not need to ensure that its online application system is fully accessible. But if a contractor only uses an online application system to accept applications for employment, it must ensure that potential applicants with disabilities either can use the system or can submit an application in a timely manner through alternative means. This includes providing a means to contact the contractor, other than through the online system, to request any reasonable accommodation needed to provide an applicant with a disability an equal opportunity to apply and be considered for the contractor's jobs."

Disabled individuals may have problems viewing the site or their adaptive software may not work with the site. In these instances, the contactor would have to make other alternatives available so the individual could make an expression of interest in employment. Examples of accommodations include:

1. Providing information regarding job vacancies in a format accessible to individuals with vision or hearing impairments, e.g., making information available in Braille, and by responding to job inquiries via TDDs or use of the telephone relay system;

2. providing readers, interpreters, or other similar assistance during the application process;

3. appropriately adjusting or modifying employment-related examinations, e.g., by extending the time in which to complete an online examination for an applicant with a cognitive or neurological disability; and

4. ensuring an applicant with mobility impairment has full access to testing locations, e.g., if an online test is given via a company kiosk, the kiosk must be physically accessible to the applicant with mobility impairment.

Contractors are specifically advised to have a phone number or email address along with the name of the person to contact if a disabled individual requires an accommodation in either using the site or submitting an application through alternative means. In the alternative, a Contractor can offer an alternative means of applying for a position other than through the website. If the contractor provides an effective alternative application process, then making the online site completely accessible may not be necessary.

The OFCCP FAQ states:

> "In order for an application system to be generally accessible, it should incorporate "interoperable" electronic and information technologies. Interoperability is the ability of a computer system to effectively interact and communicate when an applicant with a disability is using assistive technology/adaptive software and adaptive strategies with the contractor's application system. The U.S. Department of Labor's Office of Disability Employment Policy (ODEP) has identified resources available to the contractor community and job applicants in this regard. This and other information can be found on ODEP's website at www.dol.gov/odep/. Additional resources can be found on the website of the Job Accommodation Network (JAN) at www.jan.wvu.edu."

The Directive also states that contractors are required to periodically evaluate their online system to ensure that it is accessible and provides equal opportunity to individuals with disabilities.

As such, it is recommended that contractors look at their online process and ask the question, "Can someone with a disability utilize this process to identify opportunities and to express interest in an employment opportunity?" If the answer is "No" or "It would be difficult" the contractor should look at what needs to be done to make the site and process accessible.

This should in any event include listing a telephone number that can be called to ask for assistance or an accommodation; putting a TDD on the phone; or allowing an individual with a disability to send in a paper resume or application upon request. Ultimately, contractors can be held accountable by the OFCCP if it is determined that the online process does not provide access to employment to individuals with disabilities.

If there are any questions or comments concerning anything contained above, they can be directed to this office at the address shown on page one, by calling us at 440-564-7987 or sending an email to dbb@dbbrown.com. The discussion of these matters is for the clients and friends of Douglas B. Brown, LLC and does not represent nor is intended as a substitute for professional legal advice.