AFFIRMATIVE ACTION UPDATE

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OFCCP'S NEW FAQS ON "EMPLOYER – EMPLOYEE RELATIONSHIP"

HAS THE OFCCP SET THE STAGE TO CLAIM THAT TEMPORARIES ARE "EMPLOYEES" FOR AFFIRMATIVE ACTION PURPOSES?

"BEING BIG IS WORSE THAN BEING BAD"

EXPANSION OF OFCCP COMPENSATION DATA REQUESTS

A practice amongst federal contractors and non-contractors is the use of Temporary Staffing Firms (TSFs) to recruit and place temporary employees who may ultimately end up being hired by the contractor into entry-level positions. This practice often follows this scenario. The contractor has large numbers of entry-level employees in a manufacturing, healthcare or service industry setting who have a high level of turnover. The contractor has a relationship with a TSF to find and place temporary employees (temps). The contractor has agreed to keep the temps on the TSF's payroll for some period of time, such as 90-180 days before they might be eligible for hire. After meeting the required timeframe, the contractor has the option of converting the temps from the payroll of the TSF to its own payroll (by hiring them). The process of conversion may be through a number of different avenues such as 1) "anointment" where the contractor chooses who becomes an employee; or 2) having the temps bid on an open position.

Many contractors have instituted practices where this is the only avenue to employment with the contractor. They often prefer this process as it takes the burden of recruiting and assessing individuals for high turnover positions off their plate, gives them the opportunity to assess the capabilities of the temp in real-time, and appears to reduce the risks associated with large applicant pools and selection decisions.

But, does it really?

Contractors have uniformly taken the position that temps are not employees, and therefore are not reported on EEO-1 reports. In fact, the filing directions for the EEO-1 specifically state that temporary employees should not be included. They are also not included in the contractor's Affirmative Action Plans. Generally, contractors do not track applicant flow, nor conduct adverse impact analysis on the temps recruited by and placed with them by the TSF. And with limited exceptions, all has been well with this position, until perhaps, now.

On August 5, 2014, the Office of Federal Contract Compliance (OFCCP) published a new frequently asked question (FAQ) regarding the "Employer-Employee Relationship" specifically addressing the question of when an individual is treated as an employee for the purpose of inclusion in a contractor's AAP. The Agency set forth the factors used by the court in *Nationwide Mutual Insurance v. Darden,* 503 U.S. 318 (1992), as the test contractors should use to determine whether individuals are "workers" of the contractor and should be treated as employees for the purpose of inclusion in the contractor's AAPs. Among the factors listed are:

- The right to control when, where and how the individual performs the job
- The skill required for the job
- The source of the instrumentalities and tools
- The location of the work
- The duration of the relationship between the parties
- Whether the contractor has the right to assign additional projects to the individual
- The extent of the individual's discretion over when and how long to work
- The method of payment
- Whether the individual's work is part of the regular business of the contractor
- Whether the contractor is in business
- The provision of employee benefits to the individual

In the Agency's FAQ, they use two examples to illustrate the application of the *Darden* factors. The first involves an adjunct professor at a college that is a federal contractor and the second involves a software consultant performing work at a corporation that is a federal contractor. In both instances, the individuals in question are performing work on their own for the contractor and are not on the payroll of a TSF. Based on the factors, the professor is deemed to be an employee while the consultant is not. In the FAQ, the Agency says the application of the factors is "…a fact-specific, case-by-case assessment, not a simple bright-line test."

That being said, what might the OFCCP say about the following scenario? The contractor uses temporary employees on the payroll of the TSF to perform what would be characterized as entry-level, low skilled production jobs. While on assignment at the contractor's work location, the temps must:

1) work at a specific location under the control of the contractor;
2) must utilize tools/instruments provided by the contractor;
3) must work the hours and times stipulated by the contractor;
4) must possess the basic qualifications required by the contractor;
5) receive instructions and directions from individuals who are employees of the contractor;
6) work side by side with individuals performing the exact same tasks as the temps who are in fact employees of the contractor;
7) work subject to the discretion of the contractor in terms of whether or not they are told to return to work the following day/week/month;
8) they perform tasks that are necessary for the contractor to produce its products or perform services, and;
9) the contractor only hires onto its payroll individuals who have worked for a period of 90 days at the contractor's work site as a temp.

Based on the above, nine items appear to meet many of the *Darden* factors. However, 1) the temps' paycheck is from the TSF; 2) their benefits, if any, are provided by the TSF; and 3) there is no guarantee that they will be retained at the contractor's work site for any specific period of time. All of these factors weigh in favor of exclusion from the contractor's AAP, based on the *Darden* factors.

The question then is how would the OFCCP apply the *Darden* factors in determining whether temps are "employees" who should be included in a contractor's AAP? To predict the Agency's response, we need to also look at the additional other areas of "guidance" from the OFCCP.

The Internet Applicant FAQs on the OFCCP's website specify:

> **If a covered employer contracts with an employment agency to screen and refer job seekers using the employer's selection procedures, what records must be maintained?**
>
> If an employer contracts with an employment agency to screen job seekers on its behalf, it would be prudent to address expressly in its contract with the employment agency the records the agency will be expected to maintain regarding searches made on the employer's behalf.
>
> **Can a contractor ask a recruiting firm to keep, on its behalf, the records required by the Internet Applicant Final Rule?**
>
> The use of a recruiting firm in the hiring process does not relieve a contractor of its recordkeeping obligations under 41 CFR 60-1.12; the contractor will be held accountable if the specified records are not maintained.
>
> A contractor may ask that a recruiting firm keep records on its behalf… A contractor cannot delegate its obligations to another firm and would be held accountable if required records were not maintained. The Executive Order does not impose separate recordkeeping obligations upon recruitment firms with respect to their referral practices to Federal contractors and subcontractors. …we suggest that recruiting firms and Federal contractors and subcontractors have a specific discussion about recordkeeping practices so that both parties understand what records must be retained, and by whom.

It is very interesting that the OFCCP chooses to use the words and phrases "may", "suggest", "does not impose", and "would be prudent" as opposed to "must" and "shall."

Even more interesting is the holding of Daniel A. Sarno, Jr., District Chief Administrative Law Judge in *OFCCP v. United Space Alliance*, Case No. 2011-OFC-00002, when addressing the question whether the OFCCP should be required to conform to the FAQs that it published on its website. Judge Sarno specifically held:

> "In including language such as 'generally speaking' and specifically reserving the right that these standards are 'subject to change,' the language of FAQ suggests the OFCCP did not intend these statements to be characterized as binding. Secondly, the OFCCP never published this statement in the Federal Register, again suggesting the OFCCP did not intend this statement to be binding. …Therefore… the FAQ does not constitute a binding norm, but rather is a mere policy statement intended to provide the OFCCP and the regulated community with guidance."

Judge Sarno clearly holds that the FAQs are not binding. More specifically, they are not the law. Rather they are merely advisory.

Another question that arises involves the role of the TSF. Is the TSF acting as a "recruiting" agency or firm? If it is, is it required to maintain applicant flow records that must be provided to the contractor and included in an adverse impact analysis? And if the TSF is engaged in recruiting, is there anywhere else where the recordkeeping obligations of recruiting firms are addressed, other than in the FAQ?

The response to these questions may be found in the *Uniform Guidelines on Employee Selection Procedures* (UGESP) which the OFCCP uses as the basis for its recordkeeping requirements to collect data on selection decisions and to perform adverse impact analyses.

But what does the UGESP actually say? It states:

> **C. Selection procedures.**
>
> "These guidelines apply only to selection procedures which are used as a basis for making employment decisions…recruitment practices are not considered by these guidelines to be selection procedures."

So, if the TSF is recruiting individuals to be referred to the contractor on a temporary assignment and the contractor has no role in deciding who is placed, then the pool of candidates considered by the contractor would appear to be those individuals who actually work as a temp and through the contractor's process (whatever that may be) results in the temp eventually going on the payroll of the contractor.

Additionally, the UGESP appears to say that recruiting activities are not subject to its recordkeeping or analyses requirements. It should also be noted that temps are specifically excluded from the definition of "employees" for the purpose of filing the annual EEO-1 reports, which are the basis of the OFCCP's system for selecting contractors for a compliance review.

Finally, there is also the entire question of the existence of a joint employer relationship, as it applies to the temps working at the contractor's job site. Does this provide the basis for the OFCCP to require recordkeeping by the TSF or for the contractor to include the temps in its AAP? At this point it does not appear that the OFCCP has attempted to invoke the "joint employer" relationship as a basis for making an argument that contractors have recordkeeping and audit obligations for the recruiting of temps.

Further, at this point we are not aware of the Agency making an assertion that contractors may be asked to include temps in their AAPs. Given the issuance of the new FAQ, could this happen at some point in the not too distant future? It appears we will have to watch to see what, if anything, the Agency does in this regard. However, I have recently had a discussion with an OFCCP Assistant District Director who stated that temps <u>are</u> employees and should be included in the AAP. He did not provide any basis for his pronouncement.

So what are we to glean from all of this? Taking into account the Agency's Internet Applicant FAQ, and the new Employer-Employee Relationship FAQ, it appears the Agency could take the position that temps are "employees" and contractors have the obligation to obtain and include the demographic data on the TSFs' "recruiting" efforts on behalf of the contractor. In fact, some commentators are recommending that contractors include specific language in their agreements with the TSFs stating that the TSF will keep applicant flow, provide the flow data to the contractor, will

cooperate with the contractor in any matters involving the TSF's applicant flow, and will indemnify the contractor if there are any issues with the TSF's flow.

Are there any problems with doing this? You betcha.

There's the problem of whether a TSF would agree to do so. Even if they would agree, there's the question of what this would do to the price of the contract. Putting in place all the protocols necessary to capture, retain and report this data would be a substantial additional cost.

There is also the fact that directions to contractors addressing these matters are contained in the FAQs which are not the law, are not binding, and are merely advisory/guidance.

This brings us to the second and in many ways the more important part of this discussion:

"BEING BIG IS WORSE THAN BEING BAD!"[1]

The question is what happens to the size of the contractor's applicant pool if the TSF's recruiting efforts are included? If a contractor is taking on 100-200 temps during the year, how many individuals does the TSF have to recruit to find a sufficient number who meet the basic qualifications for the position? 400? 800? 1,200? Is there a downside of having large applicant pools? Isn't having more choices a good thing? Does the contractor want to include an additional 1,200 individuals recruited by the TSF in the contractor's own applicant pool? In reality, there are real and potentially costly implications for agreeing to consider the TSF's recruiting efforts as part of the contractor's applicant flow.

The downside of large applicant pools is that it significantly increases the risk of a finding of adverse impact in the selection process. This situation is exactly the fact-pattern under which the Agency has obtained its greatest settlements from contractors; that being large numbers of applicants for entry-level hiring. On September 18, 2014, the Agency settled a case with an Alabama contractor on behalf of a class of 2,474 male applicants for positions at a sandwich-making facility. Let me repeat that: 2,474 male applicants. The size of that applicant pool is mind boggling. This just confirms that the OFCCP's bread and butter cases are almost exclusively dealing with extremely large applicant pools for entry-level hiring.

This brings us to the crux of the matter – the risks associated with large applicant pools are substantial. In fact, recent research suggests that the mere existence of a large applicant pool is sufficient to increase the likelihood of a showing of adverse impact. In a recent article titled "Unintended Consequences of EEO Enforcement Policies: Being Big is Worse than Being Bad" by Jacobs, Murphy & Silva (2012) the authors concluded that:

> "The use of statistical significance tests…has the perverse consequence that the size of an organization or an applicant pool (emphasis added) has more impact on determining adverse impact than the extent to which procedures actually discriminate. That is, it is worse to be big than to be bad."

[1] Jacobs, Rick, Kevin Murphy, and Jay Silva. "Unintended Consequences of EEO Enforcement Policies: Being Big Is Worse than Being Bad." *Journal of Business and Psychology* (2012): 467-71. Print.

In fact, the author's research showed that:

> "…sample size (N) was by far the best predictor of whether or not there would be a statistically significant difference between group selection rates (r = .70), and that it accounted for significantly more variance (49%) in outcomes than the size of the difference between groups on the test or assessment in questions (10% of the variance explained). Overall selection rates and the proportion of minority group members in the applicant pool also had effects, but their effects were notably smaller than the effects of sample size (i.e. 9 and 3% of the variance explained, respectively)."

Let's stop and think about that for a moment. What this says is that almost **HALF** of the effect on whether there is a finding of adverse impact may be due simply to the size of the sample. In contrast, in the author's study, actual differences in selection rates or the proportion of the protected group in the sample accounted for only 12% of the variance. Now, is the OFCCP aware of this effect? Of course they are. This alone goes a long way towards explaining why the OFCCP tries so hard to create large samples for analysis by combining different pools together. They know that the likelihood of coming up with a determination of adverse impact increases exponentially if they are successful in creating a large pool of individuals for analysis.

On the other hand, if the contractor has not done a good job of controlling their applicant pool through proper dispositioning of applicants; by using proper data management tools; or by having the appropriate protocols in place to manage when candidates get into the pool resulting in a large applicant pool, they have in essence given the OFCCP a data set where it is more likely than not there will be a finding of adverse impact even if the actual differences are very small. When this occurs, it is the contractor who is wholly on the defensive in terms of explaining the difference.

The authors of the article point out that generally, regulatory standards reflect current scientific knowledge. But in the case of determining adverse impact, this is not true. The general basis for conducting adverse impact analyses is set forth in the *Uniform Guidelines on Employee Selection Procedures* (EEOC 1978). They have not been updated since their issuance and:

> "…still reflect the scientific and professional standards that were in place over 40 years ago, and ignore critically important developments since then (McDaniel et al. 2011)."

The dilemma for contractors is evaluating their options when confronted with a large applicant pool. What is the probability that the contractor will win an argument with the OFCCP that their methodology is flawed and any statistically based findings of adverse impact in the selection process, when the actual differences are inconsequential, should be ignored? Even though this is probably true, it is not likely the OFCCP will change its current position on creating large samples and using statistical tools for analysis.

If the individuals recruited by the TSF for possible placement at the contractor's location are included in the applicant pool, there are multiple issues. As noted in the first part of the discussion, the TSF might recruit 1200 individuals in order to obtain 100-200 temporary placements. However, the 1200 individuals recruited may have been considered for placement with multiple employers. Moreover, there's the fact that the contractor has no control over the TSF's recruiting efforts. As such, liability could be created by actions outside of the contractor's span of control.

Additionally, of the 100-200 placed, the contractor may be obligated to keep the individuals as temps for 90 days before they can be considered for conversion to the contractor's payroll. If half of the temps leave before the 90 days are up, then they are not even available for consideration to be converted. As far as the contractor actually making a selection decision, that only occurs from the pool of temps who have worked at the contractor's location for at least 90 days and are still active.

Lastly, with 1,200 applicants in the pool, it is almost certain that there will be a statistically significant indication of adverse impact against some group (male/female, minority/non-minority, minority sub-group). The only way to avoid this is to always hire in the same proportion as the representation percentages in the applicant pools. This may or may not result in hiring the best qualified individuals for the position.

For obvious reasons, contractors want to strenuously resist attempts by the OFCCP to add the individuals recruited by the TSF to their applicant flow numbers. Additionally, it is necessary for a contractor to make every effort to legitimately control their applicant pools by doing the following:

1. Ensure that applicant pools only contain individuals who properly meet the definition of an internet applicant.

2. Utilize proper and legitimate protocols and data management techniques to control the size of the pool (e.g. only consider the first 50 applicants in the pool; do a random sample of 25/50/etc. applicants for preliminary consideration).

3. Only consider individuals for the position/requisition for which they express interest. Do not transfer individuals from one requisition to another without the individual specifically expressing interest in the position.

4. Properly disposition applicants so as to be able to articulate at what stage each candidate fell out, and the reason they did not advance to the next step of the selection process.

5. Continuously monitor and audit their applicant pools and selection decisions for indications of adverse impact and if it is indicated, take immediate steps to determine why and whether the contractor can articulate legitimate, non-discriminatory rationales for its actions as well as ensuring that it is using valid selection protocols.

6. Aggressively resist efforts by the OFCCP to create "mega-pools" for the purpose of conducting adverse impact analyses (this will also be a particularly critical area when analyzing compensation differences).

Are the OFCCP and most contractors improperly using tests of statistical significance for determining adverse impact? Most likely. Are the courts relying on the improper applications of tests of statistical significance? Also most likely. Is there likely to be any effort to update the *Uniform Guidelines Employee Selection Procedures* any time in the foreseeable future? Not likely at all.

The bottom line is if the contractor gives the Agency a large applicant pool or the Agency is successful in creating a large applicant pool or pay analysis group, it is not a matter of whether there may be an indicator of adverse impact. Rather, it is only a question of which group(s) end up with a statistical imbalance and how many standard deviations are shown, as well as the size of the class of affected individuals.

Given the above, contractors must control their applicant pools, monitor the outcomes of their selection decisions, and proactively ensure that they are making decisions pursuant to valid protocols and in a non-discriminatory manner.

EXPANDED OFCCP COMPENSATION DATA REQUESTS

With the new OFCCP scheduling letter mandating the submission of employee-level data, the Agency is now requiring eight (8) different items of individual data. These include gender, race/ethnicity, hire date, job title, EEO-1 category, job group, compensation (including additions to base pay) and by default, some type of employee identifier. In addition, the Agency is suggesting that contractors provide six (6) additional items of individual data such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade.

In some recent instances, the Agency has expanded the scope of the requests during current compliance reviews by requesting data related to matters such as the amount of last merit increase; date of last merit increase; years of total prior work experience; and years of total prior related work experience.

While some of the data requested is contained in either a payroll and/or HRIS system, much of the data is not. Data points such as type of prior experience, total prior experience, total relevant prior experience, education, and perhaps performance ratings may only be available through a manual review of individual personnel files, as well as looking at job applications/resumes. In addition, other items that may explain an employee's starting salary, such as compensation prior to joining the organization, may not have been provided or captured in the first place.

Gathering this type of additional data may only be possible if the information requested was actually required when the employee applied for the job. If higher level education is not required for a position and only the past few years' work history is provided, a contractor is unable to provide the highest education level or total prior related work experience. Complete education and work history has rarely, if ever, been requested of applicants, so providing such is next to impossible without personally asking employees detailed questions to gather the information.

Can the OFCCP compel production of all this data? They will certainly try, whether or not it is readily available. If it's not available, then it simply cannot be provided. An important question is how much of this data is in your HRIS/payroll system, versus what would require a manual file dive in order to retrieve it (if the data exists)? If the answer is "we're missing a fair amount," then going forward, contractors should be evaluating whether gathering and storing this data, so that it would be easily available if asked to produce it by the OFCCP or due to a discovery request as a result of litigation, makes sense.

In particular, contractors should be asking themselves the following questions:

What data do I currently have stored electronically?
What would it take for me to produce it, if requested?
What data do I possess that is not stored electronically?
What would it take for me to produce this data, if requested?
What data (which the Agency may request) is not in my possession?
Would it be available if I searched for it?
If so, what would it take for me to conduct a search for the missing data?

It is recommended that contractors consult with counsel on the merits and risks of adding the data to their current databases.

SUMMARY

In summary, these are difficult and potentially risky times when dealing with the OFCCP. The Agency may be setting the stage to make new and challenging pronouncements about who is an employee, and who needs to be included in an AAP. In addition, current Agency practices in creating large groups for analysis tends to make it more likely that they will be successful in finding statistically significant showings of adverse impact in selection, as well as significant differentials in compensation.

Contractors must understand their own practices and be able to articulate legitimate rationales as to who is similarly situated for analytical purposes. Beyond that, if contractors are confident in who they have deemed to be similarly situated, they must be willing to defend their groupings in the face of what may be inappropriate groupings by the OFCCP.

Lastly, contractors need to be aware of what data they do or do not have readily accessible in their databases. They should also be thinking about their response to an expansive OFCCP data request that seeks information which is not a part of their HRIS/payroll systems.