

# Fall 2010 AAP Newsletter

The change in seasons is ushering in what is beginning to appear a new, more intense climate in Affirmative Action. We are beginning to see policies and procedures from the Office of Federal Contract Compliance Programs (OFCCP) that reveals the priorities of the Director Patricia Shiu under the Obama Administration.

## “On-site” Phase of Audits Becoming Standard Again

While the OFCCP under the previous administration closed compliance evaluations at the desk audit phase; if no indicators of potential discrimination were present, the current administration seems to be searching for their own guidelines. The Midwest OFCCP region has been conducting on-site investigations as part of every audit. A Yocom & McKee client who had no indicators of compensation issues and no adverse impact indicated for hires, promotions or terminations was notified of an on-site. This company had fewer than 150 employees and no indication of potential discrimination. It could be that the OFCCP used this compliance evaluation as a training tool for new compliance officers, but a legal argument could be made that OFCCP’s current Directives and Contract Compliance Manual, does not provide the OFCCP authority to conduct on-site audits absent any indicators of potential discrimination. Below is an edited version of the letter.

Dear Mr. \_\_\_\_\_;

*The OFCCP is in the process of completing the desk audit portion of your compliance review. The next phase in the evaluation process is an on-site visit of your facility. The on-site visit will take place on Monday, December 20, 2010 at 9:00am.*

*Areas that require examination and discussion are enumerated in the attachment. The items listed therein are not all inclusive and do not preclude findings of deficiencies of noncompliance with the above regulations.*

*In addition, we will need to have available the I-9 forms for (1) all employees, both current and former, hired within the last three years, and (2) any former employees hired more than three years ago (but after December 20, 1986) who terminated within the past year. We will also need documentation (e.g., payroll records) sufficient to identify all employees for whom I-9 forms are required. This letter provides you with three business days advanced notice of the I-9 inspections, as required by law.*

*In addition, please provide a private working space, copying capability, access to files and employees during the onsite review.*

### **LIST OF REQUESTED MATERIALS**

**1. Information requested is as follows:**

- *Last three Vets 100/100A reports filed.*
- *Provide a copy of the new employee orientation package, if any.*
- *Provide proof of listings for the last two years with the state employment service.*

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- *Copies of personnel policies and procedures covering issues for veterans (such as leave, reasonable accommodation).*
  - *A copy of the employee handbook, if any. A copy of any union contract, if any.*
  - *A purchase order or contract for the case file that includes the EEO/AA clauses.*
  - *Documentation showing that vendors were notified of their various obligations.*
  - *Copies of all grievances filed regarding or touching upon veterans disability, reasonable accommodation or veteran status.*
  - *Copies of any documents providing information to applicants regarding VEVRRA, reasonable accommodation process.*
  - *Copies of any training documents – training managers, etc. in the AAP obligations.*
  - *Provide copies of all job/position descriptions where hiring occurred during the period under review.*
2. *Have available for interview:*
- *Any veterans employed in the workforce.*
  - *Any employee who identified themselves as disabled.*
  - *All other employees in the workforce.*
  - *Officials responsible for implementing the AAP obligations.*
  - *Managers and Supervisors of veteran and disabled employees.*
  - *Union official. If applicable.*

*Verification of your actions with regard to Veterans and Disabled Individuals; Please set up the following requested interviews to take place during the onsite at your facility. This will cover the activity that occurred at your company from January 1, 2009 to December 31, 2009:*

*Provide a list of each individual who is currently employed at your facility who have either self-identified or have been considered to be a Veteran, special disabled Veteran, or an individual with disabilities or impairments. Please provide this list(s) at the start of the onsite. Once the list(s) are provided, OFCCP will select individuals from the list for interview.*

*Please set up date and time when we may conduct a face-to-face interview with each individual. Please arrange to have these interviews in an enclosed room so that they can take place without interference from noises or other disruptions. Please arrange so that each individual has continuous block of at least thirty minutes in which to answer our questions, taking into account lunches or other breaks in their work schedule. These interviews can be scheduled for the first or subsequent dates of the onsite.*

*As required by our regulations, please ensure that there is no harassment, intimidation, threats, coercion, retaliation or other action is taken against any person cooperating with an investigation of OFCCP (41CFR 60-1.32). Interviews of individuals who are not supervisors or managers may not be conducted with a representative of your company present or monitoring what is said. Union representatives may be present but may not answer for the person being interviewed. If any person who was on either list as an employee, supervisor or manager, but is no longer employed at this facility; provide the last known contact information for each individual including their last known address, telephone number, and/or other contact information.*

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3. *Please provide written answers and documents to the following questions regarding your online application system, if applicable, during the onsite:*
  - *Does your web-site allow users to skip past repetitive navigation link?*
  - *Does your web-site provide captioning for all video and audio content?*
  - *Do all images on your web-site have accompanying text descriptions?*
  - *Can your web-site be accessed without using a mouse?*
  - *Can your web-site be navigated with a screen reader?*
  - *Does your web-site provide fully usable online forms, PDF documents and PowerPoint materials, particularly to individuals who use screen readers?*
  - *Does your web-site avoid blinking, marquee, or other auto scrolling text which might trigger epileptic seizures?*
  - *Does your web-site timeout after a period of inactivity? Does it allow users to request reasonable accommodations?*
  - *Does your web-site provide information on how individuals with disabilities can request reasonable accommodations?*
  - *Does your web-site display its equal employment opportunity policy statement?*
4. *A list of females that have taken maternity-related leave during the last two (2) years, including their name, race, job title, department, position they held before their leave, and position that they were placed in upon their return. Also, provide their current employment status with the facility and a copy of the maternity leave policy.*
5. *Samples of all personnel action forms (e.g., application, self-identification form, performance evaluations, requests for promotion or transfer, employee requisitions, and physicals, bid sheets/job postings, etc.).*
6. *Copies of any advertisements used to solicit applicants since January 1, 2009.*
7. *A list of applicants since January 1, 2009, who have self-identified as individuals with disabilities, qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans, including the job for which they applied and whether or not they were hired. Note: Most attorneys agree that disability-related questions and medical examinations are prohibited under the ADA prior to offering a position to an applicant. In this case, we responded that the company did not solicit veteran or disability status prior to making an offer of employment. The OFCCP accepted our explanation.*
8. *A list of employees who have submitted reasonable accommodations requests in the last two years and outcome.*
9. *A list of employees who have requested religious accommodations in the last two years and outcome of each request.*
10. *A list of all applicants since January 1, 2009, who were not hired because they did not meet medical job qualification requirements.*
11. *A list of all applicants since January 1, 2009, who were not promoted because they did not meet medical job qualification requirements.*
12. *Copies of documentation since January 1, 2009, demonstrating outreach and positive recruitment of individuals with disabilities, qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans.*

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13. *Documentation that demonstrates an internal auditing system has been established pursuant to 41 CFR Parts 60-250 and 60-300.*
14. *A list of union officials at the facility (if applicable), including their name, race, gender, job title, and union position held.*

## Request for Supplemental Information

Another indicator that change is on its way is that the OFCCP has started sending a “Request for Supplemental Information” letter before a contractor has even submitted its AAP in response to the Scheduling Letter. Under the former administration, only if the AAP review revealed indicators of potential discrimination, missing data or other issues was the OFCCP allowed to request additional information. The letter below, which a Yocom & McKee client received, is an example of a “Request for Supplemental Information” letter that arrives before the desk audit deadline and before any indicators of potential discrimination has been detected.

*Dear Ms. \_\_\_\_\_;*

*There are additional items that we need in order to complete your AAP submission. In order for us to analyze your compensation data please submit it in MS Excel format via e-mail along with your original submission. The OFCCP is requesting that you submit the items listed below along with your AAP.*

1. *Under Executive Order 11246, as amended, it requires contractors to engage in outreach and other efforts to broaden the pool of qualified candidates to include minorities and women. What efforts has the company made to recruit minorities and women? What recruitment sources do you use? Do these sources refer women, minorities, individuals with disabilities, and protected veterans? Specifically, we are requesting documented evidence of these efforts for these groups. Please provide us with some support data on examples of recruitment efforts with specific organizations or agencies used as outreach and recruitment sources. Examples should be submitted.*
2. *In addition, contractors and subcontractors covered under VEVRAA are required to list employment openings with the appropriate employment service delivery system concurrently with the contractor’s use of any other recruitment source or effort. Listing with an appropriate local employment service office where the job opening occurs, or with the state workforce agency job bank in the state where the job opening occurs will satisfy the job listing requirement. Examples should be submitted.*
3. *A blank copy of an employment application form.*
4. *Lastly, I have attached a copy of a document with questions that we need responses to in order to complete the compliance review.*

### *EEO Coordinator Interview – Veterans and Disabled Persons Questions*

1. *Has your company invited employees and applicants to identify themselves as individuals with disabilities and covered veterans? (741.5©(1):250.5 (d)) (If yes, please explain the process)*

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2. *Does your company post the location and hours during which the AAP may be reviewed by employees and applicants? (741.5(d): 250.5 ©) (If yes, please explain where this information is posted)*
3. *Has your company reviewed all physical and mental job requirements? [.5©] (If yes, please explain the process)*
4. *Does your company list all suitable employment openings with the state employment service? (250.4 ONLY)*
5. *What approach to outreach recruitment, dissemination of policy and other affirmative action has your company undertaken? [.6 (F)]*
6. *Has your company reasonably accommodated the physical and mental limitations of qualified employees and applicants whom are individuals with disabilities or special disabled veterans? [.6 (D)]*
7. *Does your company's application forms request information on medical conditions or type of military discharge? (Please attach a copy of an application form if available) [6.(D)]*
8. *Does your company have a policy manual for personnel? If so, are there any medical restrictions generally or for specific jobs?*
9. *Do position descriptions or qualifications standards contain any medical restrictions?*
10. *Does your company require pre-employment physical examinations or physical examinations for promotions or other changes in status?*

## 15-item Compensation Request

The OFCCP recently submitted a notice to the Office of Management and Budget of its intent to rescind the Systemic Compensation Discrimination Guidelines and Guidelines for Self-Evaluation for federal contractors. New standards will likely be issued via an OFCCP Directive or as part of the revisions to the Federal Contract Compliance Manual. In the interim, some OFCCP offices have replaced the 12-item compensation request that was used to investigate a contractor's AAP compensation data when it indicated a potential compensation discrimination issue. The OFCCP is now using a revised 15-item request. Four new items have been added and one removed. The following is an example of the 15-item follow up request letter:

*Dear Mr. \_\_\_\_\_;*

*As you are aware, your company was selected for a compliance evaluation by the OFCCP. We thank you for your timely submission of materials to our office, and look forward to working with your company as this evaluation progresses.*

*The office completed a desk audit review of the compensation data submitted. The results of our analysis indicate unexplained differences in average compensation that require further investigation of your company's compensation practices.*

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*While the desk audit results suggest possible indicators of compensation discrimination, the results should not be regarded as a finding of discrimination with respect to your company's compensation system. The desk audit analysis is only an initial screening procedure based on limited information. Therefore, in an attempt to better understand the compensation practices of your company, we are requesting that you provide additional data for further analysis and clarification. See CFR 60-1.43.*

*For the next phase of our investigation, we are requesting that you provide the following information, for all employees in your workforce as of the date used for the salary analysis included in your AAP.*

1. *Employee ID Number (or suitable ID for matching purposes, NO Social Security Numbers please);*
2. *Job Title;*
3. *Job Group (AAP) of title (for cross-reference purposes);*
4. *Department;*
5. *Gender (Coded as "Male" or "Female");*
6. *Race/Ethnicity;*
7. *Date of Hire;*
8. *Date of last change in grade/title;*
9. *Annual base salary or base hourly wage (excluding overtime, bonuses, incentives);*
10. *Part-time (please indicate average hours worked in a typical week as readily available) vs. full-time status;*
11. *Work shift;*
12. *Exempt vs. non-exempt status;*
13. *Grade level or salary band classification;*
14. *Employee location; and*
15. *All other factors not previously listed that impact compensation for your company.*

*These items are critical pieces of data that OFCCP needs to evaluate further the compensation differences identified during the desk audit. If possible, please submit the data electronically in Microsoft Excel format. We also suggest that the data be submitted on a password-protected CD or diskette.*

*At this stage of the investigation, OFCCP's goal is to better understand your company's compensation practices. Therefore, if any of the items requested above are not readily available, please contact us to discuss the specifics of the situation so that the best available and informative data is provided in a timely manner. OFCCP also encourages you to submit any additional information, data, or analysis that you believe is appropriate for OFCCP to consider in determining whether to investigate further.*

## Recreating the Equal Opportunity Survey

The OFCCP has indicated that it intends to post an Advanced Notice of Proposed Rulemaking in 2011 asking for public comments on recreating the Equal Opportunity Survey. The original EO Survey was eliminated several years ago when it was proven not to be a useful audit selection tool.

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## In Our Opinion

As the On-site, Supplemental Information, and 15 item Compensation Request letters seem to indicate, the days of a “clean” AAP resulting in a closure letter may be behind us. The OFCCP is requesting more and more items to conduct compensation analyses. Finally, as part of its compliance evaluation process, the OFCCP appears to be increasing the number of on-site reviews.

Although the OFCCP is focusing on Veteran and Disabled recruiting and accommodation, these rarely result in any monetary fines or penalties against contractors. This may change if The OFCCP is able to add Veterans and the Disabled to the Availability Analysis and is able to require contractors to track them as applicants. Contractors should ensure that they are meeting all current requirements under Veterans and the Disabled regulations. Read through the Veterans & Disabled narrative portion of your AAP to view the regulatory requirements.

If history is any guide, the OFCCP will continue spending most of its time reviewing applicant/hire issues in entry-level job groups and reviewing compensation issues. Any of your job groups that show adverse impact should be broken down by job to identify where any potential discrimination issues lie. You should continue completing compensation analyses by job to avoid framing the issues in Comparable Worth terms. Completing a simple regression analysis by job using a handful of basic variables such as hire date, time in job, and performance evaluations is still a valid compensation analysis strategy. Jobs that fail this initial analysis should of course be subject to closer review.

Contractors should prepare more thoroughly for on-site evaluations by ensuring that the proper postings are in place, I-9 documentation is in order, equal opportunity clause language is included in purchase orders and contracts, vendors and subcontractors have been notified of their obligations, any help wanted advertisements include an equal opportunity clause, web sites have options for disabled applicants, etc. Please call us to request a “Preparing for Audits” document that will inform you of everything you need to do and what to expect if your site is targeted for compliance review and on-site audit.