

Yocom & McKee, Inc. 2010 Spring AAP Newsletter

Overview

As we enter the 2nd year of the Obama Administration, we have experienced and can expect more changes from the new Director of the OFCCP, Patricia Shiu. One of the first actions last fall under Ms. Shiu's direction was to remove their self-imposed 25 compliance reviews per year per employer limit. While former Director Charles James' work experience included time in human resource departments, Ms. Shiu's experience is primarily as a plaintiff lawyer. One can expect that Ms. Shiu's approach and awareness of employer issues will be different than Mr. James'.

The OFCCP's budget increased for 2010 and over 200 new Compliance Officers are being hired. The appointment of more Compliance Officers is likely to result in more audits and on-site reviews. Construction contracts have come under increased scrutiny as a result of the Federal stimulus legislation. Consequently, many of the new OFCCP Compliance Officers will be involved in compliance reviews of the construction industry. Contractors can also expect new female and minority construction goals to be proposed by the OFCCP in the near future to replace the current goals that were set over 20 years ago.

Ms. Shiu stated in a recent webinar that the OFCCP will be ceasing to conduct expedited reviews. Although she did not elaborate, the statement appears to be a response to the practice under former Director Charles James to end Compliance Reviews at the Desk Audit stage if the AAP was complete, and without significant compensation or adverse impact activity. Contractors may again face automatic on-site visits as part of regular Compliance Reviews. OFCCP's Midwest Region is testing this new policy. They appear to be conducting a pilot program in which every Compliance Review includes at least a one day on-site phase. Other regions still routinely close compliance reviews without an on-site visit if there are no indications of adverse impact or compensation issues.

2010 Census and the American Community Survey

If you have been observant, you might have noticed everyone is receiving the short census form. None of the questions on the form address occupation status. So if no one is receiving the long form during the 2010 Census, how will we get occupational data to be used in affirmative action plans? Meet the American Community Survey.

The American Community Survey (ACS), a relatively new survey conducted by the U.S. Census Bureau, is ushering in the most substantial change in the decennial census in more than 60 years. The ACS is a nationwide, continuous survey designed to provide communities with reliable and timely demographic, housing, social, and economic data every year. The ACS will replace the decennial census long form in 2010 and thereafter by collecting long-form-type information throughout the decade rather than only once every 10 years. The ACS data will provide, for the first time, a continuous stream of updated information for states and local areas, and will revolutionize the way we use data to understand our communities.

The ACS began in 1996 and is conducted every month. 1 and 3 year estimates are produced. The survey has been expanded over time in content and geographically until it became a nationwide survey with the intent on replacing the census long form, <http://www.census.gov/acs/www/AdvMeth/CollProc/CollProc1.htm>.

No date has been announced for when the ASC data will be available for use in affirmative action plans. Will the ASC update AAP related data yearly, every three years, or only every ten? Could it be possible that the elusive data for Veterans and the Disabled might be part of the ASC and used for setting goals for these groups in affirmative action planning?

Veteran and Disabled Issues

OFCCP Director Shiu also announced that she will be placing additional emphasis on Veteran and Disabled affirmative action issues. One proposal is to set goals for these groups, but several obstacles may prevent this approach. First, getting availability data for Veterans and the Disabled is difficult. Unlike race and gender data, Veterans and Disabled information is not collected by occupation for the Census, although the new American Community Survey could become the vehicle for collecting this data. Secondly, a person's disability status is not necessarily a permanent condition like race and gender, so the statistics are fluid. Finally, it is illegal to ask applicants to identify their disability status prior to offering a position, so conducting any sort of Adverse Impact Analysis of hiring activity for Disabled persons or Veterans is not permissible under current laws and regulations.

At this point, rather than trying to set goals, the OFCCP is taking a different approach during Compliance reviews. Compliance Officers are probing deeper into a contractor's good faith efforts to recruit qualified Veteran and Disabled applicants. They are suggesting that to show good faith efforts contractors should collect data from applicants about who referred them to the job opening. The contractor can then evaluate the numbers of applicants and resulting hires from every source and make decisions about which are effective and which need to be changed. This evaluation process, although just beginning at the OFCCP, may represent the means for the OFCCP to place more emphasis on recruiting and hiring Veterans and the Disabled.

In at least one audit, the OFCCP required the contractor to have a statement on their web site regarding how an applicant with disability can request a reasonable accommodation if they are unable to use the on-line application system. This is the OFCCP's suggested language:

"As an equal opportunity employer, (your company's name) is committed to a diverse workforce. In order to ensure reasonable accommodation for individuals protected by Section 503 of the Rehabilitation Act of 1973, the Vietnam Veterans' Readjustment Act of 1974, and Title I of the Americans with Disabilities Act of 1990, applicants that require accommodation in the job application process may contact xxx-xxx-xxxx for assistance."

Director Shiu has also stated OFCCP's goal is to have revised Disabled and Veteran regulations ready by early 2011.

Tipping Point/Trigger Point test

We have received reports of contractors passing the Tipping Point/Trigger Point test, and the OFCCP still conducting further investigations into compensation issues, especially on jobs with many employees. This seems to confirm rumors that the OFCCP is not satisfied with the Tipping Point/Trigger Point test as a first tier compensation tool and is searching for alternatives.

Most Favored Group

During some Compliance Reviews, Compliance Officers have been asking for Adverse Impact and Compensation analyses to be completed by “most favored group.” Whether this is official OFCCP policy is not clear at this time. The OFCCP’s own policy manual states that whites and males should be defaulted as the most favored group. It seems clear the OFCCP can legally ask for these analyses by most favored group, but traditionally they have been very disinterested in reverse discrimination issues.

A lawyer speaking at a recent Industrial Liaison Group meeting stated that he has been involved in several dozen cases now where the OFCCP used the “most favored group” for Adverse Impact and Compensation analysis. He believes because the OFCCP has adopted the 2std Deviation test, it is intellectually dishonest not to consider reverse discrimination. Basically anytime the 2std Deviation test shows greater than 2 standard deviations, a presumption the action did not occur by chance exists and must be investigated by the OFCCP. At the same meeting, Nicole Huggins, Denver District Manager for the OFCCP confirmed they indeed review any Adverse Impact situation where the 2std Deviation test indicates a problem, regardless of the protected group.

Most Common Pitfalls When Analyzing Employment Activity

Ms. Huggins also listed the most common pitfalls found in Contractors’ analysis of employment activity.

- Failure to determine favored group
- Failure to maintain records
- Failure to conduct analysis by each step in process
- Failure to determine statistical significance
- Failure to identify and state minimum qualifications
- Failure to uniformly apply qualifications
- Failure to conduct periodic analysis for early detection of problem areas

New in the Complete AAP Software

On-line Training Manual & Training Videos give users the ability to access self-paced software training. Read a section of the Training Manual and then view a video demonstrating exactly how to use the software to the fullest extent.

The Complete AAP has the ability to run Adverse Impact and Compensation reports by most favored group in order to identify reverse discrimination.