

The Complete AAP News

Yocom & McKee, Inc.

Special points of interest:

- Official definition of Applicant—informal guidelines are announced
- 2000 Census Data scheduled for fall 2003
- New Race/Ethnic categories not to be decided until late 2003
- Functional Business AAPs removed from audit list—for now

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Expect EO Surveys before 2003

Charles James, Director of OFCCP, revealed at a recent National Employment Law Institute conference that Equal Opportunity Surveys will be mailed before the end of 2002. Rumors about the demise of these surveys under the Bush Administration have surfaced, but at the conference in November, Mr. James stated the current rules clearly require use of the EO Survey.

41 CFR 60-2.18 requires that: "Each year, OFCCP will designate a substantial portion of all non-construction contractor establishments to prepare and file an Equal Opportunity Survey." Any attempt to change or eliminate the EO Survey requires a showing through "statistical analysis" that the

survey is no longer of value, and all Notice and Public comment procedures must be followed. These same Notice and Public comment procedures to institute EO Survey took several years to navigate.

Mr. James would not comment on exactly how many surveys will be mailed. Approximately 50,000 EO Surveys were sent during the last mailing in 2001.

The EO Survey was designed as an audit selection tool to replace the current EEO-1 based system. OFCCP is analyzing the usefulness of the EO Survey for selection purposes and designing implementation procedures.



Charles E. James Sr.
Deputy Assistant Secretary
for the Employment
Standards Administration
and Director of the Office
of Federal Contract
Compliance Programs

Who is an Applicant?

The OFCCP and EEOC are still working on a definition of "applicant." In light of modern recruitment practices, the OMB has insisted that "applicant" be defined to justify continued use of the 1978 Employee selection Guidelines. The Guidelines state that "the concept of an

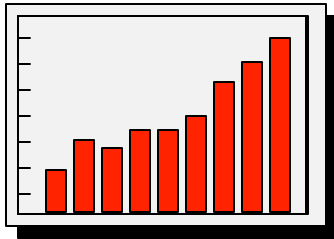
applicant is that of a person who has indicated an interest in being considered for hiring, promotion or other employment opportunity." The latest definition deadline is March 31, 2003, but don't be surprised if that deadline is extended.

Meanwhile, the OFCCP has sug-

gested interim guidelines for contractors who desire a working definition that is more flexible than the current definition.

OFCCP Director Charles James stated at a National Employment Law Institute conference in Washington that all records of those who express interest

News from Inside the OFCCP



“\$28,975,000 was collected from 210 contractors, an average of almost \$138,000 each!”

The Office of Federal Contract Compliance Programs (OFCCP) completed 7,211 compliance evaluations in 2001. 36% were found to have violations. 67 referrals were made to the Regional or National Solicitor's office. Solicitors are the government attorneys who take enforcement action when a settlement between the OFCCP and a contractor cannot be reached.

One debarment was reported in 2001. \$28,975,000 was collected from 210 contractors; an average of almost \$138,000 each! An additional \$9,036,000 was assessed in backpay penalties for 6,925 alleged victims, which averaged to about \$1,300 per person.

There were 444 Compliance Officers and 332 managerial and administrative staff working for the OFCCP in 2001. Over 60% of the management staff will reach retirement age in the next couple years. While compliance officers continue to have a high turnover rate, the management staff has remained fairly stable. Expect a period of training and some inconsistency while new management personnel are put in place.

The OFCCP audits approximately 3% of all federal contractors in a year. This ranks second behind the federal Wage and Hour division for total number of actual on-site visits in the workplace by all federal agencies.

An average compliance evaluation, from scheduling letter to final resolution, averages 12 months. The period to complete an audit has been slowly rising each year.

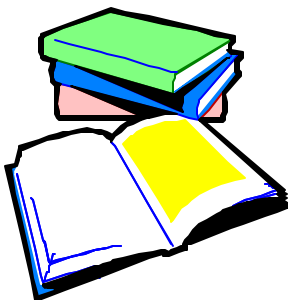
The OFCCP has no efficient way to know how many of a contractor's locations are being or have been recently reviewed. They are working on a solution that should give their compliance officers this information in the near future. This information would limit reviews of multiple locations of the same contractor where one has been recently reviewed and had no problems. Obviously this system would also alert compliance officers to other contractor locations that had problems when they were audited.

In 2002, Field Solicitors began reviewing all conciliation agreements before they were presented to contractors. This

process checked for enforceability of the agreement and served to train personnel to draft better documents. It is not known whether this practice will continue in 2003.

The United States Census Bureau has decided upon 472 occupational categories for the 2000 Census data. They estimate that the data will be available to the public sometime late 2003.

Functional AAP's



FAAPs are affirmative action plans based on functional or business units rather than physical location. Employees from multiple locations may be included in one FAAP.

A Directive explaining how the OFCCP will process Functional AAP (FAAP) applications was published in March of 2002.

As of November 2002, the OFCCP had received 92 applications for FAAPs and approved 31. Contractors who have gone through the approval process report that it amounts to a mini-audit. Each FAAP is tailored to the particular contractor, no standard FAAP format exists.

Approved FAAP contractors are

removed from the current audit selection system until procedures for auditing FAAPs have been finalized. Those who have FAAPs can rest assured they will be audited after the procedures are in place!

Compensation Issues in Your AAP

Reviewing compensation has become a standard part of any OFCCP audit. There are four legal grounds for examining compensation issues.

1. Equal Pay Act
2. Individual Disparate Treatment
3. Class-type Disparate Treatment
4. Disparate Impact

The Equal Pay Act prohibits pay disparities based on gender. There is strict liability for violations, no intent to discriminate is required. Men and women in substantially similar jobs must be paid the same. You may legally differentiate their pay only if there are differences of seniority, merit, productivity, or any other factor other than sex. Most of these claims revolve around proving that the jobs are "substantially similar." Comparable jobs and minorities are not covered by the Equal Pay Act.

Individual Disparate Treatment theory is used by the OFCCP in the vast majority of their audits. The OFCCP calls this their "Cohort Analysis." A job is identified where one or more minorities or women are paid less than whites or men. The burden is then on you to show a "legitimate, non-discriminatory" reason for the pay disparity. The OFCCP would have to prove that your reasons were a pretext for

discrimination in order for their case to succeed in court.

Class-type Disparate Treatment involves showing a pattern or practice of discrimination through statistical disparity. The OFCCP often tries to use their average and mean analysis of wages to prove disparities, but very quickly moves to comparing individually affected persons. You can rebut the statistical disparity by using other statistical tests such as the Regression Analysis in the Complete AAP, or by articulating a "legitimate, non-discriminatory" reason for each individual's pay disparity, just as in an Individual Disparate Treatment case. The OFCCP must then prove that your evidence is not credible in order to enforce penalties.

Disparate Impact theory is based upon the idea that discrimination can be the result of a practice or policy that appears neutral on its face, but that in reality has an adverse impact on women or minorities. The OFCCP shows that a particular policy/procedure has a statistically significant disparity on a protected group. You can submit your own statistical analysis to rebut OFCCP's statistics, and/or show that the practice is job related and consistent with business necessity. OFCCP will then try to show there were alternatives available that would have had a lesser impact.

Our experience has been that OFCCP's compensation examinations almost always end up being a "Cohort" analysis. We suggest that you educate the Compliance Officer about the jobs in question and present legitimate, business-related reasons for disparities in pay. Most compensation issues can be successfully resolved in this manner.

If you find it necessary to perform a statistically based defense, it is recommended that you retain a firm with specific expertise in employment compensation claims. Performing multiple regression analysis in compensation issues can be very complicated and expensive!



"OFCCP's compensation examinations almost always end up being a "Cohort" analysis."

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Employment Tracker software Update

In 2000, Yocom & McKee notified users that we would not be updating the Employment Tracker software as changes to race, ethnic, veterans and other reporting requirements were made.

Some of our users of the Employment Tracker have converted to !Trak-It Solutions Applicant tracking software. !Trak-It Solutions offers a service that

will move your Employment Tracker applicant and hire data into !Trak-It Applicant tracking software.

For more information, contact John Enyedy at 916-728-4880

Who is an Applicant? (continued from page 1)

must be maintained, but contractors have some discretion to determine at what point they will be considered applicants. Only when a person is considered an applicant do race and gender data need to be collected.

Harold Busch, Director of Program Operations, explained that one becomes an applicant a point between reading the resume and conducting the interview. He stressed that it is OFCCP's view that a person becomes an applicant before the interview stage. The most likely spot to begin the collection of race and gender data is after you have sorted interested persons by qualifications.

For example, if you accept resumes for an open Engineering position, you could sort them by the requirement that they possess an engineering degree. Those who do not possess a degree are not considered applicants and you need not collect race or gender data. Further, you may sort those with engineering degrees into years of experience. If your position requires 5 years of relevant experience, you can eliminate those with less than 5 years experience from consideration as applicants and not collect their race and gender data. Only those with Engineering degrees and 5 years relevant experience are considered "applicants" for the open position. Race and

gender data is collected only for these "qualified" applicants.

It is important to note that the resumes from those persons that you determined were not must be kept according to Mr. James and Mr. Busch.

During any OFCCP audit, you need to be prepared to defend the minimal qualifications standard used to determine who was considered an applicant. Using an unreasonable standards or inconsistent application of the standard could result in the Compliance Officer broadening your applicant pool definition.