

# STEERING: Where Hiring Meets Compensation

# Presenters

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## **Joyce Morgan, President/Owner, Morgan Consulting Services, LLC**

Joyce Morgan is President of Morgan Consulting Services, LLC. Joyce began her consulting practice in 2006 as a natural progression from her career with OFCCP. Joyce retired from OFCCP in August 2005 after 26+ years. She began her career with OFCCP in 1979 moving quickly through the ranks to management serving as Assistant District Director, District Director and finally Deputy Regional Director for the two largest regions—Dallas, Texas, and Chicago, Illinois—covering approximately 70% of the entire United States. This progression placed her in a constant mobile position allowing her to work in 4 of the current 6 regions of OFCCP—a plus obviously as no region is alike. Joyce's career with OFCCP, coupled with her consulting practice, makes her one of the unique consultants and definitely an expert in OFCCP regulations and the Agency's administration and implementation of the respective laws enforced. Her relationship building carried over from her OFCCP management roles to the Federal contracting community and obviously serves both factions very well.

# Presenters

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## **N. Darlene Walker Ph.D., Founder & President, N. Darlene Walker & Associates, L.P.**

In this capacity, Darlene serves as a consultant to major corporations in the fields of EEO and Affirmative Action Planning. She prepares annual Affirmative Action Plans, provides consultation and technical assistance in OFCCP compliance reviews, manages company responses to EEO charges and provides general policy assistance and training in Human Resources. Darlene has been active as a consultant in this field for more than 30 years.

Darlene received her Ph.D. in political science from the University of North Carolina at Chapel Hill. She was a member of the faculty at the University of Houston for twelve years, teaching graduate and undergraduate courses and publishing in the field of public law and regulation. Darlene has also been a visiting professor at The University of Texas at Austin and Cornell University in Ithaca, New York.

## **J. Anne Clayton, Attorney, N. Darlene Walker & Associates, L.P.**

Anne is a senior attorney and corporate trainer at N. Darlene Walker & Associates, a consulting company specializing in equal employment opportunity and affirmative action. She graduated in accounting from Louisiana State University and has a law degree from Tulane Law School. Before joining N. Darlene Walker & Associates, Ms. Clayton practiced law at Vinson & Elkins and then served in the legal department for Compaq Computer Corporation. Ms. Clayton has trained thousands of employees and managers on the topic of equal employment laws and policies, including workplace harassment, affirmative action planning, applicant flow tracking and performance management.

# Disclaimer

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The materials contained in this presentation were prepared for informational purposes. Attendees should consult with counsel before taking any actions and should not consider these materials or discussions about these materials to be legal or other advice.

# Agenda

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- Definition of Steering
- Importance of Steering
- Identifying Steering
- Risk of Not Addressing Steering
- Best Practices to Avoid Steering Allegations

# Definition of Steering

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- OFCCP Regulatory Definition
- References:
  - OFCCP Manual – CMCE's; not routine audits
  - Directive 307 – Compensation
  - Press Releases!
  - FY 2014 OFCCP Congressional Budget Justification

# Working Definition of Steering

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Steering is a policy or practice of directing applicants or employees into certain jobs or departments based on a gender, race or ethnic stereotype AND the direction results in:

- lower compensation
- reduced advancement opportunities
- lower rates of employment or
- other unfavorable terms and conditions of employment



# Why is Steering Important

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- Merges low hanging fruit “Failure to Hire” cases with “Compensation” cases
- Gives OFCCP an additional tool for a systemic approach to compensation resulting in larger settlements
- May prompt OFCCP to take a single establishment finding and extend it to multiple establishments with open or in subsequent audits



# How to Find Possible Indicators of Steering

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## Annual Obligations

- EEO-1 Reports
- AAP
  - Workforce Analysis
  - Job Group/Job Title/Utilization Analysis
  - Disparate Impact Analysis
- Annual Compensation Analyses

# EEO-1 Reports

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## Categories and Establishments

- Review each category and establishment for concentrations and underrepresentation by race, ethnicity and gender.
- Compare your data to NAICS data for your industry.
  - Available by US, State, and CBSA
  - If your organization has lots of underrepresentation or concentration atypical to your industry, investigate further. Look for more information in your AAP.
- Focus on categories with entry level jobs, especially those with lots of hiring and turnover as those are of particular interest to the OFCCP because there are large numbers of easily comparable employees.
- Look at under 50 facilities compared to the facilities they are rolled into for an AAP and to each other.

## Workforce Analysis

- Look for concentrations/underrepresentation in areas of facility by gender or race
  - Inside vs. Outdoor work area
  - Dirty vs. Clean
  - Front office vs. Back office
  - Heavy duty jobs vs. Light duty jobs
  - Full time vs. Part time
  - Large machine operators vs. Fine motor skill assemblers
  - Caregivers vs. Transporters
  - Inside sales vs. Outside sales
  - Large accounts/small accounts
  - Day shift vs. Night shift

# Job Groups/Job Title/Utilization

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Look for concentrations/underrepresentation by Job Group and Job Title.

- Rank jobs within job groups by lowest to highest paid.
- Are there concentrations by race or gender in the lower paying positions.
- Is the concentration an availability issue or steering ? If availability for the underrepresented group is correspondingly low, availability may explain the issue.
- Check applicant flow. What jobs did the underrepresented group apply for? If they did not apply for a specific job ('any" or "all") or applied for more than one job, what jobs were they actually considered for? Is there steering?
  - Possible defense: Applicant preference. Look at interview notes to see if a candidate expressed a job preference . Look at dispositions to see if underrepresented candidates withdrew themselves from consideration.
  - Possible defense: Members in the underrepresented group were not qualified or the best qualified.

## Disparate Impact - Hires

- Look at adverse impact by job group.
- Also look at adverse impact by job title.
- Check to see if areas of adverse impact correspond with your areas of concentration or underrepresentation. If they do, this is a red flag for steering issues.
- Hiring practices vulnerable to steering allegations:
  - Multiple job titles (in same or different job groups) filled from the same pool of applicants
  - Large numbers of applicants for any one title or group (If this is the case, consider whether the Internet Applicant Rule was consistently and correctly applied to pool)
  - Multiple hires from the same requisition if positions are different in any way that affects pay
  - Allowing applicants to apply for “any” or “all” positions
  - Allowing managers to move applicants from one requisition to another
  - One to one hire

## Disparate Impact - Promotions

- Do areas of disparate impact align with areas of concentration?
- Analyze promotion activity from and placement into Job Group and Job Title.
- Combine assessment with previous years, if necessary.
- Where are the dead end jobs? Are there concentrations by gender, race and/or ethnicity?
- Check promotional sequences to see if there are gender, race, ethnic concentrations in the bottom of the sequence. If yes, check the disparate impact by title.
- When employees are promoted, are they promoted into different jobs concentrated by race, ethnicity or gender?
- To avoid steering allegations in promotions:
  - Post ALL open positions internally & allow employees to bid for them
  - Avoid shoulder tap promotions



# Annual Compensation Review

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- An annual study is required by Regulation.
- Analyze by Job Group/Pay Analysis Groups.
  - Do it under Attorney-Client Privilege.
- Where there are large or statistically significant differences by race or gender, look for concentrations by race, gender or ethnicity in the job titles of these groups. Is there a difference in pay between job titles where there are gender or race/ethnic differences?
- Analyze by Job Titles. What factors result in pay differences within a title? Could steering be involved?
- Examine all components of pay:
  - Blue Collar - base pay, overtime, shift differential
  - White Collar – base pay, commissions, bonuses, stock options, incentive pay



# Risks of Not Addressing Steering

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- Not hiring the best people as a result of stereotyping
- Monetary settlements and non-monetary remedies
- PR issues – OFCCP press release and publication of conciliation agreement
- Low morale/poor reputation
- Information sharing with other agencies
- Blacklisting issues - Fair Pay and Safe Workplaces

# Conciliation Agreements

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- Multiple Establishments
  - Moving Applicants from requisition to requisition
  - Single Establishments
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- Conciliation agreements can be found on the OFCCP's FOIA webpage at [www.dol.gov/ofccp/foia/foiareadingroom/](http://www.dol.gov/ofccp/foia/foiareadingroom/)

# Multiple Establishments

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## **G&K Services (2013)** – one facility

- ✦ Paid \$265,983 to settle charges of steering 59 women into lower paid light duty jobs rather than higher paid heavy duty jobs
- Paid \$23,968 to 331 male applicants denied light duty jobs
- Agreed to hire 59 females into heavy duty jobs. Reportedly 0 took offer.

## **G&K Services (2014)** – one facility

- Paid \$30,000 for black and white applicants denied General Labor jobs.

## **G&K Services (2015)** - 9 facilities - Paid \$1.8 million to settle:

- Steering 444 females into lower paid light duty jobs
- Failure to hire 2,327 males into lower paid light duty jobs
- Failure to hire 456 blacks and 111 whites
- Agreed to hire 58 females into higher paid jobs
- Agreed to hire 33 men, 40 blacks and 5 whites into lower paid jobs

# Multiple Establishments

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## **G&K Non Monetary Remedies include:**

- Revise job descriptions
- Advertise internally and externally
- Revise comp guidelines
- Complete disclosure to applicants
- Reviews to ensure hiring practices consistent with UGESP
- Adverse impact analysis of hires
- Good faith outreach to females and minorities
- Training
- Independent settlement administrator
- Reporting

# Multiple Establishments

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## Alsco (2014 and 2016)

- 2014 - Paid \$5,288 to settle charges of placing female applicants for Operative positions into lower paying Feeder Folder jobs while male applicants were placed into higher paying Checker Sorter positions. Also paid \$8,313 to male applicants for Operative positions
- 2016 - Paid \$7,758 to 22 female operatives for steering them into lower paying positions while hiring men into higher paying positions
- 2014 Remedies
  - Salary adjustment in Feeder Folder title to same as rest of Operatives
  - New applicant tracking system
  - Revise selection procedures
  - Training

# Multiple Establishments

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## **Alsco (2016)**

- Agreed to hire 5 females into “similar work and higher paying positions”
- OFCCP alleged that failure to take affirmative action resulted in the near exclusion of females, Blacks and Hispanics in management positions and complete exclusion of females in sales & marketing and maintenance positions.
- Agreed to institute a development program to advance females, blacks and Hispanics into higher paying positions
- Remedies – Self analysis of selections, training, policy and procedure revisions.



# Moving applicants from Req to Req

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## Comcast (2015)

- Paid \$53,633 to settle charges of steering 96 women into lower-paid customer cable services jobs and men into higher-paid customer internet service jobs
- Agreed to hire 31 females into internet services
- Paid \$133,366 for failure to hire African-American, Asian and Hispanic applicants into both the cable and internet customer service jobs as a result of hiring tests that were not validated or uniformly applied
- Revised job titles and selection procedures and held training
- Comp analysis comparing current wages of females steered during audit period into lower paying job to males hired during audit period into higher paying job. Make pay adjustments if difference in pay is more than 2% and is attributable to steering
- Subsequently combined these two titles into one title



# Single Establishments

## **Home Depot (2015)**

- Paid 46 women who applied for positions and were either placed into cashier positions instead of sales associate positions or not hired
  - \$71,022 to applicants not hired
  - \$12,386 to applicants hired as cashiers
- OFCCP alleged female applicants or employees were as qualified or better qualified than some of the males selected for sales associate positions
- OFCCP also found the store failed to maintain interview score guides for applicants during audit period

## **Central Parking (2014)**

- Paid \$100,000 to settle charges of steering women into lower paid cashier jobs and men into higher paid valet jobs
- Agreed to place 65 of the women into valet positions
- Agreed to undertake extensive self-monitoring
- Also paid \$175,000 for failure to hire African Americans as valets

# Best Practices

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- Require job seekers to apply online to a specific, open position tied to a specific requisition.
- Ensure your posting includes position specifics including:
  - Exact type of role applying for
  - Day shift or Night shift
  - Part time or Full time
  - Work location
  - Telecommuting opportunities
- Require applicants to express an interest for any job for which he or she wishes to be considered.
- Do not permit managers, recruiters or HR to move applicants from requisition to requisition.
- Ensure all applicants are treated the same based on qualifications.

## Best Practices (Cont)

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- Analyze your applicant flow data to ensure you are counting as “applicants” only those who meet the OFCCP’s Internet Applicant Rule.
- Document any preferences mentioned by applicants in interviews or by employees in performance reviews.
- Post open positions to allow employees to bid for them; avoid shoulder tap promotions and have well defined standards for promotions.
- Review advancement opportunities to determine whether there is equal access to higher paying positions.
- Train managers and recruiters on best practices and the dangers of stereotyping.

Questions?