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RECENT SIGNIFICANT OFCCP DEVELOPMENTS: WHERE THE OBAMA ADMINISTRATION HAS TAKEN US AND WHAT'S NEXT?

AUGUST 3, 2016

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**THESE POWERPOINT SLIDES ARE
MEANT TO ASSIST IN A GENERAL
UNDERSTANDING OF THE CURRENT
OFCCP COMPLIANCE OBLIGATIONS. IT
IS NOT TO BE REGARDED AS LEGAL
ADVICE. COMPANIES OR INDIVIDUALS
WITH PARTICULAR QUESTIONS
SHOULD SEEK ADVICE OF COUNSEL.**

ABBREVIATION KEY

COs	=	Compliance Officers
EEOC	=	Equal Employment Opportunity Commission
EO	=	Executive Order
Ees	=	Employees
Equal Pay Report	=	EPR
<i>Federal Register</i>	=	<i>FR</i>
FY	=	Fiscal Year
Kor	=	Contractor
NPRM	=	Notice of Proposed Rule Making
OMB	=	Office of Management & Budget (the operating arm of The White House)
USDOL	=	United States Department of Labor

1. THE PRESIDENT'S EXECUTIVE ORDER HIT PARADE

Presidential Action	Regulatory Response	*Further Regulatory Response
1) Minimum Wage , EO 13658, amends nothing (February 12, 2014; 79 <i>FR</i> 9851-February 20, 2014)	January 1, 2015: New \$10.10 Federal Minimum Wage became legally effective as to “new” contracts signed on or after this date	January 1, 2016: Increase to \$10.15/hr. Legally effective as to a “new” federal K/Sub-K, meaning when a company first signs a new covered federal K/Sub-K <u>or</u> alters, amends or extends (through bi-lateral negotiation) an existing K/SubK
2) Non-Retaliation for Disclosure of Compensation Information , EO 13665, amending EO 11246 (April 8, 2014; 79 <i>FR</i> 20749-April 11, 2014)	September 17, 2014: OFCCP’s NPRM re: “Government contractors prohibitions against pay secrecy policies and actions”	September 11, 2015: OFCCP published its Final Rule containing “Prohibitions Against Pay Secrecy Policies and Actions”
		January 11, 2016: No litigation filed. Becomes legally effective when a Kor signs a “new” federal K/Sub-K after this date (see above)
3) “Presidential Memorandum” [directing OFCCP to issue compensation data collection tool] amending nothing (April 9, 2014)	August 8, 2014: OFCCP’s NPRM re “Government contractors, Requirement To Report summary data on employee compensation”	January 5, 2016: WITHDRAWN. But see EEOC EEO-1 Proposal
4) Equal Employment Opportunity [LGBT] , EO 13672 amending EO 11478 and 11246 (July 21, 2014; 79 <i>FR</i> 42971-July 23, 2014)	December 9, 2014: OFCCP Final Rule: LGBT (legally effective April 8, 2015)	<p>April 10, 2015: FAR Council Published Interim Rule re OFCCP LGBT Final Rule. See 80 <i>FR</i> 19504</p> <p>November 4, 2015: Final Rule published. See 80 <i>FR</i> 75907</p> <p>December 4, 2015: Final Rule legally effective.</p>

NOTE: there are often two different dates on Presidential documents

- Date signed
- Date in *Federal Register*... a few days after signing

1. THE PRESIDENT'S EXECUTIVE ORDER HIT PARADE (CON'T)

Presidential Action	Regulatory Response	*Further Regulatory Response
5) Fair Pay and Safe Workplaces [Labor Law Compliance Certifications for K Bids], EO 13673 (July 31, 2014; 79 <i>FR</i> 45309-August 5, 2014) amending nothing	May 28, 2015: -FAR Council published NPRM to implement EO 13673. 80 <i>Federal Register</i> 30548 -Comments were due on/before July 27, 2015 -USDOL published “Proposed guidance” to implement EO 13673: 80 <i>Federal Register</i> 30574 -Comments were due on/before July 27, 2015	December 18, 2015: Congressional Appropriations Committees denied USDOL budget for “Labor Compliance Advisors” May 4, 2016: USDOL and FAR Council submitted to OMB their proposed Final “Guidance” and Rule, respectively
6) “Establishing Paid Sick Leave for Federal Contractors”	February 25, 2016: -USDOL WH Division issued NPRM -Comments were due April 12, 2016 (as extended)	July 25, 2016: USDOL sent draft Final Rule to OMB

NOTE: there are often two different dates on Presidential documents

- Date signed
- Date in *Federal Register*... a few days after signing

2. DOL'S RECENT REGULATORY PUBLICATIONS

DATE	OFCCP REGULATORY ACTION
1. March 24, 2014	OFCCP's Final Regulations § 503/VEVRAA
2. September 25, 2014	VETS Final Rule: Annual Report from federal contractors: VETS-4212
3. October 1, 2014	OFCCP New Audit Scheduling Letter and Itemized Listing (effective Oct. 15, 2014)
4. October 27, 2014	VETS-4212 Final Rules legally effective
5. November 2014	OMB approved the VETS-4212 Form
6. June 14, 2016	OFCCP published Final Rule re “Discrimination On The Basis Of Sex” (i.e., “Sex Discrimination” Rule) 8/15/16 : Legally effective

3. UPCOMING DATES OF “BALLS IN THE AIR”



3. UPCOMING DATES (CON'T.)

WHAT	NEW DATES	OLD DATES
Proposed Construction NPRM:	August, 2016 (probably dead)	September 2015 November 2015 May 2016
FINAL Equal Pay Report Rule:	WITHDRAWN	
Establishing Paid Sick Leave for Federal Contractors	September 30, 2016 (if it happens)	None

3. UPCOMING DATES (CON'T.)

WHAT	NEW DATES	OLD DATES
FAR Council Final Rule re Fair Pay and Safe Workplaces and U.S. DOL's Final "Guidance" re same	August 2016 Watch out for Labor Day! (September 5, 2016)	April 2016

4. OFCCP'S BIGGEST CHANGE DURING THE OBAMA ADMINISTRATION – KUDOS TO THE OFCCP FOR THIS!

SECTION 503 & VEVRAA DO NOT REQUIRE GOOD FAITH EFFORTS!

- There's a new model called "Effectiveness"!
- "Good Faith Efforts" model is gone, gone, gone as to Section 503/VEVRAA (NOT EO 11246...YET!)
- End of an era where all a Kor had to do was send a letter explaining its affirmative action status and try, but only "spin wheels"
- Now the OFCCP wants to see RESULTS! And good for them – this was definitely needed!

4. OFCCP'S BIGGEST CHANGE (Con't)

- **SECTION 503 & VEVRAA DO NOT REQUIRE GOOD FAITH EFFORTS! (Con't)**
- This is why you now must now record “Data Metrics” and undertake “Effectiveness Assessments” (Section 503/VEVRAA):
 - To determine if your outreach & positive recruitment efforts have been successful
 - To force your thinking and cause your thoughtful and individualized review of EACH AND EVERY recruitment outreach effort and activity EACH YEAR in EACH Section 503/VEVRAA AAP:
 - -Are you just mindlessly continuing your old ‘GFE’ exercises (without monitoring results achieved) and simply delivering jobs to diverse sites without knowing with what effect, or are you truly building relationships that will benefit your recruiting program and create successes to hire protected veterans and individuals with disabilities?

4. OFCCP'S BIGGEST CHANGE (CON'T)

- **SECTION 503 & VEVRAA DO NOT REQUIRE GOOD FAITH EFFORTS! (Con't)**
- **PRACTICAL TAKEAWAYS:**
 - Remove 'Good Faith Efforts' terminology from your Section 503 & VEVRAA AAP's (if you still have that concept and language in those AAPs)
 - Consider voluntarily adopting the new "Effectiveness" model as to ALL of your recruiting efforts – even those pursuant to EO 11246
 - EO 11246 still requires Good Faith Efforts model,

BUT...

- ***NOTHING*** prevents you from VOLUNTARILY incorporating an "Effectiveness Review" into your EO 11246 Plans to measure your efforts and results to source female and/or minority candidates!
- In fact, many OFCCP COs are already asking in audits for your Outreach & Positive Recruitment efforts for Executive Order AAPs

5. THE FINAL BATCH OF SAND IS NOW TRICKLING THROUGH THE HOURGLASS AS THE OBAMA OFCCP PLANS ITS COMING EXIT



5. OBAMA OFCCP PLANS ITS EXIT (CON'T)

The Obama Administration has less than 6 months left in office.

The Chief Justice of The United States will swear in the next President of the United States on Friday January 20, 2017.

Here is a link to a countdown clock by days, hours, minutes and seconds:

<http://www.timeanddate.com/countdown/to?msg=Time%20left%20until%20Obama%20leaves%20office%22&p0=263&year=2017&month=1&day=20&hour=0&min=0&sec=0>

5. OBAMA OFCCP PLANS ITS EXIT (CON'T)

As a legal matter, OFCCP MUST publish its last FINAL Rules in the *Federal Register* on or before Wednesday December 21, 2016 so that any such Rules have 30 days during which to become “legally effective” before the new President takes office and possibly “stays” any still inchoate Rules not yet fully “baked” in public view for 30 full days before becoming “legally effective.”

4 $\frac{3}{4}$ months left

5. OBAMA OFCCP PLANS ITS EXIT (CON'T)

Question: So, What happens to Pat Shiu?

- Pat's appointment expires with USDOL Secretary Perez' appointment on January 20, at noon.
- Pat could leave at any time, especially if she went to work in Hillary's campaign, hoping to position herself for a new appointment elsewhere in the next Administration (if Hillary wins).
- However, Pat has a lot of unfinished business blocking the exits of OFCCP.

5. OBAMA OFCCP PLANS ITS EXIT (CON'T)

Question: What happens after Pat Shiu?

A three-phase transition begins:

Phase I: Nov 9, 2016 – Jan 20, 2017 (noon EST).

If Pat remains at OFCCP past November 8, 2016 the new President Elect's Transition Team will enter USDOL on the morning of November 9, 2016.

- The tug-of-war between the incoming and the outgoing Administration then begins.

5. OBAMA OFCCP PLANS ITS EXIT (CON'T)

If Hillary wins, transition will be fairly comfortable:



5. OBAMA OFCCP PLANS ITS EXIT (CON'T)

If Trump wins:



5. OBAMA OFCCP PLANS ITS EXIT (CON'T)

Phase II: After Jan 20, 2017: Career Ees Run The Show (until the new political appointees show up)

- Subject to control of the new Administration
- Interim “Acting” career-employee Director

Phase III: Sometime in 2017 The New Political Appointees Arrive and Set New Course and Direction

- After Secretary of Labor confirmed by the Senate
- When new Secretary of Labor can get to it
 - Typical transition runway: 5 months
- New OFCCP Director is NOT subject to Senate confirmation
 - This should change, but probably will not
 - Tradition usually trumps function in political matters

6. WHERE HAS THE OBAMA ADMINISTRATION TAKEN US?

Pat Shiu's Legacy

- 1) Most prolific regulatory change period in OFCCP history.
- 2) Redefinition of measure of Affirmative Action Compliance from “Good Faith Efforts” model to “Effectiveness” model under § 503/VEVRAA is a major directional change.
- 3) Emphasis to seek 100% quality control of audit results admirable (even though Kors felt they never saw the quality of result).
- 4) Continued focus on specialization was very important as OFCCP continues to deepen mindshare/resources on non-discrimination.

6. OBAMA ADMINISTRATION (CON'T)

Pat Shiu's Legacy (con't)

- 5) Broadening of non-discrimination reach to make Sexual Orientation and Gender Identity Discrimination unlawful under EO 11246 (whether lawful or not) is historic.
- 6) Establishing “Utilization Goals” for Individuals with Disabilities and a “Benchmark for hiring” for Protected Veterans was historic.
- 7) Confirming - - through the review of over 30 million employee-level compensation files in over 25,000 nearly “no-error” Compliance Reviews - - that there was no widespread compensation discrimination in employment in the federal government (1/10,000 or 0.01%) of alleged compensation discrimination was historic and helped the federal government understand it now needs to look elsewhere to find the primary drivers of the Wage Gap in America.

7. OFCCP'S FY2017 BUDGET IS DESPERATE: JUST TRYING TO HOLD HEAD ABOVE WATER

THIS FISCAL YEAR (2016)

(Oct. 1, 2015 – Sept. 30, 2016)

- **December 18, 2015: Congress Expressed “Concerns” To OFCCP and Cuts Its FY2016 Budget By \$1M (exactly).**
- House and Senate Appropriation Committees accused OFCCP in writing of implementing and compelling unlawful quotas in audits and in litigation.
- Senate had wanted to reduce OFCCP's Budget by \$10M.
- House had wanted to reduce OFCCP's Budget by \$6M.
- OFCCP was heading to an \$8M Budget decrease.

7. OFCCP'S FY2017 BUDGET (CON'T)

NEXT FISCAL YEAR (2017)

(Oct. 1, 2016 – Sept. 30, 2017)

- **June 13, 2016:** Senate Appropriations Committee on a (first during Obama Administration) Bi-partisan vote of 29-1 proposed a \$1M **REDUCTION** to OFCCP's FY 2017 Budget.
- **July 6, 2016:** House Appropriations Committee proposed a \$5M **REDUCTION** to OFCCP's FY 2017 Budget.

OFCCP's FY 2017 Budget also reports +\$2M in new expenses.

History of appropriations would suggest a compromise at a \$3M **REDUCTION**. If so:

- \$5M budget operating loss could be coming. (-\$3M + -\$2M).
- Context: \$1M “buys” about 10 OFCCP Compliance Officers (“COs”).
- If OFCCP took the loss all in payroll, a 50 CO RIF *could* be in the offing.

7. OFCCP'S FY2017 BUDGET (CON'T)

OFCCP's Budget has behaved like an inflated tire slowly bleeding air out along its long road journey, with only a single major budget increase at the start of the Obama Administration (from 585 employees to 788...equivalent to the headcount of the last year of the Clinton Administration) followed by six successive down years (from 788 to 775 to 755 to 729 to 683 to 621 to its current budgeted staffing level of 615 employees - only 30 more employees than the last year of the Bush Administration 7 years ago) as noted in OFCCP's Budget Justification request to Congress:

OFCCP's FY2017 Budget Justification seeks to hold steady at 615 employees... the first time the Obama-OFCCP has NOT sought to grow head count.

7. OFCCP'S FY2017 BUDGET (CON'T)

APPROPRIATION HISTORY (Dollars in Thousands)					
	Budget Estimates to Congress	House Allowance	Senate Allowance	Appropriations	FTE
2007					
Base Appropriation	\$83,657			\$82,441	625
2008					
Base Appropriation	\$84,182			\$81,001	585
2009					
Base Appropriation	\$89,013			\$82,107	585
2010					
Base Appropriation...1/	\$109,521	\$101,521	\$107,021	\$104,976	788
2011					
Base Appropriation	\$113,433			\$105,386	775
2012					
Base Appropriation	\$109,010			\$105,187	755
2013					
Base Appropriation...2/	\$106,415			\$99,685	729
2014					
Base Appropriation...3/	\$108,467			\$104,976	683
2015					
Base Appropriation	\$107,903			\$106,476	621
2016					
Base Appropriation...4/	\$113,687	\$100,500	\$96,000	\$105,476	615
2017					
Base Appropriation	\$114,169				615

7. OFCCP'S FY2017 BUDGET (CON'T)

Practical Observations:

Contractor displeasure with OFCCP is obviously taking its toll on this again small and now beleaguered agency.

- When does OFCCP become too small to operate effectively?

8. OFCCP 2015 ENFORCEMENT STATISTICS POINT THE WAY TO KOR COMPLIANCE

OFCCP has in recent years taken to publishing an on-line enforcement database accessible to the public. Link:

<http://ogesdw.dol.gov/views/searchChooser.php>

While extensive and very useful, it lacks copies of the Conciliation Agreements the agency signs and dollar figures for back pay and other remedies.

NEW DEVELOPMENT: OFCCP FOIA Reading Room

All “Financial” Conciliation Agreements now online:

<http://www.dol.gov/ofccp/foia/foiareadingroom/>

Practical Tip: Warn your clients who will NOT like this development (which civil rights groups, unions and vendors all like).

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

OFCCP's Enforcement Database and now FOIA Reading Room are valuable steps forward to understanding OFCCP's enforcement activities and now largely replace the need for the annual ritual of many law firms and vendors to retrieve copies of all of OFCCP's Conciliation Agreements (always months and sometimes years in arrears) to tabulate OFCCP's enforcement statistics.

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

Assorted Observations:

FY2015 was OFCCP's worst year for enforcement in the agency's last 30 years.

OFCCP has explained it consciously slowed the audit process to allow it to mine systemic discrimination investigations.

However:

- 1) OFCCP also predicted to the Congress that it would complete at least 3800 audits in FY2015, but completed only about 63% of that usual and historically predictable audit completion number, and
- 2) the number of systemic discrimination audits OFCCP completed in FY2015 was only about 2/3rds of the number it completed in FY2014.

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

Assorted Observations (con't):

- a) The violation percentages remain largely unchanged (approximately 16% of all audits overall allegedly found contractors not compliant in FY2015 vs. approximately 15% in FY2014).
- b) Here is a 2015 OFCCP Enforcement Statistics Summary as of July 25, 2016 as taken from OFCCP's electronic enforcement database.
 - Stricken numbers are those OFCCP reported 10/16/2015 (immediately after the close of OFCCP's FY 2015 on September 30, 2015). The unstricken numbers are OFCCP's current figures for FY 2015, as corrected.

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

Assorted Observations (con't):

- c) Several major indicators have dropped sharply:

Alleged Systemic Violations:

FY2013	FY2014	FY2015
31	38	0 25

Alleged Failure To Hire Claims:

FY2013	FY2014	FY2015
51	54	37 28

Alleged Salary Violations:

FY2013	FY2014	FY2015
5	5	7

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

2015 OFCCP Enforcement Statistics Summary				
Violation		# of Violations		% per Total Audits
1	Recordkeeping	235	233	9%
2	Recruitment	229	228	8.8%
3	Written AAP	130		5%
4	Past Performance	116		4.5 %
5	Other (Job Listing)	101	100	3.9%
6	Hiring	37	38	1.4%
7	Selection or Testing	8		0.31%
8	Salary	7		0.27%
9	Accommodation	4		0.15%
10	Promotion	2		0.08%
11	Termination	2		0.08%

Other Important Notes - FY2015:

- 2,602 Audits
- 2,134 (~~2136~~) Notices of Compliance – 82.0%
- 0 (~~25~~) Systemic claims - 0%
- 432 (~~431~~) Conciliation Agreements – 16.6%
- 1 Consent Decree - .04%
- 35 Financial Agreements – 1.3%

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

The Two Things KORS Must Do To Avoid Paying Backpay In Audits

Where The Money Is In OFCCP Audits

- 1) Failure-to-hire entry-level production laborers (92%-98% of all back pay OFCCP “collects” involve failure-to-hire entry-level production laborer Applicants)
 - “evergreen jobs”
 - documentation failures at point of hire
 - Usually about \$10M/yr (less than \$4M in FY2015)

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

1) Failure-to-hire entry-level production laborers... (con't)

PRATICAL ACTION ITEM:

Either: (a) hire proportionally relative to applicant flow percentages of each minority subgroup and of men and women, OR

(b) document, document, document:

(1) which jobseekers are and are not “Applicants” as the law defines that term; and then

(2) the legitimate non-discriminatory reason(s) for each “Applicant” rejected; and

(3) all “Applicants” who received an offer of employment

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

Where The Money Is In OFCCP Audits (con't)

- 2) Compensation claims (2%-8% of all back pay OFCCP “collects” involve compensation discrimination allegations)
 - Usually ~\$1M/yr involving ~ 50-100 alleged victims
 - ~\$500,000 in FY 2015 (*de minimis*)

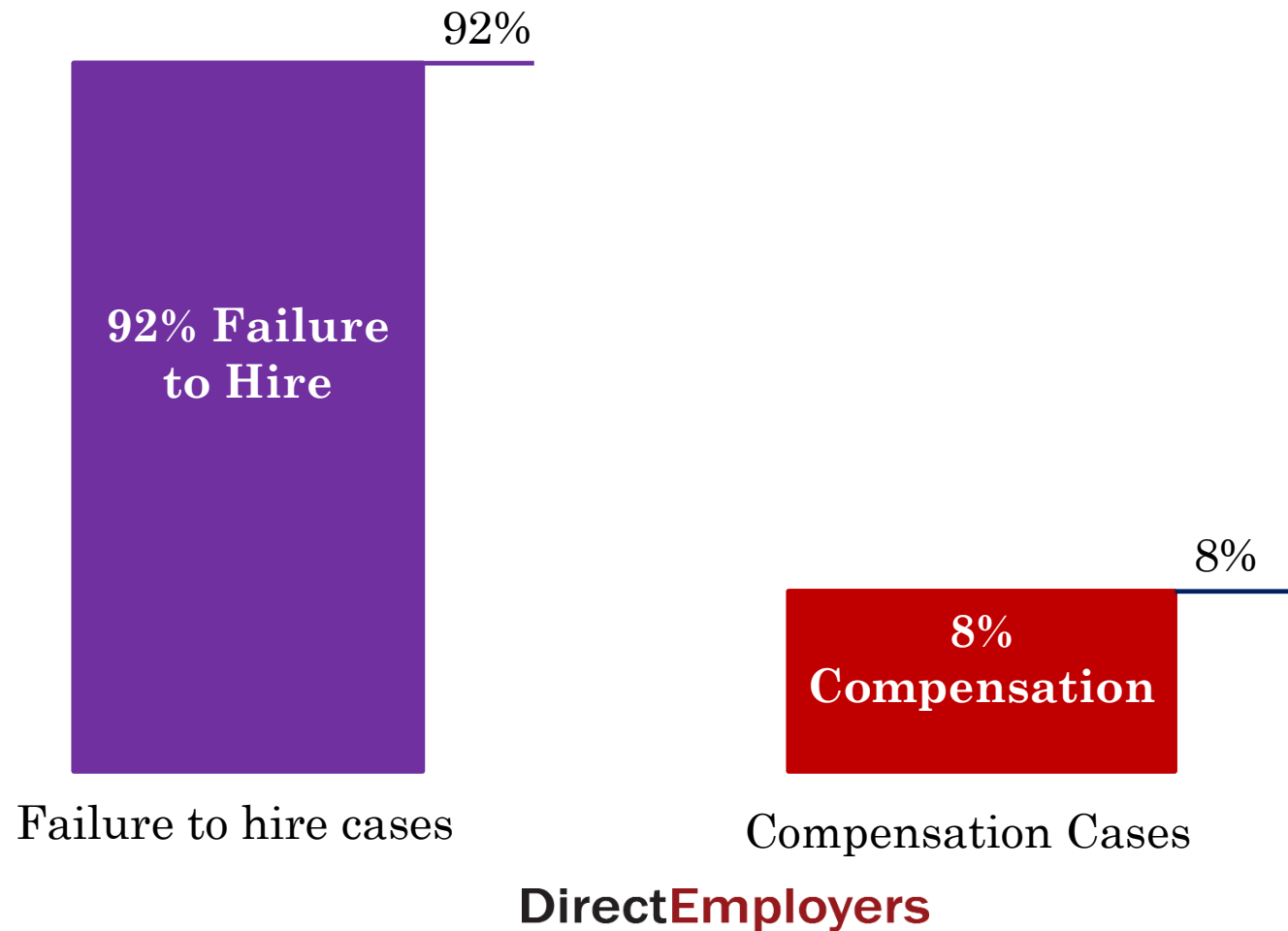
PRATICAL ACTION ITEM:

Defend against OFCCP's often non-meritorious allegations of pay disparities so-often comparing employees who are not similarly situated and/or who have differing qualifications or differing degrees of knowledge, skills and/or abilities or legitimate non-discriminatory reasons for differential pay (i.e. mergers).

8. OFCCP 2015 ENFORCEMENT STATISTICS (CON'T)

Where The Money Is In OFCCP Audits (con't)

An Average:



9. WHAT'S HAPPENING WITH OFCCP AUDITS?

- OFCCP audit starts are at record lows.
- OFCCP should be starting about 320 Supply & Service (i.e. non-construction) Compliance Reviews per month ($3,800/\text{yr} \div 12$).
- OFCCP is currently starting fewer than 115 Supply & Service Compliance Reviews per month (2,500 CSAL audit targets announced Nov. 11, 2014 \div 22 months, to date).
- OFCCP District Directors report compensation analyses are strangling them and consuming the majority of their resources: Gridlock. Also: no audit deadlines.
- These low audit starts/closures will depress OFCCP backpay collections for 3-4 years to come.

9. OFCCP AUDITS (CON'T)

- Pat Shiu explains it as follows:

“In FY 2015, OFCCP fell short of its FY 2015 target (at 63 percent) for the number of completed compliance evaluations, including 2,452 supply and service evaluations (including the Functional Affirmative Action Program), and 266 construction evaluations. During FY 2015, OFCCP intentionally relaxed case closure production targets to focus efforts on its robust open inventory of systemic discrimination cases while maintaining high quality standards (emphasis added). With this strategy, in FY 2015, OFCCP achieved record highs in the percent of cases without major deficiencies and the percent of cases without technical deficiencies due to the agency’s emphasis on improving case quality during this transition.”

9. OFCCP AUDITS (CON'T)

- Will this audit pace change in FY 2016?

Yes. OFCCP audit pace WILL GET SLOWER, as we are observing.

- OFCCP Budget Justification for 2017 at p. 28.

Pat Shiu explains:

“In FY 2016, OFCCP is entirely eliminating case closure targets (including functional affirmative action program compliance evaluations) (emphasis added) and will replace these closure targets with measures that demonstrate implementation of OFCCP enforcement priorities of complex systemic compensation and high impact construction while maintaining high quality. In FY 2017, OFCCP will again continue this new strategy in order to maximize case quality and prioritize larger systemic discrimination cases with the potential for helping more workers and thereby realizing even larger total back pay recovery amounts.”

9. OFCCP AUDITS (CON'T)

- So, a “winners and losers” market has evolved: those 2,000 or so companies in audit are in “deep dive investigations,” and those not in audit wonder what all the fuss is about.
- Compensation Supplemental Data Requests (SDRs) are getting more numerous, more detailed and much longer.
 - A final “deep dig” by the Obama OFCCP to hopefully prove, before it leaves office, that there is substance to its claim of “widespread” federal contractor pay discrimination against women.
- Note: Does a “Deeper Dig” mean more back pay?
 - No. Not historically. Shirley Wilcher (Clinton Administration) proved that:
 - OFCCP averages 1-2% discrimination findings year-in and year-out since 1970s (when recordkeeping began).
 - A higher volume of audits increases back pay.

9. OFCCP AUDITS (CON'T)

- OFCCP audits are now about 10 things:
 - 1) Compensation
 - 2) Compensation
 - 3) Compensation
 - 4) Compensation
 - 5)
 - 6)
 - 7) } See OFCCP FY 2015 audit violations list (slide 35)
 - 8)
 - 9)
 - 10) Failure-to-hire entry-level unskilled/low-skilled laborers

9. OFCCP AUDITS (CON'T)

- OFCCP is not busting contractors in OFCCP's “new” March 2014 § 503/§ 4212 Rules
 - “Transition AAPs” now finished
 - All Kors must now have “fully loaded” AAPs
 - OFCCP is not, thus far, quibbling with Kor “Data Metrics”
 - OFCCP is not quibbling with failure to meet § 503 7% Utilization Goal
 - OFCCP is not quibbling with Kor's failure to hire at 6.9% Benchmark for Hiring
 - New § 503/VEVRAA Rules are non-event, so far

9. OFCCP AUDITS (CON'T)

- We are seeing more and more OFCCP COs “check the plumbing” in audits:
 - Important that Kors develop relationship with OFCCP COs and to present company data, which has integrity, with confidence.
 - Example 1: Internal data bases must match, i.e. number of employees reported on VETS-4212 must be the same, or close, to near in-time AAP headcount.
 - Example 2: Number of reported hires must = # of jobs listed with ESDS.

9. OFCCP AUDITS (CON'T)

- OFCCP “running time” in audits now usually measured in multiple years.
 - Set your expectations for a “marathon,” not a sprint.
 - “Keep your powder dry:” don’t respond to every OFCCP request with customized deluxe and detailed responses. (Audit costs will spiral)
 - Simply re-send a prior e-mail to OFCCP when they forget and ask for information a second time.
 - No need to array data for OFCCP. Present data to OFCCP the way it exists on your/your client’s shelves/computers, or invite OFCCP to manipulate the raw data.

9. OFCCP AUDITS (CON'T)

- Compensation audit advice
 - You have little to fear, but:
 - Burden/cost of producing pay documents and pay data to OFCCP; and
 - Explaining/defending your compensation practices
 - Unlike “Applicants” v. Hires analyses, don’t try to model what OFCCP may do with your data
 - You have no idea what data will intrigue them, or why
 - If you absolutely must, undertake “Cohort” Analyses
 - *Harry vs. Sally*
 - Individual, disparate treatment discrimination analyses

9. OFCCP AUDITS (CON'T)

- Don't undertake "Regression Analyses" unless you are the 1 out of 100 companies which:
 - a. Has 30 or more similarly situated employees (and which Ees are not in a Bargaining Unit where seniority governs pay thus rendering them legally immune from review/attack);
 - AND
 - b. Have digitized all (not 9 out of 10) "major" factors which affect pay. You cannot do a legally meaningful regression analysis unless you analyze ALL factors **which affect pay**. A Regression which analyzes 9 out of 10 (90%) of the major factors which affect pay is NOT an A- minus... it is an "F." Worthless. Wasted money. (Because the addition of 1 more factor could "move the needle" - - - one way or the other. False Negatives and False Positives could result).

10. WHERE OFCCP IS HEADING IN THE NEXT ADMINISTRATION

- A. Big changes in structure/focus coming.
- B. Both Clinton and Trump support affirmative action and non-discrimination. And LGBTQ.
- C. Neither candidate has expressed an opinion re OFCCP.
- D. A worrisome development: Is affirmative action/non-discrimination still vibrantly relevant in 2016?
 - The party platforms of both parties are silent as to a position on affirmative action and non-discrimination.

10. NEXT ADMINISTRATION (CON'T)

- E. Trump transition teams are on schedule and moving ahead.
 - Trump = Chris Christie (seasoned sub-cabinet team coming).
- E. Clinton team delayed: Will probably be John DePodesta.
 - Clinton (the husband) had the fastest transition team in history.
 - Clinton (the candidate) will have a seasoned sub-cabinet team.

10. NEXT ADMINISTRATION (CON'T)

- Obama did not have his sub-cabinet appointments lined up quickly.
 - I announced Pat Shiu's name for the first time publicly at the Atlanta NILG meeting = August.
- There will be a movement to transfer OFCCP to the EEOC (Systemic Discrimination arm of EEOC). Should fail.
- There will be continued consideration of collapsing OFCCP into 6 specialized regional centers with no, or few, District Offices. (This may well happen, over time).
- Audit volumes will nearly double.

10. NEXT ADMINISTRATION (CON'T)

- The emphasis on compensation discrimination will morph into:
 - Investigations of steering (creates wage-gap OFCCP believes: documentation issue).
 - Audit interest in promotion.
 - Audit interest in job training.
- Emphasis will return to race-based employment discrimination.
- Emphasis will return to disability-based employment discrimination.

10. NEXT ADMINISTRATION (CON'T)

NOTE: Employment issues are most pressing as to IWD's and Blacks.

Unemployment Stats 2nd Qtr 2016

	B	H	W	A
16+	8.3%	5.6%	4.2%	3.8%
55+	4.9%	4.2%	3.1%	3.3%

NOTE: 4% is “full employment” in America = “structural unemployment”

10. NEXT ADMINISTRATION (CON'T)

Individuals with Disabilities Unemployment Rates:

- 10.7% (2015)
- 32% of workers with a disability worked PT in 2015
- 18% of workers with no disability worked PT in 2015

Veteran (not Protected Veteran) Unemployment Rates:

Veterans: 4.6% (2015) = 495,000 unemployed veterans

Female Veterans: 5.4% (2015)

10. NEXT ADMINISTRATION (CON'T)

Workforce Participation Rates:

Workforce Dropout Rates (i.e. Non-Participation Rates:
% no longer looking for work):

All	B	B (19 or Under)	IWDs
35%	38%	71%	82.5%

10. NEXT ADMINISTRATION (CON'T)

Education Rates (2011-2012)

High School Graduation Rate:

All	W	H	B
80%*	86%	73%	69%

North Carolina

W	H	B
85%	73%	75%

*All-time high

10. NEXT ADMINISTRATION (CON'T)

2005 College graduation rates of those who start college:

H	B	Harvard (B)	Howard (B)
41%	42%	95%	56%

Percent of population who graduate from college:

All	A*	W	B	H**
28%	51%	41%	22%	16%

*Asians are now almost 6% of the U.S. population.

** Hispanics are now 17% of the U.S. population.

Thank You

Questions?