Federal Contractors Get New Scrutiny

While President Barack Obama’s labor and employment agenda has stalled in the divided Congress, it appears to have gained traction through his executive agencies, including the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP)—one of the administration’s lead agents of change. Recently, the agency made significant changes in three areas: monitoring contractor compensation practices, affirmative action requirements for veterans and individuals with disabilities, and audit enforcement.

Monitoring Compensation

The Obama administration is relying on the OFCCP to be its lead enforcement agency in identifying women and men or minorities and nonminorities with the same job titles who are not making the same salaries. In January, the agency proposed rescission of its current systemic compensation discrimination standards and self-audit guidelines adopted in 2006. The agency had already stopped following the standards, which require similarly situated employee groupings, multiple regression analyses and anecdotal evidence of discrimination.

Rescinding the standards was only one change in the approach to policing contractor compensation. Next, the agency sought to find a way to gain access to mass amounts of individual compensation data when summary compensation data submitted in the aggregate did not suggest unexplained differences in pay based on race or gender.

When OFCCP officials receive compensation data in a routine audit, they receive only total compensation and total number of employees in whatever appropriate groupings the employer decides to submit the data. Most employers submit compensation data broken out by job titles because job title tends to be closest to the concept of similarly situated employees. Some employers use pay grades or bands; however, jobs grouped into grades or bands often are not similarly situated, and grouping individuals who are not similarly situated tends to exaggerate or highlight pay differences among them.

To get individual compensation data, officials needed to find a basis or threshold test to use as a means to force contractors into producing specific data. In June 2010, the agency issued an internal directive.

The directive informs compliance officers that when the average difference between female and male workers’ salaries or minority and nonminority workers’ salaries is at least 2 percent or $2,000, the compliance officer is authorized to request additional information, regardless of how the employer submits its compensation data. Not surprisingly, most employers fail the test and receive a follow-up letter stating that the OFCCP has identified unexplained differences in compensation, requiring the production of individual line-item data.

Government contractors that do not submit the data are virtually guaranteed an on-site visit,
preceded by an extensive information request so that officials can build a compensation database quantifying the variables requested in that same letter using applications, resumes, personnel files and salary histories. Most employers engage in a cost-benefit analysis and end up submitting the requested data even if they know they have not made any pay decisions based on race or gender.

Compliance officers will focus on titles where women or minorities are being paid statistically significant amounts less than men and nonminorities and the quantifiable variables that the employer maintains in its payroll or human resource information system do not explain the differences. In smaller data sets, compliance officers will review job titles with average differences and seek more information from the employer on certain titles.

The OFCCP district office handling the audit will identify job titles with differences in pay and request that the employer either:

- Provide a written explanation of the pay difference accompanied by supporting documentation.
- Make available the employees and their personnel files, along with the compensation decision-makers, during an on-site visit.

Both options shift the time burden and financial cost to the employer to explain the differences.

On Aug. 10, the OFCCP issued its advanced notice of proposed rulemaking on the development and implementation of a data compensation collection tool. In the event that agency officials are rebuffed in their ability to change the type of information obtained in a routine audit, they are simultaneously developing a web-based compensation data collection tool that would have government contractors and subcontractors upload compensation data, much like employers upload demographic data for the annual EEO-1 filing.

**Affirmative Action**

No one disputes that qualified veterans and individuals with disabilities face much higher levels of unemployment than the general population, but the fundamental disagreement between advocacy groups and the business community is in how to achieve full employment for those cohorts. The debate boils down to whether there is a need for hiring goals or preferences for veterans and individuals with disabilities to improve their representation in an employer’s workforce, or whether the frequency with which employers are being cited for violating their regulatory obligations will motivate them to comply proactively before they are selected for an audit. The Obama administration believes that hiring goals are the answer, and the business community wants more time to self-audit and police itself, in light of the recent shift toward stricter enforcement of existing regulations.

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The legal reality is that government contractors have had veterans and disabled population outreach obligations "on the books" for decades. The practical reality is that the Bush administration stopped enforcing those aspects of the regulations, so contractors that were facing diminished HR budgets reallocated their resources to the regulations that the OFCCP was enforcing—namely compliance with the OFCCP’s Internet applicant definition and recordkeeping burdens.

Starting in January 2010, four to five months after current OFCCP Director Patricia Shiu took office,
government contractors began observing a fundamental shift toward stricter enforcement of their obligations regarding veterans and people with disabilities. Instead of receiving information requests pertaining to their veterans and disabled population outreach efforts just before an on-site visit, officials began sending these requests much earlier in the audit. It became common practice for the contractor to receive an information request that sought proof of the employer’s compliance with its obligations for veterans and people with disabilities almost immediately after the submission of the desk audit materials. Recently, contractors have begun to see these information requests even before they send in their desk audit materials and fewer than 30 days after receiving the OFCCP’s scheduling letter. Examples of such requests include documentation of the following:

- Posting with appropriate state employment service.
- Engagement in affirmative outreach efforts to recruit applicants and employees who are qualified veterans.
- Consideration of the qualifications of covered veterans, including reasonable accommodations.
- An internal audit system pursuant to the Vietnam Era Veterans’ Readjustment Assistance Act.

Under the current administration, if an employer fails to produce evidence of compliance it will receive a notice of violations, not the cautionary letter that it might have received under the Bush administration. More important, the notice will be accompanied by a conciliation agreement with reporting obligations. Instead of the audit being deemed closed and that location being free from audit for 24 months, the reporting obligations keep the contractor’s data under the OFCCP officials’ watchful eye for one or two more years.

Moreover, although the notice is not automatically produced in response to Freedom of Information Act requests, final conciliation agreements are required to be produced upon request under the OFCCP’s freedom-of-information provisions (41 C.F.R. Section 60-40.2(b)(3)). There is nothing to stop a government contractor’s competitors from obtaining copies of conciliation agreements to use in contract bid protests. Many in the contractor community firmly believe such protests create sufficient incentive for employers to police themselves.

Most employers aren’t inclined to commit resources to something if the government isn’t going to audit the employer for compliance in that area. If the government is going to enforce all regulatory obligations, it is substantially more likely that employers are going to comply with all regulatory obligations. But rather than taking a step back and asking whether employment of qualified veterans and individuals with disabilities has improved since the OFCCP began enforcing all regulations, the OFCCP shifted the agenda toward hiring goals and metrics.

The advance notice of proposed rulemaking that the OFCCP issued in July 2010 relating to the Section 503 disability regulations at 41 C.F.R. Part 60-741 as well as the proposed changes relating to the veterans’ employment regulations at 41 C.F.R. Part 60-300, announced April 26, demonstrate that agency officials place little confidence in the government contractor community’s ability to police itself. Regarding referrals and applicants, the OFCCP seeks future reporting of the following metrics:

- Number of priority referrals of protected veterans the contractor received from the applicable employment service delivery systems.
- Number of total referrals not limited to protected veterans that the contractor received from the applicable employment service delivery systems.
Ratio of priority, protected veteran referrals to all referrals received from the applicable employment service delivery systems.

- Number of applicants who self-identified as protected veterans or are otherwise known as protected veterans.
- Total number of job openings and total number of jobs filled.
- Ratio of jobs filled to job openings.
- Total number of applicants for all jobs.
- Ratio of protected veteran applicants to all applicants.
- Number of protected veteran applicants hired.
- Total number of applicants hired.
- Ratio of protected veteran hires to all hires.

A contractor also will be required to establish a percentage of its total hires that it will try to ensure are protected veterans. Contractors will account for the following in establishing these benchmarks:

Average percentage of veterans in the civilian labor force in the states where the contractor is located during the preceding three years, as calculated by the Bureau of Labor Statistics and maintained on the OFCCP’s website.

Number of veterans in the previous four quarters who were participants in the employment service delivery system in the states where the contractor is located, as tabulated by the U.S. Department of Labor’s Veterans’ Employment & Training Service and published on the OFCCP’s website.

Contractor’s referral ratio, applicant ratio and hiring ratio for the previous year.

Contractor’s recent assessments of the effectiveness of its external outreach and recruitment efforts.

Other factors including, but not limited to, the nature of the contractor’s job openings and its locations, which would tend to affect the availability of qualified protected veterans.

In short, unless the OFCCP receives substantial push back during the regulatory review process in response to employer comments on the proposed veterans rule, it is likely that the administration will impose outreach metrics and hiring goals for veterans and individuals with disabilities.

Audit Enforcement

The OFCCP has replaced its prior Active Case Management Directive with its Active Case Enforcement Directive. Under the new directive, compliance officers conduct a full desk audit of all companies and an on-site visit of one out of every 25 contractors. That means that in addition to evaluating progress toward prior years’ goals, adverse impact of hires, promotions and terminations, and compensation inequities, compliance officers are asking about the contractor’s compliance with religious discrimination regulations, sex discrimination regulations, leave policies and accommodations, among other requests, very soon after the initial desk audit materials are submitted.

The OFCCP is proposing changes to the information that contractors submit in the initial phase of the audit submission in response to the itemized listings. In addition to evaluating adverse impact by job groups, the OFCCP is proposing to require employers to evaluate it by job titles, too. Instead of submitting summary compensation data, the OFCCP is proposing to require that employers submit individual line-item data, along with additional pay categories beyond base pay, such as
commission, bonus and other forms of incentive pay. In short, nearly every personnel decision that the employer makes during each audit evaluation period is potentially subject to OFCCP scrutiny if the proposed changes are adopted.

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