

NATIONAL EMPLOYMENT LAW INSTITUTE

AFFIRMATIVE ACTION BRIEFING

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Summary

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1. The Office of Federal Contract Compliance Programs (OFCCP) has undergone a paradigm shift over the past few years, away from generalists and towards specialists.
2. OFCCP is rapidly abandoning affirmative action per se; rather, its primary mission now is unlawful discrimination, particularly systemic discrimination. Even more specific, OFCCP is pursuing low level, African American hiring discrimination.
3. In Washington, there is currently very little attention paid to civil agencies; rather, the focus is on the military, natural disasters, and terrorism.
4. Compliance reviews are being conducted through the Federal Contractor Selection System and through random selections.
5. New regulation concerning Internet applicants: to be considered an "applicant," the individual must express interest in and have the basic qualifications for a particular position for which s/he is considered. Also, at no point prior to an offer has the person withdrawn interest.
6. **If a contractor uses Internet and non-Internet applications, the new definition applies to all.**
7. Basic qualifications must be established before applications are solicited; they should be **non**competitive, objective, and business related. An example of a "competitive" qualification would be if the employer considered only the applicants with the highest number of years of experience, rather than all those who met the minimum number of years of experience.
8. You can add basic qualifications sequentially to get a manageable number of applicants if you are searching a resume data base.
9. For resume data base searches: You must keep record of all internal and external candidates (not actual applications); the search criteria; the position; the record and date of search; record of candidates considered; and you must solicit race and gender of the final applicant pool. You do not need the race and gender of applicants who are not considered, e.g., do not meet basic qualifications, for your adverse impact analysis.

10. E.O. 11246 explicitly states that you can't discriminate against qualified applicants. Title VII doesn't cover nonqualified applicants explicitly.
11. The Uniform Guidelines on Employee Selection Procedures do not apply to recruitment, only to selection. Thus, employers can target minorities and women for recruitment.
12. Disparate impact analysis can be based on Census or workforce data, not just on applicant flow.
13. The new definition of applicant is not limited to Internet applications; it will attach to "traditional" applicants.
14. If an "applicant" doesn't follow the employer's application protocol, they can be excluded from consideration; however, the employer must be consistent in excluding them.
15. Be careful in defining your search criteria; it is better to start specific and expand, rather than search general and go specific because you must keep a record of your search.
16. If an offer is extended and declined, it counts as a hire for adverse impact analysis.
17. Your internal recordkeeping:
 - Record of each resume considered (can scan electronically)
 - Date added to data base
 - Position for which you searched
 - Search criteria and date of search.
18. Recordkeeping if searching external data bases:
 - Record of position searched for (basic qualifications)
 - Search criteria used
 - Date of search
 - Resume of applicants considered
19. Whether you use internal v. external availability, and the weights assigned to each, can significantly impact your statistical analyses. Determine them carefully.
20. Do you use actual internal availability or historical record of internal hires into group? May want to weight the two, if both are used.
21. Compare availability rate to your applicant flow rate to your selection rate. If underrepresented, this might indicate where a potential problem exists. For example, if your applicant flow rate was comparable to availability, but the selection rate considerably lower, it may be an internal hiring issue. However, if your applicant flow rate is considerably lower than the availability rate, this may be a recruitment issue.
22. You must look at racial groups individually to determine if discrimination exists. Case law supports individual group analysis.
23. Performance evaluations and seniority might account for salary disparities within a salary grade.
24. OFCCP has proposed a guideline for employers on how to conduct a compensation self-analysis, but is already trying to implement it. This is being used as an incentive for contractors to use regression analysis.
25. The Dubray (median) analysis within job groupings is inconsistent with Title VII.

26. OFCCP's compensation reviews will involve multiple regression, so it is important to identify all factors that may influence pay. In addition to statistically significant differences, OFCCP will also look for anecdotal evidence to determine if discrimination exists.
27. Guidance on how to implement compensation analyses:
- Use similarly-situated employee groups (SSEGs)
 - Have at least 30 individuals in each group
 - Have at least five in each pair (male/female, minority/non-minority)
 - Have at least 80% of your workforce included in the analysis
 - Conduct analysis on an annual basis
 - Include all factors affecting pay decisions
 - For employers with more than 250 employees, use multiple regression
 - Investigate and remedy any disparities
- If all these are done, OFCCP will presume provisional compliance; however, it may tweak variables, such as the SSEGs. *It will still do its own analysis.*
28. Most contractors are only providing the data required for the desk audit. However, at the investigation stage, more data can be requested by OFCCP.
29. Most cases die of their own weight; no cases of systemic discrimination have been found yet. OFCCP doesn't have the staff to analyze or lawyers to prosecute (only four to five cases of all kinds involving audits are litigated each year). OFCCP investigators are being turned into paralegals—gather the facts then turn it over to the specialists (statisticians and lawyers). Thousands of cases are backed up. NELI doubts more statisticians will be hired (GS-15 level); OFCCP can pay for three to four investigators for that amount of money.
30. Contractors can't be compelled to use regression analysis. If they decide to do so, they may want to under attorney-client privilege.
31. Compensation and adverse impact analyses are two completely different processes.
32. The July 2004 Walmart class certification has exploded the field; there may be more class complaints in the future.
33. Disparate compensation may be due to seniority, performance, productivity, or any other factor than sex. "Major" factors must be considered, not necessarily "all" factors, according to OFCCP.
34. Most circuit courts of appeals say that market factors are not a defense. However, the 11th Circuit upheld a market defense in a limited situation; gave the employer six months to transition the lower paid employees upward.
35. To prove discrimination, OFCCP must find a pattern or practice of discrimination, e.g., in the employer's standard operating procedures. "Gross disparity" (2-3 standard deviations) is required to determine if it is a class action and if the disparity is long standing.
36. If you're not going to be able to do a meaningful analysis because numbers are too small, you can do a disparate treatment cohort analysis.
37. The courts will look at the "totality of circumstances," not just a two or more standard deviation prima facie case (actually, it is 1.96 standard deviations).
38. To make an affirmative defense under E.O. 11246, the employer must show the disparity is because of a "job-related" factor that is "consistent with business

- necessity.” For an affirmative defense under Title VII, the employer must only show it is “job-related.”
39. OFCCP – business necessity can be well intentioned and good for the employer, but it may not be “essential.”
 40. Plaintiff probably cannot bring an adverse impact claim based on regression analysis unless a single objective pay factor can be shown to cause the impact.
 41. How to properly analyze compensation data:
 - Catalog the facts
 - Create a “limited data base” (e.g., taking into account time in grade and time in service/longevity)
 - Expand regression factors as may be needed, if there is still a greater than two standard deviation difference.
 - Check initial compensation (perhaps may have been unequal initial pay)
 - If still greater than two standard deviations, conduct a laborious file by file review
 - If still greater than two standard deviations, check all procedural defenses and get your checkbook.
 42. There is a two year statute of limitation from the time of the notice of desk audit as far as restitution is concerned.
 43. Untimely charges may be used for background evidence, but back pay can be awarded only for the two years preceding the timely charge. Anything prior to that is an “unfortunate event of history.”
 44. Equal Pay Act – statute of limitations is two years unless it was willful, in which case the statute of limitations is three years.
 45. OFCCP will conduct a holistic analysis for the period involved, i.e., all aspects of salary (e.g., merit pay, bonuses).
 46. The University of Texas at Austin, CC-10 (OFCCP), 1985 WL 81820, 38 Fair Empl. Prac. Cas. (BNA) 886 (June 28, 1985 – Secretary of Labor William E. Brock): OFCCP must apply substantive Title VII standards when investigating discrimination under Executive Order 11246; in other words, it must reach the same conclusion as would be found in a Title VII case.
 47. OFCCP v. Bridgeport Hospital, ARB Case No. 00-034 (decided January 31, 2003): E.O. 11246 applies to subcontractors only when the subcontractor is “necessary to” the performance of the contract, or that it was performing part of the contract. If two different services are so different, it is not a subcontract for E.O. 11246 purposes.
 48. During an OFCCP audit, stamp documents “Not Subject to Disclosure,” “Confidential Statistical Information,” or “Contains Trade Secrets” so you can at least object to disclosure.
 49. To make job groupings large enough for meaningful statistical analysis, consider cutting off “prefixes” and/or “suffixes;” e.g., *Senior* Accounting Clerk/Accounting Clerk/*Junior* Accounting Clerk can be one grouping; also *Mechanic I*/Mechanic *II*/Mechanic *III*.
 50. If OFCCP changes your job groupings for analysis, you should state you disagree with their way of grouping titles.

51. OFCCP will not ask for your adverse impact analyses; they will want the raw data and then conduct their own analysis.
52. You may want to look at voluntary transfers for adverse impact; this could indicate constructive discharges.
53. In job applications, employers can *require* race/sex self-identification in order for the application to be complete; however, this could lead to a perception that it is used as a basis of the hiring decision.
54. Employers need only retain the current year's AAP and the previous year's AAP.
55. If an individual self-identifies as White and another race/ethnicity, count them as "minority."

56. Adverse Impact Sins: Hiring, Promotions and Terminations

- Sins in General
 - i. Potentially problematic Adverse Impact Analyses (confessing 2 or more standard deviations of impact on one or more protected groups) sit in files with no action taken to either (a) reform this improper conclusion, or (b) cure the results of any such proper conclusion.
 - ii. Failure to recite that the database is "too small to make for meaningful statistical analyses." (This should, almost always, be the contractor's primary response to adverse impact calculations.)
 - iii. Adverse Impact Analyses done for all "minorities" as a whole (instead of for each of the five subgroups)
 - iv. Adverse Impact Analyses are not done by identifying the "Most Favored Group (as they should be) and then comparing the rejection rates of the other four subgroups to the rejection rate of the MFG.
 - v. The number of "hires" equals the number of "applicants."
 - vi. The number of "hires" exceeds the number of "applicants."
 - vii. Use of an inappropriate measuring tool (80% rule of thumb) instead of Fisher's Exact Analyses.
 - viii. Adverse impact analyses analyzed by Job Group rather than by Job Title (except in those rare instances where the JB equals the JT).
- Hiring Sins
 - i. Incorrect definition of the term "applicant."
 - ii. Part-time employees included with full-time employees in analyses.
 - iii. Independent contractors included with "employees."
 - iv. Not all applicants captured in database (typically due to poor document capture and retention).
 - v. Are batch hire/termination calculations applicable? (Particularly concerning large scale hiring upon opening a new facility or new production line or upon a reduction in force.)
- Promotion Sins
 - i. No database for identifying a pool of interested and minimally qualified "applicants" (for promotion).
 - ii. No definition of the term "promotion."

- Termination Sins
 - i. “Voluntary” terminations analyzed in the same database with “involuntary” terminations.
 - ii. Most Favored Group is not the subgroup suffering the most involuntary terminations. It is the subgroup suffering the smallest percentage of involuntary terminations.
57. Lines of progression are intradepartmental only. Interdepartmental are promotions.
 58. Employees who are not recruited in the U.S. who work overseas are exempt from the AAP. If they are recruited in the U.S., they should be included in the local plan vis-à-vis adverse impact analyses but not in the workforce analysis, however.
 59. E.O. 11246 is not extraterritorial; Title VII and ADEA are.
 60. Job Groups should be based on similar wages, content, and opportunities for upward mobility.
 61. **If minorities are the majority, do not substitute White in the job group analyses; however, you may want to set placement goals for the non-predominant minority.**
 62. Similarly Situated Employee Groups don’t necessarily equal job groups, although they may be similar.
 63. OFCCP doesn’t like employers to use EEO-1 categories as jobs groups unless the employer has 50 or less employees.
 64. Affirmative action is forward-looking; adverse impact is backward-looking.
 65. Employers might want to use applicant flow for availability, particularly at the end of the decade before the new census.
 66. Employers might sort data by earnings for manager categories in order to get better availability data.
 67. Applicant flow might be better to use for faculty since the 2000 census did not break out postsecondary teachers by discipline.
 68. Good caveat to put in AAP: “The establishment of a Placement Goal does not amount to an admission of impermissible conduct. It is neither a finding of discrimination nor a finding of a lack of good faith affirmative action efforts. Rather, the establishment of a Placement Goal is designed to be a technical targeting term used exclusively by affirmative action planners who seek to apply good faith efforts to increase in the future the percentage employment of minorities and women in the workforce.”
 69. Fisher’s exact analyses should always be used! 2 standard deviations will be wrong with small numbers and with large numbers and will result in false positives and false negatives.
 70. OFCCP has the authority to require subgroup goals.
 71. Reasons for underrepresentation might be:
 - Inadequate applicant flow.
 - Good applicant flow, but not enough “contender candidates.”
 - Good applicant flow, enough competitive candidates, but still placement goals: the “historical baggage” problem (e.g., few openings).

- Good applicant flow, enough contender candidates, good selection rate, no “historical baggage,” and still setting placement goals: the “backfill” problem (retention—out the door as fast as they are coming in).
- None of the above, but still setting placement goals: might be unlawful discrimination.

72. “Recently Separated Veterans” category is expected to be required in the 2007 VETS-100 Report.