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● counsel for employers

AFFIRMATIVE ACTION COMPLIANCE IN UNCERTAIN TIMES

Presented May 23, 2017

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● counsel for employers

We counsel companies across the Northwest & California on complex employment issues including affirmative action

Today's Presenter



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The information presented here is not intended to be legal advice

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Introduction

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Background

- Supply/service vs. construction
- Race, gender, veteran status, disability status
- Employer coverage
 - 50 employees and
 - \$50,000 in federal contracts or first-tier subcontracts (\$150,000 for vets rules)
- Enforced by Office of Federal Contract Compliance Programs (OFCCP)

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Agency Leadership

- Patricia Shiu (OFCCP Director) resigned Nov. 2016
- Tom Perez (DOL Secretary) resigned Jan. 2017
- Alexander Acosta (DOL Secretary) sworn in April 2017
- New OFCCP Director = ???
- Janette Wipper (OFCCP Pacific Region Director) joined OFCCP Jan. 2014

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OFCCP Enforcement History

- G.W. Bush era: 4,000 – 5,000 audits closed per year
- Obama era: Fewer audits, but more intense
 - FY 2013: 4,100
 - FY 2014: 3,838
 - FY 2015: 2,602
 - FY 2016: 1,696
 - 1st 7 months of FY 2017: 688

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OFCCP Enforcement History FY 2017

- Audits closed in 1st 7 months of FY 2017: 688
 - 42 in California
 - 12 in Washington
 - 1 in Idaho
 - 0 in Oregon

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Financial remedies are imposed in approximately 2 percent of audits

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Current Enforcement Focus

- Compensation
- Steering
- Hiring
- Veterans and disabilities

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Enforcement Practices

- OFCCP combines employees into largest “pay analysis groups” possible
 - Watch out for overly large job groups
- Voluminous data requests (83 pages!)
 - Pay data for entire tenure
- Skepticism over salary explanations
 - Pacific Region has said “no” to time in position

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Status of Obama-Era Initiatives

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Expanded EEO-1 Report

- Imposed by Equal Employment Opportunity Commission (EEOC)
- No report in 2017
- Report 2017 W-2 wages & hours in Q1 2018
- Expansion applies if 100+ employees
 - Old report applies if 50-99 employees

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Expanded EEO-1 Report , cont.

- 5-person commission (3-2 political balance)
- 1 position is vacant
- Acting Chair Victoria Lipnic (R) term ends July 1, 2020
- Terms of 3 Democrats end July 1, 2017, 2018, and 2019
- Next 2 appointees will be Republican

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Expanded EEO-1 Report , cont.

- Fall 2017 reassessment?
- Possible slimming of EEO-1 Report
 - Annualized base compensation?

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Pay Transparency Notices

- Currently in effect
- Federal contracts worth \$10,000 signed or modified on or after 1/11/16
- Incorporate nondiscrimination provision in employee handbook
- Distribute or post nondiscrimination provision physically or electronically
- Display temporary supplement to “EEO is the Law” poster

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Pay Transparency Nondiscrimination Provision

The contractor will not discharge or in any other manner discriminate against employees or applicants because they have inquired about, discussed, or disclosed their own pay or the pay of another employee or applicant. However, employees who have access to the compensation information of other employees or applicants as a part of their essential job functions cannot disclose the pay of other employees or applicants to individuals who do not otherwise have access to compensation information, unless the disclosure is (a) in response to a formal complaint or charge, (b) in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or (c) consistent with the contractor's legal duty to furnish information. 41 CFR 60-1.35(c)

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Paid Sick Leave

- Currently in effect
- Applies only to certain federal construction and services contracts
- Solicitations issued on or after January 1, 2017
- Employees working directly or indirectly on the federal contract
- Accrue and use up to 56 hours per year, based on accrual rate of 1 hour of sick pay per 30 hours of work

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Minimum Wage

- Currently in effect
- Applies only to certain federal construction and services contracts
- Solicitations issued on or after January 1, 2015
- Employees working directly or indirectly on the federal contract
- \$10.20 per hour in 2017; adjusted for inflation annually

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"Fair Pay and Safe Workplaces" EO

- Gone! It would have:
 - Required covered federal contractors to self-report adverse labor law decisions ("blacklisting");
 - Prohibited certain pre-dispute arbitration agreements with individual workers
 - Required certain disclosures on employee pay stubs and a special notice of employment status to independent contractors (paycheck transparency)

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EEO for apprenticeship programs

- DOL's Employment & Training Administration (ETA) published new rules 12/19/16
- No bills in Congress disapproving the rules
- Effective 1/18/17, but phased in over 2 years
- Expands protected classes (sexual orientation, age (40+), genetic information, disability, pregnancy, and gender identity)
- Written AAP requirements for programs with 5+ apprentices expanded

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Future OFCCP Enforcement

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OFCCP Enforcement for Next 12 Months

- Status quo
- Few audits but painful
- Greatest financial exposure:
 - Entry-level hiring
 - Wage comparisons for salaried employees

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New Directions for OFCCP

- New OFCCP director late summer/early fall 2017?
- New initiatives early 2018?
- Streamlined audit process
- More audits
- Vets/disabilities focus?
- Apprenticeship focus (in coordination w/ DOL's ETA)?
- Merger of OFCCP and EEOC?

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Where to Focus Your Efforts

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Priority #1: Entry-Level Hiring

- Monitor for adverse impact
- Evaluate and correct as needed

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Use Internet Applicant Rule

- Define basic qualifications in job posting
 - (objective, job-related, non-comparative)
- You don't have to track people as applicants in the AAP if they:
 - Don't meet advertised basic qualifications; or
 - Remove themselves before a job offer
- But you must separately retain records if you considered them

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Train Everyone in Hiring Process

- What to consider in resumes or applications
- Questions to ask in interviews
- Probing/follow-up questions
- Criminal history considerations (know state/local law)
- Document stage and reason for decisions

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Priority #2: Pay Equity

- High priority for OFCCP under Obama
- OFCCP on autopilot for now
- States are taking up the cause

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Pay Equity Pitfalls

- Starting salary
- Professional and managerial positions
- Large job groups

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Guard Against Pay Equity Claims

- Know why you pay what you pay
- Establish standards
- Determine what jobs to compare
- Be alert to “steering” claims
- Large groups? Consider compensation expert under attorney-client privilege

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Priority #3: Outreach & Retention

- Focus on largest job groups where you have goals (minorities, women, individuals with disabilities (IWDs))
- Connect with state vets reps
- Make personal connections when possible
- Schedule and document all contacts

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Look at Current Workforce

- Encourage employees to self-identify as veterans or IWDs
- Examine job groups dominated by one gender or race
 - Why the disparity?
 - What can be done to be more inclusive?
- Review turnover trends
- Exit interviews – Why did they leave? What would have made them stay?

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Priority #4: Fix Your Recordkeeping

- HRIS, payroll, and applicant tracking systems should mesh
- Processes for tracking personnel changes should be consistent
- Internal systems should catch errors
- Data entry people should be trained
- Data should be compiled soon after close of AAP year

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Priority #5: Do the Easy Stuff

- EEO tagline in job postings
- Reasonable accommodation notice in job postings
- Give applicants links to “EEO is the Law” poster and temporary supplement
- Display workplace posters
- Notices to vendors and subcontractors
- List jobs with state employment service
- File VETS-4212 Report by Sept. 30

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Conclusion

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What to Expect

- If selected for audit, brace for long slog
- Not selected? Get house in order
- Stay tuned on EEO-1 Report
- Stay tuned on new leadership and enforcement

Prioritize Compliance Efforts

- Entry-level hiring
- Pay equity
- Outreach & retention
- Recordkeeping
- Easy stuff

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QUESTIONS?
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