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## **OFCCP BEGINNING TO RECOGNIZE FEDERAL DISCRIMINATION LAW STANDARDS**

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During the past year, the OFCCP has announced and formally instituted policy changes that recognize their methods of determining discrimination issues regarding pay and selections in hiring, promotion and terminations must take into account federal discrimination law standards. In the past, the agency has, at times, proceeded as an island, wasting company and agency resources chasing its own brand of statistical analysis that would not be acceptable in courtroom proceedings. That seems to be changing and, slowly, companies being audited are seeing the changes.

1. The agency has begun hiring statisticians to formulate and perform mathematically sound calculations of affirmative action plan data that would be acceptable to the courts in evaluating selection and pay patterns in class actions. A testing expert has also been hired to review pre-employment tests.
2. The agency is making a shift to conducting compensation analyses of similar jobs and away from its past practice of comparing jobs in broad bands or wage categories irrespective of dissimilarities among the comparative jobs. The agency has also proposed a self-audit that if performed by employers can result in a pay system being deemed compliant with the law.
3. In affirmative action audits, the agency is placing a greater focus on evidence of intentional discrimination in the logs and compensation analyses rather than on technical paperwork violations or goals attainment.

All of these changes in policy and focus present both good and bad news for employers. The bad news is that where the agency finds statistically significant disparities in affirmative action data, there is a potential for large class action damages against the employer. The good news is that employers are less likely to have to commit to extensive conciliation agreements with reporting obligations for what are merely paperwork violations of the affirmative action regulations. For minor technical violations, the agency has been issuing modified compliance letters which state generally that the employer's plan is compliant but with noted exceptions, and convey an expectation that the employer will resolve those problems. The agency's use of this special letter is similar to the "letter of commitment," the use of which was discontinued in 1998.

As part of its new initiatives, OFCCP also has a new pilot contractor targeting plan to provide advance review notice to corporations targeted for multiple facility reviews during the next twelve months. Even the selection method has changed. The new system was developed by an outside contractor to compare EEO-1's, 2000 census data, and contractor workforce profiles in the same industry to identify establishments that appear likely to have systemic discrimination issues. For now, this will remain a pilot program until the selection methodology can be validated.

Cumulatively, the agency appears to be moving in the right direction. Implementation in the field will demonstrate over time if the changes are good news for a majority of employers. Meanwhile, employers will best protect themselves from OFCCP scrutiny by reviewing compensation plans and applications, and evaluating all hiring, promotion and termination decisions where a statistical problem might exist.

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If you have any questions about the issues raised by this e-alert, please feel free to contact Laurie Petersen at (414) 273-3910 or by e-mail at [lpetersen@lindner-marsack.com](mailto:lpetersen@lindner-marsack.com)

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