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OFCCP Announces Regulatory and Enforcement Initiatives in FY 2012 Budget Justification

By Alissa Horvitz, George Chaffey and Joshua Roffman

In conjunction with the U.S. Department of Labor's overall budget proposal, the Office of Federal Contract Compliance Programs (OFCCP) disseminated its congressional budget justification on February 14, 2011.

The dollar amount sought in FY 2012 (\$109,010,000) is not a significant increase over the OFCCP's FY 2011 budget request (\$105,386,000), but it is the regulatory and enforcement initiatives highlighted in the document that are drawing attention.

A Recap of Last Year

According to OFCCP, within the last year, it:

- Initiated more onsite investigations to conduct more thorough investigations.
- Began revisions to the Federal Contract Compliance Manual (FCCM), ensuring consistency within its investigative process.
- Published an Advanced Notice of Proposed Rule Making related to the revisions of Section 503 of the Rehabilitation Act of 1973 to strengthen the affirmative action provisions of the Act.
- Hired over 200 compliance officers to build the Agency's capacity to conduct more comprehensive compliance evaluations and increase enforcement efforts.
- Implemented an intensive training program for new compliance officers to ensure that they are provided with the tools necessary to conduct quality investigations.

It completed 4,960 compliance evaluations, attaining 99% of its goal to conduct 5,000 evaluations. It found violations at 1071 facilities, 919 of which were resolved through conciliation agreements. It obtained \$9,750,272 in financial settlements for 12,397 victims. It also conducted 107 complaint investigations.

Preview of the Future

For FY 2012, OFCCP intends to focus its resources on the following areas:

- focusing on the prevention of gender and disability-based discrimination as a way of promoting work-family balance and workplace flexibility;
- fostering compliance through worker education;
- expanding efforts to deter, detect, and eliminate worker misclassification by expanding its investigative process to include an analysis of potential misclassification of employees as independent contractors during compliance evaluations; and
- improving transparency by designing a web-based, searchable database comprised of aggregated data from the Compensation Data Collection Tool.

OFCCP predicts that it will finalize its revisions to the Construction Regulations in 41 C.F.R. Part 60-4 and its regulations involving individuals with disabilities under 41 C.F.R. Part 60-741.

Although OFCCP's Unified Agenda announced that it would propose new regulations implementing the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA) in January 2011, those regulations still have not issued. OFCCP states in this budget document that it will publish those regulations "in 4th quarter FY 2011."

Fewer Audits, But More Thorough with More Violations

OFCCP intends to update the compliance evaluation manual with revised enforcement procedures that will include a more wide-ranging and thorough compliance investigation process. OFCCP anticipates conducting more full desk audits, additional onsite investigations, and focused reviews. Although OFCCP expects this strategy to result in fewer total audits, each audit will be more thorough and may result in its finding a greater number of violations.

New Systems to Solicit and Track Statistical Data

OFCCP uses its Federal Contractor Compliance System (FCCS) to select government contractors for audit. OFCCP has been investing in information technology that will enable it to track statistical data collected through the compliance evaluation process. The FCCS will enable OFCCP to electronically collect and analyze equal employment opportunities, hiring and promotion activities, and compensation information in a more timely and effective manner. OFCCP envisions that affirmative action plan data will be collected via a secure web portal that will be accessible to the federal contractor community.

The Compensation Data Collection Tool

In its budget justification document, OFCCP asserts that there is a 23% pay disparity between men and women, and that the disparity is even greater among African-American and Hispanic women. OFCCP plans to develop and implement a web-based compensation data collection tool that would enable the agency to identify indicators of pay disparity. The tool would collect compensation data from 70,000 to 110,000 contractors, but doesn't indicate whether that is per year. OFCCP would "likely" array the data by job group, but the scope of the data has yet to be fully determined. "Current possibilities include salary, gender, race and ethnicity data for each employee or average compensation and variances for each group by gender, race and ethnic category." Also not yet determined is the type of personnel activity data that will be required and whether data on veteran status and disability status will be included.

Misclassification of Workers

Because individuals misclassified as independent contractors rather than employees do not receive the protections and benefits of the nation's civil rights laws, OFCCP believes that some federal contractors who are seeking "to skirt the requirements of E.O. 11246 may misclassify their employees as [independent] contractors in order to make the composition of their workforce appear more diverse or to mask discriminatory employment practices."

Therefore, in FY 2012, OFCCP intends to develop an investigative plan addressing this issue and train compliance officers to identify

this issue during OFCCP's compliance evaluation process. It is this initiative that has led OFCCP to request the increase of \$3,566,000 over last year's budget and to request an additional 11 full-time equivalent employees to address the misclassification issue.

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