

CLIENT ALERT

OFCCP — Here They Go Again!

April 1, 2000

On March 30th, the Office of Management and Budget ("OMB") approved the controversial "Equal Opportunity Survey" initiative sponsored by the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP"). As a result, on April 7, OFCCP will circulate the Survey to 7,000 government contractors and subcontractors. All other contractors (those with 50 or more employees and federal contracts in excess of \$50,000) will receive the Survey over the course of the year. As a result, before the end of 2000 (at best) and perhaps within the next few weeks (at worst), almost every U.S. business that does business with the government, either directly or indirectly (according to the agency, OFCCP's jurisdiction covers approximately 26 million employees or nearly 22% of the total civilian workforce), will be faced with deciding how to respond to the Survey. Once a company receives the Survey, it will have only 30 days to prepare and submit a response.

The Survey *mandates* the submission of reams of data which most contractors have never before tracked - at the risk of an OFCCP enforcement audit for non-compliance. The business community has been understandably alarmed at this latest gambit by OFCCP. Late last year, C&M filed formal comments on behalf of the United States Chamber of Commerce, urging OFCCP and OMB to abandon the Survey. We argued that the Survey is unduly burdensome and that the data generated would simply not indicate compliance or non-compliance.

OFCCP's decision to go ahead with the Survey is the latest indication of the agency's misguided zeal with respect to this subject. The cost of complying with the Survey (and the sheer mischief that may result from it) have suggested to some that a legal challenge to the Survey may be appropriate.

The Survey requires contractors to submit the following data, either for calendar year 1999 or for the most recently concluded AAP year:

- "Applicants" (including all persons who have "expressed an interest in being considered for hiring, promotion, or other employment opportunity") by race and gender, for each of the nine EEO-1 categories
- Hires, by race and gender, for each EEO-1 category
- "Promotions" (including movements to a position "with the *opportunity* to attain increased pay, rank, skill, or responsibility"), by race and gender, for each EEO-1 category
- Terminations, by race and gender, for each EEO-1 category
- Number of full-time employees, by race and gender, for each EEO-1 category
- "Total annual monetary compensation" for minority females, non-minority females, minority males, and non-minority males in each EEO-1 category

- "Annual monetary compensation" for the highest and lowest paid minority female, non-minority female, minority male, and non-minority male in each EEO-1 category
- Average tenure of minority females, non-minority females, minority males, and non-minority males in each EEO-1 category

In our experience, few, if any, contractors track all these data or use these definitions for all compliance purposes. In addition, each contractor must: (1) list the expiration date for each of its AAPs or acknowledge that it does not have current AAPs; and (2) state whether and how many employment openings were listed with the state employment service and/or America's Job Bank during 1999 or during the most recent AAP year. Finally, a company official must certify that the Survey responses are "accurate and complete."

Many long-time observers of OFCCP believe the Survey is another attempt to improperly expand the agency's regulatory authority. The information that may be obtained through responses to the Survey is likely to make it more difficult for many contractors to respond effectively to OFCCP audits.

Now that OFCCP is poised to circulate the Survey, all covered contractors should give careful consideration about how best to respond. The options range from attempting to comply fully with the Survey (notwithstanding the problematic definitions that are included and the certification requirement) to challenging the Survey through litigation. Time is of the essence in making this decision, since responses to the Survey are due within 30 days of receipt.

As this process goes forward, we intend to stay in close touch with our clients in order to learn as much as we can about how OFCCP deals with the contractor community in administering the Survey. This promises to be a very interesting new chapter in OFCCP's relationship with U.S. employers.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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