

# ***Third Thursday Briefing:*** **OFCCP Developments**

**May 16, 2013**

The webinar will begin shortly. Please stand by.

# Today's Presenters



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# Agenda

- Update on Regulatory Developments
  - Compensation Guidelines
  - FAAPs
  - VEVRAA and Section 503 Regulations
- Significant Cases
  - *UPMC, Frito-Lay*
- Enforcement Trends

# Compensation Guidelines

- Compensation at the forefront of OFCCP's agenda
- New compensation guidance issued February 28, 2013
  - Rescinded Bush era compensation guidance
  - Issued Directive 307: Procedures for Reviewing Compensation Systems and Practices

# Compensation Guidelines

- Directive 307
  - Ad hoc, case-by-case approach
  - Statistical, non-statistical and anecdotal evidence
  - Consideration of all employment practices
  - Develop pay analysis groups
  - Investigate at system, unit and individual level
  - Review and test factors
  - What's missing?

# Compensation Guidelines

- What to do now?
  - Conduct initial OFCCP analysis
  - Conduct multiple regression analysis pursuant to attorney-client privilege
  - Proactively address compensation discrepancies
  - Examine complete compensation process
  - Components of pay other than base pay

# Functional AAPs

- New FAAP Directive issued December 17, 2012
- Reinstates prior FAAP process
  - Significant amount of data required for application
  - Meeting with OFCCP required
- Landmines for contractors
  - Functional business unit must “exist and operate autonomously” and maintain “unit-specific policies” - *Dukes* implications
  - Application may flag compliance issues
  - Automatic audits of two FAAPs in three-year period

# Proposed VEVRAA and Section 503 Regulations

- Proposed Rules - Published 2011
- Not Yet Submitted to OMB
  - Business community assessment of cost
- Date Final Rule Will Issue - Uncertain
- **Substantial** Increase in Contractors' Obligations - Certain



# Final VEVRAA and Section 503 Regulations

## – Changes Likely to be Implemented

- Utilization Goals/Benchmarks
- Increased Data Collection and Record Maintenance Requirements
- Pre-offer Invitations to Self-Identify
- Increased, Prescribed Outreach
- Communication and Active Training Requirements
- Expanded Reasonable Accommodation Obligations/Written Notice of Denial and Right to File Charge

# Case Law Developments – “Subcontractor”

- Subcontractors – Generally on notice of EEO/AA obligations via clause(s) included in their subcontract with a prime government contractor
  - 48 CFR 52.222-26 Equal Opportunity
  - 48 CFR 52.222-35 Equal Opportunity for Veterans
  - 48 CFR 52.222-36 Affirmative Action for Workers with Disabilities
  - OFCCP Equivalent Clauses
- Rejection of Subcontract – if entity decides EEO/AA obligations too onerous

# OFCCP Definition of “Subcontract”

- Any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of the employer and an employee):
  - (1) For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is *necessary to the performance of any one or more contracts*; or
  - (2) Under which *any portion of the contractor’s obligation under any one or more contracts is performed*, undertaken or assumed.

41 CFR 60-1.3, 60-741.2, 60-250.2(1)

- OFCCP has a history of broadly interpreting its definition of “subcontract.”

# OFCCP's Focus on Healthcare Providers

- Directive 293 (December 2010)
  - “[C]ontractor (or subcontractor) obligations mandated by OFCCP programs cannot be altered, limited, or defeated by the inclusion in the contract of provisions contrary to such obligations.”
  - Certain arrangements with the Federal Employees Health Benefit Program (FEHBP) and TRICARE constituted government contracts that created OFCCP jurisdiction
  - Rescinded April 25, 2012 - but OFCCP's focus on healthcare providers has not waned

# *UPMC Braddock Hospital*

- UPMC hospitals - network agreement with UPMC Health Plan, which had an FEHBP contract.
- ARB Decision (ARB Case No. 08-048) - 2009
  - Health Plan’s federal contract required it to provide HMO services, not just insurance, and the Health Plan depended on the hospitals to offer medical services and supplies necessary for the Health Plan to meet its HMO obligations
  - Hospitals are subcontractors because they provided “a portion of the contractor’s obligation” under the prime contract

# *UPMC Braddock v. Harris*

- UPMC appeal to federal district court - June 30, 2009
- District Court Decision – Case No. 09-1210 (D.D.C. March 30, 2013)
  - Grants summary judgment in favor of the government
  - Hospitals met the OFCCP subcontractor definition
  - OPM and the prime contractor could not contract around the requirements of E.O. 11246 and OFCCP regulation
  - The court used the “Christian Doctrine” to read in the EEO/AA obligations into the hospitals’ contracts
- Deadline for appeal - May 29, 2013

# *Florida Hospital of Orlando*

- Florida Hospital - network participation agreement with Humana Military Healthcare Services, which performed a TRICARE contract
- ALJ Decision
  - Hospital a subcontractor - Humana required to provide medical services to TRICARE beneficiaries, so the hospital's provision of medical services was performance of "a portion of the contractor's obligations"
- Hospital appealed to ARB
- Congressional Action Prior to ARB Ruling - healthcare providers operating as part of TRICARE managed care network of providers will not be considered to be federal contractors or subcontractors
- ARB Decision – Case No. 2009-OFC-0002 (Oct. 18, 2010)
  - Ruled for the hospital in light of legislation

# Ramifications of *UPMC* Decision

- Who is affected by this decision?
  - Healthcare providers with contractual arrangements with health plans, which, in turn, have FEHBP HMO contracts
  - Healthcare providers associated with other federal managed care programs, such as Medicare Part C (Medicare Advantage) and Part D (Prescription Drug Program)
  - Entities other than healthcare providers who OFCCP deems to meet the definition of subcontractor, even if such entities do not have contractual requirements to comply with EEO/AA obligations – expansion of application of the *Christian Doctrine*
    - Previously applied only to prime contracts



# Key Takeaways

- If you provide services or supplies to a federal contractor:
  - Be aware of OFCCP’s broad definition of “subcontract” and even broader application of that definition
  - Even if the clauses are not in your subcontract, OFCCP could determine that you qualify as a subcontractor subject to affirmative action/equal opportunity requirements
  - An agency regulation that carves out certain types of arrangements from being a “subcontract” is not a guaranteed safe haven; OFCCP could very well disagree

# Case Law Developments – Right to Information

- *Frito-Lay, Inc.*
  - Scheduling letter dated July 13, 2007
  - Company provides activity data for 2005, 2006, and part of 2007
  - OFCCP claims data show “statistically significant disparity” – requests data in 2008 and 2009 AAPs
    - Cites variance in female hiring rates – 3.26 SDs
  - Company refuses – beyond date of scheduling letter
  - ALJ Decision – Relying on FCCM, finds OFCCP precluded from seeking 2008-09 data

# Case Law Developments – Right to Information

- *Frito-Lay, Inc.* – ARB Decision (Case No. 10-132)
  - Rejects Company position that OFCCP permitted only to look backwards two years
  - “OFCCP clearly has discretion to request AAP data covering activity occurring after the Scheduling Letter”
    - in the circumstances of this case
      - Was pursuing concern about disparity in hiring of women
      - OFCCP’s “impetus” in seeking additional data “reasonable”
- Frito-Lay’s District Court Action – Texas
  - OFCCP’s March 2013 Motion to Dismiss pending

# Enforcement Trends

- Significant expansion of document and data requests at desk audit stage
- Near-automatic request for individualized compensation data
  - Focus currently on base pay, but. . . .
- Focus on any statistical disparities – even if few selections
- Unwillingness to share information
- Have “discovered” email

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