OFCCP Compliance 101

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Carmen Couden, Foley and Lardner LLP
Webinar 101

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  - Share information
  - Ask questions
About Us

- **Cady Chesney**, an OFCCP Specialist with LocalJobNetwork.com, has experience in collaborating with federal contractors, subcontractors, and consultants relating to recruiting and compliance needs.

- **Ashley Fitzgerald**, an OFCCP Manager with LocalJobNetwork.com, has experience in helping employers with recruiting and OFCCP compliance solutions for small companies with limited budgets to complex organizations with thousands of employees.

- **Carmen Couden**, Senior Counsel with Foley and Lardner LLP, is a member of the firm’s Labor and Employment Practice team and represents employers in investigatory proceedings before state agencies and in legal actions in federal and state court. Ms. Couden also counsels employers on a wide variety of labor and employment issues, with a particular emphasis on ADA and FMLA compliance; affirmative action and OFCCP compliance; military leave issues; discrimination, harassment and retaliation; labor and employment class actions; reductions-in-force; and union employer matters.
Disclaimer

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.
Agenda

• Who is the Office of Federal Contract Compliance Programs (OFCCP)?
  – Laws it enforces

• Coverage
  – What is a federal contractor and subcontractor?

• Compliance
  – Mandatory job listing requirement
  – Outreach requirement
  – Record keeping requirement
  – Disposition codes

• Q&A
Who is the OFCCP?

- Office of Federal Contract Compliance Programs (OFCCP)
  - Enforces equal employment opportunity and affirmative action to benefit job seekers and wage earners
  - Equal Employment Opportunity (EEO)
    - Prohibits employment discrimination based upon race, color, religion, gender, or national origin
  - Affirmative Action (AA)
    - Takes proactive steps to recruit and advance women, minorities, individuals with disabilities, and covered veterans
- Offers technical assistance
- Compliance with regulations
Who is a Federal Contractor and Subcontractor?

- **Who is a federal contractor?**
  - A company who has a federal contract
  - Tri-care healthcare providers
  - Federal Deposit Insurance Corporation (FDIC) insured banks

- **What is a federal contract?**
  - An agreement between a federal department or agency and any person for the purchase, sale, or use of goods or services
    - Example: Company ABC makes automobiles for the military

- **Who is a federal subcontractor?**
  - A company who does business with a federal contractor

- **What is a subcontract?**
  - Agreement or arrangement with a federal contractor
    - To perform a portion of the covered contract
    - Necessary to the performance of the covered contract
    - Example: Company XYZ supplies Company ABC with tires for automobiles
Coverage

• Executive Order 11246 (E.O. 11246)
  – Contract value exceeds $10,000
  – Must have evidence of good faith efforts to increase participation of minorities and women in the skilled trades
  – Written Affirmative Action Plan (AAP) 120 days after contract starts, if:
    • 50 or more employees and
    • Contract value is $50,000 or more

• Section 503 of the Rehabilitation Act of 1973
  – Contractor is covered if contract value exceeds $10,000
  – Written AAP 120 days after contract starts, if:
    • 50 or more employees and
    • Contract value is $50,000 or more
  – Federally assisted construction contractors are not covered
Coverage (cont.)

- Vietnam Era Veteran’s Readjustment Assistance Act (VEVRAA)
  - Coverage starts if single contract before 12/1/2003 is $25,000 or more
  - Written AAP 120 days after contract starts, if:
    - 50 or more employees and
    - Contract value is $50,000 or more
  - If after 12/1/2003, single contract of $100,000 or more
  - Written AAP 120 days after contract starts, if:
    - 50 or more employees and
    - Contract value is $100,000 or more
  - Federally assisted construction contractors are not covered
Coverage (cont.)

- Companies with multiple facilities and locations
  - All facilities of covered contractors are subject to the requirements of the regulations it enforces
  - Foreign entities
  - Multiple entities deemed a “single entity”
    - Entities have common ownership;
    - Entities have common directors and/or officers;
    - One entity has de facto day-to-day control over the other through policies, management or supervision of the entity's operations;
    - Personnel policies of the entities emanate from a common or centralized source;
    - Operations of the entities are dependent on each other (i.e. services are provided principally for the benefit of one entity by another and/or both entities share management, offices, or other services)
Affirmative Action Plan

• What is an Affirmative Action Plan (AAP)?
  – A management tool to ensure equal employment opportunity in the workforce
  – “A central premise underlying affirmative action is that, absent discrimination, over time a contractor's workforce, generally, will reflect the gender, racial and ethnic profile of the labor pools from which the contractor recruits and selects.”
    • 41 C.F.R. § 60-2.10(a)(1)

• What is an Affirmative Action Program?
  – “An affirmative action program is...more than a paperwork exercise...includes policies, practices, and procedures the contractor implements to ensure all qualified applicants and employees are receiving an equal opportunity for recruitment, selection, advancement, and every other term and privilege associated with employment.”
    • 41 C.F.R. § 60-2.10(a)(3)
Affirmative Action Plan (cont.)

- What does an AAP contain?
  - Diagnostic components that include quantitative analyses designed to evaluate the composition of the workforce and compare it to the composition of the relevant labor pools (impact ratio analyses)
  - Action-oriented programs to improve diversity in the workforce (good faith efforts)
  - Steps designed to address disparities where the analyses show that minorities or women are not being employed at the expected rates (goals)
  - Internal auditing and reporting systems as a means of measuring the progress toward achieving a diverse workforce that reflects the composition of the relevant labor pools (progress on goals)
Additional Responsibilities of Federal Contractors

- **Self-audit**
  - Monitor and examine employment decisions to evaluate the impact on women and minorities

- **Analyze**
  - Compensation systems to evaluate the impact of those systems on women and minorities

- **Communicate**
  - Management must be involved and aware of the plan to ensure effectiveness and needs for improvement
Executive Order 11246 (E.O. 11246)

- Requires contractors and subcontractors that have contracts exceeding $10,000 from discriminatory practices and must take affirmative action to ensure equal opportunity.

- Applies to federal contractors and subcontractors with contracts of $50,000 or more and 50 or more employees.
  - Establishment with 50+ employees must have an AAP
  - Establishment with less than 50 employees may be included in the AAP of another establishment.
    - Personnel function is directed from the other location
    - Manager at the smaller establishment reports to the other location

- Collection of demographic data for Internet applicants
- Data management/record retention related to Internet applicants
Section 503 of the Rehabilitation Act of 1973

- Prohibits discrimination and requires federal contractors and subcontractors with contracts or subcontracts of $10,000 or more, to take affirmative action to hire, retain, and promote qualified individuals with disabilities.

- Disability
  - Mental and physical impairments that impact a person’s hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, and learning.
    - Expanded definition to include persons who have or who had cancer, diabetes, and chronic depression, etc.

- Invitation to self-identify
  - Contractors must invite applicants to identify as an individual with a disability pre and post offer using language prescribed by OFCCP beginning March 24, 2014.
Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) – Mandatory Job Listing Requirement

- Requires federal contractors and subcontractors with contracts or subcontracts of $25,000 or more to take affirmative action to employ, and advance in employment, certain categories of veterans
  - Disabled veteran, other protected veteran, recently separated veteran, armed forces service medal veteran

- Requires listing of most employment openings with employment service delivery system (ESDS), formerly known as “state job banks”

- Requires invitation to self-identify at pre and post offer stage beginning March 24, 2014

- Hiring benchmarks

- Data collection
Compliance – Mandatory Job Listing Requirement

- VEVRAA - mandatory job listing requirement
  - Listing with the appropriate employment service delivery system must be done concurrently with a contractor’s use of any other recruitment source or effort

- Exceptions to the rule
  - Jobs filled by internal candidates
  - Executive positions
  - Jobs that last three days or less

- Job listing documentation
  - Job title, description, location, company name, contact person, contact information
Compliance – Mandatory Job Listing Requirement (cont.)

- Register employment service delivery system account(s)
- Provide employment service delivery system offices with contact information for the third party and person responsible for hiring at location
- Must provide name and location of each hiring location within the state
- Post open positions onto the employment service delivery system in an acceptable format
- Record/document the posting with a confirmation ID from the employment service delivery system
- Save PDF snapshots of the job postings
- Maintain and keep reports in case of an audit
- Collect demographic data
- Record searches in the resume database
- Verify job websites have Internet accessibility for individuals with disabilities
- Send your jobs to organizations within the community for women, minorities, individuals with disabilities, and veterans
Compliance – Mandatory Job Listing Requirement (cont.)

- VEVRAA - mandatory job listing requirement
  - Documentation

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- Employers may want to use third party resources for tracking and reporting tools
  - Keep employment service delivery system confirmation ID on all jobs posted
  - Keep detailed records
Effective Outreach

- Target under-represented groups based on geographic goals

- Added emphasis
  - Covered veterans and individuals with disabilities

- “New” focus is on results, not just efforts
  - Focus has shifted to hires
  - During an audit, OFCCP will ask for information on applicants and hires
  - Monitor effectiveness of sources

- New regulations require annual assessment of outreach efforts in each affirmative action plan update
  - Assessment must include review of data collected
  - Criteria used to assess effectiveness of outreach must be documented
  - Develop action plans if outreach efforts are not effective
  - OFCCP will determine if companies conclusion regarding outreach was reasonable
Outreach in Action

- Establish and maintain relationships with outreach management
  - Notification of job openings
  - Personal contacts (face-to-face, phone conversations, etc.)
  - Invitation for facility tours, open houses, and company events
  - Attend job fairs that target diverse candidates
  - Recruit students from organizations that serve targeted groups
  - Advertise in targeted magazines and newspapers
    - U.S. Veteran Magazine, Veterans Magazine, American Veteran Magazine
    - Apprenticeships

- Track referrals and evaluate outreach efforts

- Diversify outreach efforts
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Internet Applicant Definition

1. Expression of interest in a particular position
   - Resume sent electronically, by fax or email, posted to website, internal or electronic database

2. Considered for the position (by contractor or third party)
   - Reviews candidate information with respect to qualifications for a particular position
     • Any job or position; does not have to be an open job position
     • Can have a standard requiring job seeker to specify position; if does not meet protocols, can discard
     • Must be consistent practice

3. Basic qualifications
   - Can be advertised or established in advance in writing
   - Must be non-comparative, objective, and relevant to the performance of the position and accomplishment of business goals

4. Do not remove themselves from consideration before receiving an offer
Record Retention and Demographic Data Solicitation

- Record retention obligation
  - A contractor must retain all electronic “expressions of interest” from candidates if the contractor “considers” the individuals “for a particular position” regardless of whether the individual qualifies as an Internet applicant
  - Records must be kept for a 2-year period
  - Outreach and recruitment activities must be kept for a 3-year period

- Demographic data solicitation of applicants
  - Veteran self-identification inquiry
    - General question about protected veteran status at pre-offer; more specific status questions at post-offer
  - Disability self-identification inquiry
    - Must use OFCCP’s language
    - Solicit applicants when surveying for race and gender
  - Can begin surveying applicants on March 24, 2014
Applicant Flow Log

- Applicant flow log
- All individuals meeting the Internet applicant definition must be maintained on an applicant flow log
- It is imperative that contractor recruiters (and managers, if applicable) correctly identify applicants in the contractor’s system
- All candidates need to be processed through the system correctly in order to maintain correct data for annual and mid-year applicant flow reports
Data Management Techniques

- Limiting the number of records required to be maintained, or viewed as “considered” under the regulations

- Techniques used to limit the number of expressions of interest which will be considered
  - Examples
    - Random sampling
    - Absolute numerical limits to reduce the number of minimally qualified candidates
      - First 50 resumes
Disposition Codes

- Essential for capturing applicant data for reports that are necessary to complete the AAP
- Vary by employer and types of position
- Effective codes answer:
  - When or at what stage the candidate fell out of consideration for the job?
  - Why the candidate fell out of consideration?
  - Who made the decision?

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<td>Considered</td>
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<td>Did not fit corporate culture</td>
<td>Not willing to work required hours – Recruiter 2</td>
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<td>Not approved by manager</td>
<td>Not willing to work required shift – Recruiter 1</td>
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When searching an internal database (contractor’s own database) or external database (e.g. DCJobs.com) for candidates of a particular position, the employer (or third party recruiter) must maintain a log that identifies the following:

- Specific job for which the search was performed (by job title and requisition number, if any)
- Date the search was conducted
- Criteria used for conducting the search
- Results of the search
- Resumes of those that meet the basic qualifications that are reviewed must be saved even if the individual does not become an Internet applicant
Data and Record Retention Compliance Obligations

- All information and materials required to be maintained by third party recruiters shall be maintained for a two-year period, shall be accessible to contractor, and provided within seven days of a request.

- Contractor should reserve the right to audit third party recruiters for compliance with these obligations.

- Third party recruiters may be required to enter into a recruiting addendum that notes that failure to comply with record maintenance requirements may result in terminating the contract for services.
Compliance Review Steps

- Audits
- Resolution
  - Conciliation agreements
    - A document acknowledging the offense and stating how the offense will be corrected to mitigate future violations
  - Required outreach
    - A document connecting a contractor with community recruitment and/or training centers in order to gain candidate leads
  - Monitoring
  - Litigation
  - Sanctions and debarment
Resources

• Carmen Couden, Foley and Lardner LLP
  – ccouden@foley.com
  – 414-297-5568

• Community and Diversity Outreach

• Employment Service Delivery Systems

• LVERs and DVOPs Locator

• Vocational Rehabilitation Guide

• The OFCCP Digest

• LJNRadio
Wrap-Up

- Thank you for attending our webinar
- HRCI credit information is emailed
- Please complete our survey
- Q&A
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