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Government contractor to pay more than \$540,000 to settle discriminatory hiring case with OFCCP

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A recent settlement with the Department of Labor's Office of Federal Contract Compliance Programs (the "OFCCP") has once again made clear that, if an employer is a federal government supply and service contractor or subcontractor subject to the affirmative action/non-discrimination obligations imposed by Executive Order 11246, including the obligation to develop and maintain a written affirmative action program, it is imperative that the employer properly track its applicants and hires.

Such tracking should include documenting the gender and race/ethnicity of each applicant, the stages of the selection process at which each applicant meeting the minimum qualifications for the position is considered, and the reason(s) why such applicant is not hired. Records obtained and generated during the hiring process, including resumes, applications and interview notes, also need to be kept to support each hiring decision.

Why is tracking such data and maintaining such records necessary? Because contractors and subcontractors with fifty (50) or more employees having a supply and service contract in excess of \$50,000 with the federal government (or a covered contractor) must develop and maintain a written affirmative action program that is subject to a compliance review by the OFCCP. With each compliance review, the OFCCP is analyzing an employer's applicant/hiring data, and, where the analysis statistically reveals adverse impact, it is putting ***the burden on the employer to justify its hiring decisions***. If an employer is unable to justify one or more of its hiring decisions, it may be required to pay out significant back-pay to those applicants that were not hired.

Case in point, the OFCCP recently announced that Alcoa Mill Products Inc. will pay \$484,656.19 in back wages to 37 Hispanic and African-American applicants as well as \$35,516.88 to two female applicants, all of whom were rejected for material handler positions at the company's plant in Lancaster, Pennsylvania. These payments were the result of a scheduled compliance review for the period from 2009 to 2010. Entering into a conciliation agreement, Alcoa has also agreed to extend job offers to nine of the identified class members as positions become available, to conduct EEO, anti-



harassment and sensitivity training for employees, including managers and human resources personnel involved in hiring, and to revise its selection process for material handlers. (See OFCCP News Release <http://www.dol.gov/opa/media/press/ofccp/OFCCP20111168.htm>).

To avoid a similar result, employers must ensure that they are properly tracking their applicants and hires. They also need to analyze their applicant/hiring data to identify potential adverse impact. Where the statistical results of such analysis indicate adverse impact in hiring, employers need to review the hiring decisions made to ensure that each decision is justifiable, and that the employer has the documentation to support it.