



## Legal Alert: Administrative Law Judge Rules in Favor of Company in OFCCP Compliance Review Dispute

8/5/2010

On July 23, 2010, Administrative Law Judge Larry W. Price issued a significant ruling that clearly establishes the temporal scope of an OFCCP compliance review during the desk audit phase. **Facts** On July 13, 2007, the OFCCP sent Frito-Lay a Scheduling Letter stating that its Dallas Baked Snack facility had been selected for a compliance review. In the letter, the OFCCP asked Frito-Lay to submit applicant and hire data for the 2006 Affirmative Action Plan year. It also asked for data for the first half of 2007 if Frito-Lay received the letter six months or more into its current AAP year. The Frito-Lay AAP was effective January 1, 2007; thus, the Company sent the OFCCP hire and applicant data for 2006 and the first six months of 2007. The OFCCP later requested data for the second half of 2007 and for data dating back to July 13, 2005. Frito-Lay complied with the OFCCP's request. The OFCCP analyzed hiring at the Dallas Baked Snack facility and alleged the analysis showed an adverse impact in Frito-Lay's hiring of women from June 13, 2006 to December 31, 2007. The OFCCP then alleged it was necessary to determine whether the adverse impact continued after December 31, 2007. The OFCCP sent Frito-Lay a request on November 10, 2009, for applicant and hire data from January 1, 2008 to October 31, 2009. Frito-Lay refused to comply with the OFCCP's request and the OFCCP subsequently filed an administrative complaint. In Frito-Lay's case, the compliance review was still in the desk audit phase. Frito-Lay argued that the OFCCP's regulatory framework establishes the temporal scope of a compliance review during the desk audit as the contractor's previous affirmative action plan year at the time the contractor received the Scheduling Letter. The scope extends to the date the contractor received the Scheduling Letter if the contractor was more than six months into its current AAP plan year when it received the Scheduling Letter. If the OFCCP is investigating discrimination, the regulatory framework allows it to investigate the two-year period prior to the date the contractor received its Scheduling Letter. Frito-Lay argued that OFCCP's regulatory framework does not allow the OFCCP to lengthen the review period to data regarding employment activity that occurred beyond the date it received the Scheduling Letter. The OFCCP, however, argued that the 2008 and 2009 applicant and hire data was relevant to its investigation and was appropriate under its implementing regulations. Judge Price framed the issue to be whether the temporal scope of the desk audit phase of a compliance review can be extended beyond the date the contractor received its Scheduling Letter. Judge Price ultimately agreed with Frito-Lay and held that nothing in the OFCCP's regulatory framework requires the company to provide the OFCCP with the 2008 and 2009 applicant and hire data. Judge Price cited regulatory provisions that do

not reference the OFCCP's examining data going forward in time. He held that the OFCCP had not cited any cases where broad power was extended during the desk audit phase to dates beyond the Scheduling Letter. Based on his analysis, he recommended dismissal of the complaint against Frito-Lay. The OFCCP plans to appeal Judge Price's decision to the U.S. Department of Labor's Administrative Review Board. **Impact of this Decision on Federal Contractors** During recent audits, the OFCCP has routinely asked for data compiled after the date of the Scheduling Letter. If you are in the middle of a desk audit, be mindful of requests for personnel activity data beyond the date of the Scheduling Letter. Based on *Frito-Lay*, you are not required to submit such data. However, you will want to consult legal counsel to determine if this case is applicable to your situation. Also, keep in mind that after this case, the OFCCP can still request personnel activity data going **back** two years. Thus, the OFCCP will continue to make requests for data compiled prior to the Scheduling Letter. If you have any questions regarding this Alert, please contact any member of Ford & Harrison's Affirmative Action Compliance and Plan Development practice group or the Ford & Harrison attorney with whom you usually work.