



Labor Letter

OFCCP Gets Tough

By [Celia Joseph](#)

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"We are going to be extremely proactive and aggressive. The message is it's a new day at the Department of Labor and it's a new day at the OFCCP," Patricia A. Shiu, Director of the OFCCP, Feb. 16, 2010.

The Office of Federal Contract Compliance Programs (OFCCP) certainly remained true to these words during the course of 2010. The OFCCP has promised to aggressively enforce its regulatory agenda – and is delivering on its promise. While the federal contractor community awaits revised OFCCP regulations, the following cases, settlements, and program changes announced by the OFCCP since mid-October 2010 are certainly enough to make federal contractors want to ensure that they take all steps to understand and comply with their affirmative action and non-discrimination obligations.

Note that, in every case, the companies mentioned below denied any discrimination or wrongdoing.

TRICARE Participation = OFCCP Jurisdiction

A DOL Administrative Law Judge held that the Florida Hospital of Orlando was required to comply with OFCCP affirmative action and nondiscrimination requirements since it provided health care services for a federal contractor that administered TRICARE, the Department of Defense's program for military members. That meant that the hospital was subject to OFCCP regulations, including the requirement that the OFCCP can enter its facilities to conduct compliance evaluations.

Hiring Discrimination Claim No. 1: \$167,000

The OFCCP and Gruma Corporation, a tortilla manufacturer, entered into a Consent Decree resolving allegations that Gruma discriminated against female applicants in hiring, arising from the compliance evaluation of one of its facilities. Gruma settled the dispute for \$167,000, representing back pay and interest to be distributed among the class of 1,106 female applicants, as well as several hiring and recordkeeping requirements.

Hiring Discrimination Claim No. 2: \$250,000

The OFCCP filed an administrative complaint alleging that Nash Finch Company, the U.S.'s second-largest publicly-traded wholesale distributor, and one of the leading suppliers of the United States armed forces, discriminated against over 80 female job applicants at the company's Lumberton, North Carolina, facility. The OFCCP is seeking reinstatement of qualified female candidates, payment of lost wages and other benefits, and immediate cancellation of Nash Finch's federal contracts and debarment from receiving future federal contracts.

The OFCCP stated that over the past decade, it settled discrimination cases with other Nash Finch facilities after uncovering serious legal violations regarding recordkeeping and hiring discrimination, and that the Company "created an uneven playing field for women, minorities, and veterans seeking employment" with Nash Finch. OFCCP Director Shiu stated: "It is unacceptable that a company which profits from lucrative federal contracts would repeatedly violate the law in this manner. Nash Finch has demonstrated an unfortunate pattern and practice of hiring discrimination, and the American taxpayers should not have to bankroll this company's bad behavior anymore."

Hiring Discrimination Claim No. 3: \$570,000

The OFCCP and Tyson Refrigerated Processed Meats Inc., settled a hiring discrimination case for \$570,000 upon the OFCCP's finding that Tyson favored Hispanic applicants over Caucasian and African-American applicants at its Vernon, Texas site. The settlement included 375 Caucasian and 157 African-American applicants for the site's laborer positions and involved one of a number of OFCCP actions involving Tyson Foods. Tyson agreed to: 1) pay \$560,000 in back pay and interest to the 532 applicants; 2) offer laborer positions to 59 applicants as these positions become available; 3) revise the practices, policies, and procedures it uses to recruit, track, and hire applicants to fully comply with the law; and 4) immediately correct discriminatory practices.

Data Analysis, Recordkeeping And Reporting Required By Consent Decree

DOL Office of Administrative Law Judges approved a Consent Decree between OFCCP and URS Energy and Construction, Inc. requiring detailed statistical analysis and reporting on employee and applicant information. The company must perform an in-depth analysis of its total employment process in its Princeton, N.J. facility to determine where impediments to equal employment opportunity might exist, and evaluate its applicant and new-hire activity to determine whether there were selection disparities in job groups.

Charges Filed Against Aerospace Engine Part Manufacturer

Meyer Tool, Inc., a federal contractor that manufactures engine parts for the aerospace industry, was faced at its Cincinnati facility, with charges that it systematically rejected African-American job applicants seeking positions as entry-level machinists, and violated recordkeeping requirements.

In addition to seeking a court order requiring Meyer Tool to hire at least 14 African-American applicants from the affected class list and to provide them with lost wages and retroactive seniority, the OFCCP stated that if Meyer Tool failed to remedy these violations it could face cancellation of its existing government contracts and debarment from entering into any new ones.

And Lots More On The Way

On December 2, 2010, the OFCCP discontinued its Active Case Management Procedures forging the way for the agency to increase the number of its onsite audits. Under the ACM process, absent any indicators of discrimination, onsite audits were only conducted in a small percentage of compliance evaluations.

Our Advice

Federal contractors should expect increasingly aggressive enforcement by the OFCCP, including greater numbers of onsite compliance evaluations. You should continue to follow all OFCCP obligations, of course, but in addition establish procedures to ensure that your paperwork and decision making are both accurate and fully documented.

Two specific steps to take in this regard are to ensure that: 1) only applicants who satisfy all of the OFCCP definitions of an applicant (such as being qualified for the position) are included as applicants in the applicant flow log; and 2) recruiting Human Resources professionals, as well as hiring supervisors of all levels. And be sure to document the reasons why you did or did not offer a job to an applicant.

Federal contractors who are the subject of repeated conciliation agreements and consent decrees can expect that the OFCCP will seek the most aggressive enforcement actions through administrative complaints seeking federal contract cancellation, debarment, and significant monetary and employment-related relief for employees and applicants found to be victims of discrimination.

The bottom line is that you should create and maintain robust diversity and affirmative action programs that comply with both the letter and the spirit of the mission of both OFCCP and EEOC law.

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