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LEGAL ALERT



## Legal Alert: OFCCP's \$900,000 Settlement with Gerber Holds Lessons for Other Employers

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A recent announcement by the Office of Federal Contract Compliance Programs (OFCCP) that Gerber Products Company will pay \$900,000 to settle findings of hiring discrimination against 1,912 rejected minority and female applicants may be a reflection of the increased aggressiveness that has been promised by the agency. Secretary of Labor Hilda Solis stated that the settlement "should put all federal contractors on notice that the Labor Department is serious about eliminating systemic discrimination."

The hiring disparity was discovered during a scheduled compliance evaluation conducted by the OFCCP. According to agency investigators, the disparity was caused in part by inconsistent selection procedures used for entry-level positions. Additionally, the agency found that the company used pre-employment tests that negatively impacted minority applicants and determined that there was insufficient evidence of validity to support Gerber's use of the test.

Under the terms of the conciliation agreement, Gerber will pay 1,912 minority and female applicants \$900,000 in back pay and interest and will also provide 61 entry-level positions, 11 of whom have already been hired.

Employers can take several lessons from this case. First, the OFCCP continues to collect the vast majority of its settlement monies in the hiring context for entry-level positions. It is not clear from the information available to the public but many situations where contractors are facing allegations of discrimination result from recordkeeping problems with the applicant data. This case demonstrates the importance of ensuring that employment-related data is properly maintained, especially applicant tracking, and that the employer is properly prepared for a compliance audit. Remember, the OFCCP received a substantial increase to its 2010 fiscal year budget that will allow the agency to increase its enforcement efforts during audits.

Additionally, the use of employment tests should be evaluated carefully to ensure that the tests are valid for the positions for which they are used. Any device used to measure an individual's employment or career-related qualifications and interests can be considered an employment test. If the use of such tests has a disproportionately negative impact on minority or female applicants, employers should consult with experienced legal counsel to determine whether other screening methods would be appropriate.

If you have questions regarding these issues, please contact Linda

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