

OFCCP Sets New Targeting Plan

The nondiscrimination and affirmative action obligations imposed on employers who do business with the government are enforced by the Office of Federal Contract Compliance Programs (OFCCP). In the past, very large government contractors could generally expect that one or more of their facilities would be reviewed by the OFCCP each year, while smaller contractors could go many years without any review. Larger contractors were the principal targets because they generally had more opportunities for hiring and/or promoting minorities and women. But now, the OFCCP has announced a new targeting plan—which is based on whether a contractor’s statistics reflect a likelihood of discrimination rather than opportunities for affirmative action.

In a keynote address to the National Industry Liaison Group in August, the Director of the OFCCP, Charles James, announced that the OFCCP has begun applying a new target model developed by an outside research consultant. The new model analyzes statistics to determine which employers are most likely to have systemic discrimination. Based on this new target model, the OFCCP has developed a list of 3,560 “worst offenders” for possible compliance review. The agency has already sent out “scheduling letters” to 663 members of the allegedly

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“worst offenders” group. The notice gives contractors the opportunity to address possible problems with respect to their EEO compliance. According to the Bureau of National Affairs (BNA), a draft of the letter states: “OFCCP will give serious consideration to any remedial action voluntarily undertaken by a particular establishment

prior to the conduct of an OFCCP review ... where compliance deficiencies have been identified through self-audits Such remedial action may mitigate any relief sought by OFCCP, to the extent the remedial action [voluntarily undertaken] corrects the problem(s) at issue.”

Traditionally, an OFCCP audit concluded with the agency issuing directives on how to correct the affirmative action plan. If the OFCCP is successful in using this model, employers can expect many more compliance reviews to end in findings of unlawful discrimination. In such cases, monetary relief must be provided to the applicants/employees found to be victims of discrimination. This approach is dramatically different from the approach that the OFCCP has taken for most of its existence and it is potentially more expensive for employers. Whether this new focus will really promote affirmative action remains to be seen.

Steven H. Adelman | 312.443.0405 | sadelman@lordbissell.com

FLSA

Court Finds That Insurance Adjusters Are Not Exempt From Overtime

The new Fair Labor Standards Act regulations on overtime exemptions took effect on August 23, 2004. Even before their effective date, the District Court in Washington, D.C. decided to look to the new regulations for guidance in a case involving auto insurance adjusters. Based on that decision, it appears that not only did the Department of Labor fail to achieve its goal of simplifying the classification process, but critics claiming that it would only erode overtime eligibility were also wrong.

The insurance industry was one of the industries seeking Fair Labor Standards Act reform, because it has been subjected to a spate of class action cases claiming that insurance adjusters were entitled to be paid for overtime. Many insurance companies breathed a collective sigh of relief when the new regulations published by the Department of Labor simply stated:

Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liabilities and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

But in a case involving Government Employees Insurance Company (GEICO), it turned out that this new regulation does not mean that all insurance adjusters are exempt from overtime pay requirements. The case involved

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