

AN EQUAL OPPORTUNITY PARADOX FOR FEDERAL CONTRACTORS

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Federal contractors assume a litany of obligations. Unlike non-contractors, federal contractors must “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard” to their protected characteristics (e.g., race, color, religion, sex, sexual orientation, gender identity, or national origin). Federal contractors must be especially mindful of abiding by these obligations because the potential consequences for noncompliance go far beyond the usual damages other employers face in discrimination cases. Contractors run the risk of losing a very significant customer—the federal government.

The applicable legal framework. The U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) is responsible for monitoring federal contractors’ compliance with requirements, including that they not discriminate in violation of Title VII of the Civil Rights Act of 1964 and that they “take affirmative action.” Among other relief, the OFCCP can seek debarment, the ultimate sanction for businesses relying on federal contracts.

Contractors must be careful to avoid claims of disparate treatment as well as

disparate impact. Disparate treatment requires proof of intentional discrimination against an employee or group of employees on the basis of a protected trait. An employer found to have engaged in disparate treatment may have discriminated through a pattern or practice or, instead, engaged in individual discrimination. To establish a pattern or practice of disparate treatment, the OFCCP must provide “convincing proof of a

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company-wide discriminatory policy” and demonstrate that “discrimination was the company’s standard operating procedure—the regular rather than the unusual practice.”

Disparate impact claims shift the focus from discriminatory intent to discriminatory effect. The determination of disparate impact discrimination is inherently a backward-looking exercise focused on a facially race- or gender-neutral process.

OFCCP disparate impact cases challenging facially neutral selection procedures are governed by the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines). To establish a disparate impact case, the OFCCP “must show that a facially neutral employment practice causes a significant discriminatory impact on a protected class,” and that, to the extent the employer is able to show the challenged practice is job-related and consistent with business necessity, “other . . . procedures exist that would serve the defendant’s legitimate business interest without causing an adverse impact.” *OFCCP v. TNT Crust*, No. 2004-OFC-3, 2007 WL 5309232, at *16–18 (Sept. 10, 2007).

The OFCCP’s near exclusive reliance on statistics. When assessing potential hiring discrimination in recent years, the OFCCP has issued notices of violation (NOVs) to contractors without any recitation of anecdotal evidence of discriminatory intent and without identifying any specific employment practice responsible for an alleged disparate impact. Instead, it relies almost exclusively on statistical analysis to determine whether candidates from each demographic group with relevant qualifications and experience were selected for hire at rates consistent with what would be expected in a neutral selection process. If not, it calculates whether the difference in the actual versus the expected selection rate is so great that it raises an inference of discrimination.

An employer must demonstrate that a challenged practice is job-related and consistent with business necessity in accordance with the Uniform Guidelines, which delineate the minimum acceptable methods contractors must use to demonstrate the job-relatedness and business necessity of a selection criterion. Defendants claiming an atypical pool bear the burden

of showing that recruitment efforts created a pool of unqualified applicants, thus explaining selection disparity.

The OFCCP's Internet Applicant Rule. New hiring technologies offer employers a wealth of possibilities to find the best talent. However, if this technology is not used properly, the contractor may be liable for disparate impact or disparate treatment claims if the selection rate is not statistically representative of the applicant pool.

It is critical for contractors to understand the OFCCP's 2005 Internet Applicant Rule (IAR), which modified contractor recordkeeping requirements to address the increasing use of electronic technologies and the Internet in hiring. Under the revised regulations, contractors must solicit and maintain certain demographic information in connection with electronic hiring processes for all "Internet Applicants." The regulations define an Internet Applicant as an individual who satisfies the following four criteria: Expresses interest in employment; possess basic qualifications (BQ); is considered for a particular position; and does not withdraw from consideration. If an employer confines its "consideration" of candidates to those who meet the other parts of the Internet Applicant definition, it need only include those Internet Applicants in its adverse impact analyses. If the employer does not do so, all job seekers screened for the position, whether they possess the basic qualifications or not, must be included in adverse impact analyses reported to the OFCCP during a compliance evaluation.

Practical advice to contractors to mitigate risk. Until the OFCCP takes a more critical approach to its investigations and enforcement strategy, the paradox faced by federal contractors leaves them vulnerable to NOV's, enforcement

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proceedings, and accompanying economic risks. The interim solution to reducing risks lies in acquiring and developing an effective applicant tracking system; regular training and monitoring of the staffing organization and hiring managers; a vigorous, disciplined, and strategic application of the IAR; and periodic diagnostic analysis under attorney-client privilege.

Most applicant tracking systems (ATS) offer an "OFCCP compliant" package. However, some deliver far greater compliance than others. Before acquiring an ATS, someone with expertise with IAR requirements must review its candidate-facing and recruiter-facing functionality to ensure it is, in fact, fully OFCCP compliant.

Contractors must develop comprehensive sourcing, selection and recordkeeping policies, and guidance documentation. The policies and guidance should cover such topics as how to open and manage a requisition; the development of basic and preferred qualifications; the strategic

use of data management techniques; consistent application of disposition codes, including accurate disposition of candidates not considered; and effective use of external databases to source candidates.

Contractors must also develop a disciplined and strategic approach to implementing the IAR. One of the contractor-friendly aspects of the IAR is the ability to reduce applicant flow. Here are some ways to accomplish this: create well-defined BQs to eliminate candidates from applicant flow early in the hiring process; use multiple, specific, and precise BQs; strategically use "knock out" and "eligibility" questions; rely on "interest" questions; carefully consider the use of a facially neutral data management technique; use carefully conceived and requisition-based talent acquisition; and avoid so-called passive recruiting—in which recruiters import candidates into the ATS who appear to have both basic and preferred qualifications without requiring them to express interest in a specific position. ■