

*Operating with Integrity*

# **CULTURE OF EXCELLENCE**

## **AFFIRMATIVE ACTION COMPLIANCE – NAVIGATING THE WATERS OF OFCCP**

Presented by **Brian Carmichael**



**45** YEARS

# TOPICS OF DISCUSSION

- 1) Who is OFCCP? Who is in charge?*
- 2) How does an audit get scheduled?*
- 3) Where should my compliance focus be?*
- 4) What happens if we fail to comply?*

## **WHO IS OFCCP? WHO IS IN CHARGE?**

- Office of Federal Contract Compliance Programs (OFCCP)
- The purpose of the OFCCP is to enforce, for the benefit of job seekers and wage earners, the contractual promise of affirmative action and equal employment opportunity required of those who do business with the Federal government.
- Currently, the Director of OFCCP position is vacant. The role is being filled in an interim basis by Thomas Dowd, Deputy Director. He has held various roles within the federal government to include head of the Bureau of Indian Education under the Department of Interior and Division Director for the Indian and Native American Employment and Training Programs under the Employment and Training Administration

# OFCCP – SERVICE & SUPPLY NUMBERS

Supply and Service Compliance Evaluations												
	FY 2017 (Q1-Q3)	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007	Average (FY07 -FY16)
Scheduled	825	1,048	2,036	3,014	4,429	3,184	2,687	3,985	4,107	3,427	4,128	3,205
Completed	831	1,522	2,345	3,471	3,696	3,496	3,463	4,441	3,676	4,121	4,701	3,493
Completion Type												
Conciliation Agreement or Consent Decree	154	273	342	395	894	1045	808	666	585	515	441	596
	18.5%	17.9%	14.6%	11.4%	24.2%	29.9%	23.3%	15.0%	15.9%	12.5%	9.4%	17.1%
EO 11246 Violation	154	258	297	343	698	788	587	486	442	497	432	483
	18.5%	17.0%	12.7%	9.9%	18.9%	22.5%	17.0%	10.9%	12.0%	12.1%	9.2%	13.8%
Section 503 Violation	55	99	173	245	614	710	555	431	289	153	108	338
	6.6%	6.5%	7.4%	7.1%	16.6%	20.3%	16.0%	9.7%	7.9%	3.7%	2.3%	9.7%
Section 4212 Violation	76	140	236	280	704	813	662	530	393	262	273	429
	9.1%	9.2%	10.1%	8.1%	19.0%	23.3%	19.1%	11.9%	10.7%	6.4%	5.8%	12.3%
Discrimination Violation	30	38	32	41	59	94	78	72	78	81	61	63
	3.6%	2.5%	1.4%	1.2%	1.6%	2.7%	2.3%	1.6%	2.1%	2.0%	1.3%	1.8%
Number of Workers in Facilities Reviewed	527,607	1,038,542	1,163,072	1,557,885	1,524,788	1,436,254	1,594,938	2,165,918	1,787,767	2,122,781	2,357,716	1,674,966

Note: The numbers do not add up to the Completed total and the percentages do not add to 100% because cases with no violations are not summarized and the completion types are not mutually exclusive.

# OFCCP – CONSTRUCTION

Construction Compliance Evaluations												
	FY 2017 (Q1-Q3)	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007	Average (FY07 -FY16)
Scheduled	71	137	225	426	305	183	388	578	661	342	182	343
Completed	84	174	258	368	414	511	550	515	238	204	223	346
Associated with a Mega Construction Project	64	86	75	97	67	67	69	39	51	49	45	65
	76.2%	49.4%	29.1%	26.4%	16.2%	13.1%	12.5%	7.6%	21.4%	24.0%	20.2%	18.7%
Completion Type												
Conciliation Agreement or Consent Decree	45	83	124	173	239	281	292	254	110	107	92	176
	53.6%	47.7%	48.1%	47.0%	57.7%	55.0%	53.1%	49.3%	46.2%	52.5%	41.3%	50.8%
EO 11246 Violation	40	82	129	178	248	278	295	268	109	107	104	180
	47.6%	47.1%	50.0%	48.4%	59.9%	54.4%	53.6%	52.0%	45.8%	52.5%	46.6%	52.0%
Section 503 Violation	17	20	33	50	81	102	90	28	16	20	13	45
	20.2%	11.5%	12.8%	13.6%	19.6%	20.0%	16.4%	5.4%	6.7%	9.8%	5.8%	13.1%
Section 4212 Violation	20	24	46	63	105	132	137	68	45	38	26	68
	23.8%	13.8%	17.8%	17.1%	25.4%	25.8%	24.9%	13.2%	18.9%	18.6%	11.7%	19.8%
Discrimination Violation	1	1	3	5	7	9	11	6	0	1	1	4
	1.2%	0.6%	1.2%	1.4%	1.7%	1.8%	2.0%	1.2%	0.0%	0.5%	0.4%	1.3%
Number of Workers in Facilities Reviewed	9,955	16,332	18,845	24,778	22,480	20,418	38,638	62,235	22,075	17,339	19,592	26,273
Note: The numbers do not add up to the Completed total and the percentages do not add to 100% because cases with no violations are not summarized and the completion types are not mutually exclusive.												

# OFCCP – COMPLAINTS INVESTIGATED

Complaints Investigated												
	FY 2017 (Q1-Q3)	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007	Average (FY07 -FY16)
Investigated	79	147	114	148	232	176	135	104	84	166	112	142
Monetary Relief	\$80,702	\$203,933	\$516,797	\$226,598	\$457,851	\$171,426	\$484,681	\$142,588	\$431,833	\$605,618	\$754,818	\$399,614
Complainants with Monetary Relief	4	11	15	12	27	7	38	16	21	21	65	23
Monetary Relief Per Complainant	\$20,176	\$18,539	\$34,453	\$18,883	\$16,957	\$24,489	\$12,755	\$8,912	\$20,563	\$28,839	\$11,613	\$19,600

# OFCCP – COMPLAINTS FILED BY PRACTICE

Complaints By Employment Practice

	FY 2017 (Q1-Q3)	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007	Average (FY07 -FY16)
Received	550	691	769	699	790	780	669	610	518	614	518	666
Hiring	37	55	113	135	155	208	145	135	95	116	108	127
	6.7%	8.0%	14.7%	19.3%	19.6%	26.7%	21.7%	22.1%	18.3%	18.9%	20.8%	19.0%
Job Assignment	20	54	125	188	222	220	185	164	136	129	117	154
	3.6%	7.8%	16.3%	26.9%	28.1%	28.2%	27.7%	26.9%	26.3%	21.0%	22.6%	23.1%
Promotion	13	43	90	113	128	134	110	100	86	111	108	102
	2.4%	6.2%	11.7%	16.2%	16.2%	17.2%	16.4%	16.4%	16.6%	18.1%	20.8%	15.4%
Demotion	4	15	35	59	48	63	47	43	27	37	37	41
	0.7%	2.2%	4.6%	8.4%	6.1%	8.1%	7.0%	7.0%	5.2%	6.0%	7.1%	6.2%
Segregated	1	2	14	26	17	25	18	35	9	20	16	18
	0.18%	0.29%	1.82%	3.72%	2.15%	3.21%	2.69%	5.74%	1.74%	3.26%	3.09%	2.73%
Termination	90	175	236	272	373	355	299	237	188	221	177	253
	16.4%	25.3%	30.7%	38.9%	47.2%	45.5%	44.7%	38.9%	36.3%	36.0%	34.2%	38.0%
Recall	3	3	11	33	26	37	28	32	12	28	17	23
	0.5%	0.4%	1.4%	4.7%	3.3%	4.7%	4.2%	5.2%	2.3%	4.6%	3.3%	3.4%
Layoff	4	14	62	71	88	109	50	67	49	45	37	59
	0.7%	2.0%	8.1%	10.2%	11.1%	14.0%	7.5%	11.0%	9.5%	7.3%	7.1%	8.9%
Wages	40	62	111	160	179	184	151	141	126	133	114	136
	7.3%	9.0%	14.4%	22.9%	22.7%	23.6%	22.6%	23.1%	24.3%	21.7%	22.0%	20.4%
Seniority	4	10	44	63	88	109	74	73	52	43	59	62
	0.7%	1.4%	5.7%	9.0%	11.1%	14.0%	11.1%	12.0%	10.0%	7.0%	11.4%	9.2%
Harassment	59	145	205	301	310	310	265	261	198	215	188	240
	10.7%	21.0%	26.7%	43.1%	39.2%	39.7%	39.6%	42.8%	38.2%	35.0%	36.3%	36.0%
Job Benefits	8	25	58	103	117	120	97	92	73	73	65	82
	1.5%	3.6%	7.5%	14.7%	14.8%	15.4%	14.5%	15.1%	14.1%	11.9%	12.5%	12.4%
Training	7	11	47	85	85	100	68	81	50	59	57	64
	1.3%	1.6%	6.1%	12.2%	10.8%	12.8%	10.2%	13.3%	9.7%	9.6%	11.0%	9.7%
Retaliation	187	282	213	143	151	189	250	256	180	216	167	205
	34.0%	40.8%	27.7%	20.5%	19.1%	24.2%	37.4%	42.0%	34.7%	35.2%	32.2%	30.7%
Pregnancy	2	8	15	7	11	12	3	4	5	6	6	8
	0.4%	1.2%	2.0%	1.0%	1.4%	1.5%	0.4%	0.7%	1.0%	1.0%	1.2%	1.2%
Disabled	22	76	121	170	141	141	97	115	93	90	92	114
	4.0%	11.0%	15.7%	24.3%	17.8%	18.1%	14.5%	18.9%	18.0%	14.7%	17.8%	17.1%
Other*	107	127	199	296	309	274	264	200	160	139	145	211
	19.5%	18.4%	25.9%	42.3%	39.1%	35.1%	39.5%	32.8%	30.9%	22.6%	28.0%	31.7%

Note: The numbers by employment practice do not equal the total number Received because the Bases are not mutually exclusive.

\*Other employment practice not listed above.

# OFCCP – MONETARY RELIEF

Discrimination Cases Completed (Compliance Evaluations and Complaint Investigations)												
	FY 2017 (Q1-Q3)	FY 2016	FY 2015	FY 2014	FY 2013	FY 2012	FY 2011	FY 2010	FY 2009	FY 2008	FY 2007	Average (FY07 FY16)
Discrimination Cases	35	46	46	51	65	102	106	86	89	94	69	75
Pay Discrimination Cases	12	15	10	14	22	34	29	13	4	9	7	16
	34.3%	32.6%	21.7%	27.5%	33.8%	33.3%	27.4%	15.1%	4.5%	9.6%	10.1%	20.8%
Systemic Pay Discrimination	11	14	7	10	3	3	5	4	2	5	6	6
	91.7%	93.3%	70.0%	71.4%	13.6%	8.8%	17.2%	30.8%	50.0%	55.6%	85.7%	37.6%
Monetary Relief												
Monetary Relief to Class Members	\$10,913,694	\$10,547,363	\$6,074,814	\$12,345,247	\$8,389,598	\$11,751,904	\$13,984,825	\$11,319,063	\$11,490,514	\$17,061,712	\$15,297,117	\$11,826,216
Class Members	7,682	18,362	16,040	23,018	9,268	30,851	15,221	12,360	21,673	25,264	20,732	19,279

# HOW DOES AN OFCCP AUDIT GET SCHEDULED?

## - **Federal Contractor Selection System (FCSS)**

- OFCCP's FCSS is a neutral selection system that identifies federal contractor establishments for compliance evaluations. The FCSS process uses multiple information sources such as federal acquisition and procurement databases, EEO-1 employer information reports, Dun & Bradstreet (D&B) data, Census data, and statistical thresholds such as industry type and employee counts of federal contractor establishments.

-The list is further refined by applying a number of neutral factors such as contract expiration date, contract value, and pre-defined operational limits on the number of establishments per contractor that may be scheduled in any one cycle. Establishments covered by Functional Affirmative Action Plan (FAAP) agreements, currently under review, reviewed within the prior twenty-four months, subject to current conciliation agreements or consent decrees, or waiting for scheduling from the prior list are also removed.

# HOW DOES AN OFCCP AUDIT GET SCHEDULED? (CONTINUED)

## - **Not on FCSS list – Can you still be scheduled?**

Yes. OFCCP may conduct a compliance evaluation of an establishment not on the FCSS list under certain circumstances:

- **Pre-award Compliance Evaluation:** Contractor establishments pending an award of a federal supply and service contract of \$10 million or more may undergo a compliance evaluation.
- **FAAP Compliance Evaluation:** These evaluations are scheduled from the companies that have an active FAAP agreement with OFCCP.
- **Directed Review:** These compliance evaluations may be scheduled by OFCCP when it receives credible information of an alleged violation of a law or regulations the agency enforces, including those deriving from individual or class complaints filed with the EEOC, or state or local fair employment practice agencies (FEPAs) that allege employment discrimination covered under the laws that OFCCP enforces.
- **Conciliation Agreement and Consent Decree Follow-Up Evaluation:** These evaluations are scheduled during the monitoring period of an executed conciliation agreement or consent decree based on information received in a scheduled progress report, or when OFCCP otherwise needs to determine compliance with the terms of the agreement or decree.

There were a total of 800 establishments (375 distinct companies) on this first release of the FY 2017 Scheduling List.

# WHERE SHOULD OUR FOCUS BE?

## Two Areas of Most Concern

Compensation – Proven discrimination by OFCCP because of race and/or gender

- a. In Annual Salaries, Merit Increases, Bonuses, Overtime Assignment
- b. Make whole remedies occur to include salary adjustments, back pay, and interest

Personnel Activities – Proven discrimination by OFCCP because of race and/or gender

- a. Includes hires, promotions, demotions, terminations, etc.
- b. Again, make whole remedies occur to include hiring/promoting/rehiring affected individuals, salary adjustments, back pay, and interest

*NOTE: OFCCP will look at male and non-minority discrimination the same as female and minority. They will refer to Title VII of the Civil Rights Act of 1964 that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.*

# ADDITIONAL FOCUS AREAS

## Affirmative Action Good Faith Efforts

- a. Posting and Listing all openings with the State Employment Service where the job is located
- b. Listing jobs with local female, minority, veteran, and disability recruitment sources
- c. Documentation of any job fairs, emails, phone calls, community events, internal training programs, shareholder programs, etc.
- d. Documentation of the results of effectiveness of outreach and recruitment for veterans and individuals with disabilities

## Documentation

- a. Annual Review of Mental and Physical Requirements for each position
- b. Accommodation requests and results for individuals with disabilities
- c. Ensure all applicants are given the required race, gender, veteran, and individuals with disabilities self-identification forms

*NOTE: OFCCP will look at male and non-minority discrimination the same as female and minority. They will refer to Title VII of the Civil Rights Act of 1964 that prohibits employers from discriminating against employees on the basis of sex, race, color, national origin, and religion.*

# OUT OF COMPLIANCE!! WHAT'S THE PENALTY?

## B&H Foto & Electronics Company

Entered into a Consent Decree to resolve allegations of systemic hiring, compensation, and promotion discrimination, as well as harassment, at the company's Brooklyn Navy Yard warehouse.

The decree settles allegations that B&H Foto discriminated against female as well as black and Asian job seekers by hiring only Hispanic men for entry-level positions. In addition, there were allegations that Hispanic shipping workers were paid significantly less than comparable workers and denied promotion to higher level positions. There were also allegations that Hispanic workers were routinely subjected to harassing conduct and had unequal access to restroom facilities, and the company failed to take corrective action when confronted with employee complaints.

Agreed to pay **\$3,220,000** in back wages and other monetary relief to more than **1,300** affected class members. B&H also agreed to hire a workplace consultant to help correct its employment practices and workplace conduct at its Brooklyn Navy Yard warehouse, as well as its future warehouse in Florence, New Jersey. The company also agreed to provide its managers with annual training on equal opportunity principles and prevention of workplace harassment.

# OUT OF COMPLIANCE!! WHAT'S THE PENALTY?

## Palantir Technologies, Inc.

Entered into a Consent Decree to resolve charges of systemic hiring discrimination at the company's Palo Alto facility.

The decree settles OFCCP's allegations that Palantir Technologies discriminated against Asian applicants in the hiring and selection process for engineering positions. Under the terms of the decree, Palantir will pay **\$1,659,434** in back wages and other monetary relief – including the value of stock options – to the affected class and extend job offers to **eight** eligible class members.

# OUT OF COMPLIANCE!! WHAT'S THE PENALTY?

## LexisNexis Risk Solutions

Allegations of systemic pay discrimination against women at its facilities in Alpharetta, Georgia, and Boca Raton, Florida.

Two separate investigations found that, as of December 2012 and continuing thereafter, LexisNexis paid 26 female employees in Operational Leadership jobs substantially less than males employed in the same jobs in Boca Raton, Florida. OFCCP's investigations further found that, as of December 2012, LexisNexis paid 185 female employees in Operational Leadership jobs substantially less than their male counterparts in Alpharetta, Georgia. The agency found a significant difference in pay in both locations even after taking into account legitimate factors that affect pay level.

LexisNexis has agreed to pay over **\$1.2 million in back pay and interest**, and to monitor practices that affect compensation for women adversely. The company also agreed to pay over **\$45,000 in salary adjustments** to women employed at the Boca Raton facility and will conduct an annual compensation analysis during the term of the conciliation agreement.



**45** YEARS

# THANK YOU

*Operating with Integrity*  
**CULTURE OF  
EXCELLENCE**

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