



# NOTES

**Event Sponsor:** National Industry Liaison Group (ILG)  
**Location:** Conference (Atlanta, GA)  
**Date:** Tuesday, July 28, 2009 through Friday, July 31, 2009

**Scribe:** Jennifer L. Newingham, PHR, Senior Consultant  
Maly Consulting LLC

---

**Event Topic: Experience the Dream - Make a Difference**

---

Wednesday, July 29, 2009 during the opening general session, **Evelyn Teague, Regional Director - Southeast, U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP)** began the conference. Here are some of her remarks:

- This conference has the largest number of government speakers ever in the history of the National ILG conferences.
- We want you to hear directly from the government to help you with your compliance.
- Cooperation and collaboration are key elements in what the OFCCP does.
- However, the OFCCP's goal is to enforce the law.
- There is much ground for us to work together.
- OFCCP has been paying much more attention to outreach - ties to local community-based initiatives, job centers, and training centers.
- Reminding us at this conference that these are important things - commitment to the spirit of EEO.
- Affirmative Action and EEO would "fall off the table" if not protected by law.
- We must remain vigilant in protecting EEO.
- Letter was read from Secretary of Labor - Hilda Solis - she is delighted that DOL employees are participating in this conference. She is living the dream (Hispanic woman in part of most diverse Cabinet for the first African American president).

Next, **Kathleen Martinez, Assistant Secretary, Office of Disability Employment Policy (ODEP)** spoke. Some of her remarks follow:

- Proud to be a part of Administration that sees disability as a serious issue.
- Created website [www.disabilityworld.org](http://www.disabilityworld.org).
- Told the story of her family and growing up blind.
- Learned to survive in a world not designed for the blind.
- Also experienced how her family was treated differently because they were Hispanic.
- Involved in farm worker issues, union issues, and independent living issues.
- People must start talking about disabled, so it becomes less uncomfortable.
- Disability must become another part of the diversity agenda.
- ODEP was established to bring focus to disability.
- Please utilize ODEP's resources.
- NEW website [www.disability.gov](http://www.disability.gov).

The keynote speaker for the opening session was **Tanya Lewis, Director of Compliance Management at Raytheon**. Some of her remarks follow:

- Raytheon received the highest honor - the 2007 Secretary of Labor's Award.
- It was a journey to get there - when they started it was not a pretty picture, there was no centralized approach.
- The consolidation of the defense industry made compliance difficult and made it easy for OFCCP to find discrepancies and errors.
- When the company stock went from \$75 down to \$17, it was hard to get anyone's attention around compliance.
- Started with candid conversations both internally and externally.
- Identified gaps.
- Had a Compliance Summit and provided education.
- Made compliance and affirmative action mandatory.
- Integrated compliance into the other HR departments (compensation, talent acquisition, diversity, and legal).
- Created external partnerships (OFCCP, ILGs, EEAC, etc.)
- Current state is a great place to be - compliance is well recognized in the company.
- Taking on international issues now.

**Compensation Analysis for Small Contractors - Presented by Javaid Kaiser, Ph.D. and Marika Litras, Ph.D. of the OFCCP**. Some of their remarks follow:

Small contractors do not have the resources to have statisticians or help, so this seminar was provided to give some guidance on what small contractors can do to analyze their compensation. Focus on looking at cohort analysis, rather than multiple regression. Do people have access to higher paying opportunities? Use similar pay for similar work analysis. Decide what factors affect pay (tenure, prior job experience, performance ratings, etc.) - these factors must be pre-determined. Just like you have to keep applications, now you need to keep factors affecting pay. Get them into your system. Conduct a "vertical analysis" and follow up on problems you see. OFCCP will look at disparities against males and whites too. Never make an SSEG just to get to 30/5 rule. Build on content and job similarity. Dr. Litras showed us an example of how you can use Excel to run pivot tables to do cohort analysis. Drill down tables to look at individuals. Find problems and make pay adjustments.

**Compensation Discrimination Law: The Ledbetter Fair Pay Act and the Paycheck Fairness Act. Why Employers Need to Worry About More Than OFCCP Investigations - Presented by Alissa A. Horvitz and Joshua S. Roffman of Littler Mendelson P.C.** Their remarks included the following:

In 2006 the OFCCP published its Standards for Systemic Compensation Discrimination which established SSEGs and multiple regression analysis as the way the OFCCP looked at compensation. However, because of the 2007 Supreme Court Ledbetter case, the

OFCCP had a difficult time moving the ball forward because it had to be shown there was a specific act that caused disparity. Now, all of that has changed with the passage of Congress's 2009 Ledbetter Fair Pay Act. If you have a disparity today, due to a decision a long time ago, there can be a claim under Title VII for race, color, religion, sex, age and/or disability. Additionally, there is the Paycheck Fairness Act which is pending (has only gone through one house) which says that you can't just point to any factor other than sex as the reason for the difference in pay - it has to be a bona fide reason (experience, education, etc.). This means that if the reason for the difference in pay was due to negotiations at hire or due to previous salary at another company, those would not be acceptable reasons to pay people differently. Also, this Act brings back the dreaded EO survey. The Fair Pay Act is also being tossed around in Washington. This Act would amend the FLSA by introducing the concept of equal pay for comparable (not equal) work. The EEOC would determine what jobs are comparable. What should you do? Ms. Horvitz and Mr. Roffman suggest the following:

1. Improve documentation - keep better records and keep them longer.
2. Tighter controls on managerial discretion - consider a government-like system and pay for performance by issuing one time bonuses each year that will not affect base pay.
3. Train managers on change in landscape and why you are making changes.
4. Conduct pay analyses - correct problems now on past decisions (but don't do this unless there is the budget and support to fix the problems). Law has changed incentives - now advise to form SSEGs and do analysis if done legally right.

**The Enforcers Look at Federal Test Discrimination Enforcement - Presented by Dr. Richard Fischer and Shirley Thomas of the OFCCP.** Some of their remarks follow:

The OFCCP is looking for illegal tests. They would be happy if every test was non-discriminatory, but most are not. A test is illegal when it causes adverse impact against one or more protected groups of examinees and validity evidence for that test is not acceptable. The OFCCP no longer uses the 4/5ths or 80% specified in the Uniform Guidelines on Employee Selection Procedures (UGESP) - they now use 2.0 standard deviation exclusively. If there is no adverse impact, there is no problem. The OFCCP is not the psychometric police. Your test may be stupid, but it is not illegal if there is no adverse impact. (Example of company hiring by astrological sign.) In 2006-2008 there was a 275% increase in number of discrimination cases with an invalid test sent from the Midwest region to the National OFCCP office. Of this year's systemic discrimination cases 27% have been test validation discrimination. Ms. Thomas went on to give several entertaining case studies/examples for the audience to determine if the test was discriminatory and/or valid.

**Adverse Impact and the OFCCP's New Enforcement Strategy - Presented by Mickey Silberman of Jackson Lewis LLP.** His remarks follow:

The OFCCP's new approach has been on applicant-to-hire adverse impact trends. OFCCP audits and settlements are almost 100% app-to-hire cases. They have altered how they conduct audits, it used to be the cases were for females and minorities. Now, the

OFCCP focuses on adverse impact on race and gender (could now be “reverse” discrimination) and by sub-minority groups. The OFCCP is “going where the numbers take them” even if that means discrimination against males, whites, or Hispanics disproportionately being hired over African Americans. You need to adjust your disparate impact analyses to include all minority sub-groups against one another. Your ATS (applicant tracking system) needs to have really good disposition codes that capture the reason for selection/non-selection. These codes need to explain why you did what you did convincingly. The burden will be on the contractor once the OFCCP finds disparate impact.

**Diversity Roundtable - Panel included Clyde Jones of ADP, Loretta Young Walker of Turner, Geeth Chettair of Lockheed Martin, and Gerald Parks of GE.** The panel discussed questions posed by Naomi Earp, former head of the EEOC and now a Director at the Library of Congress. The topics discussed were:

- Affinity groups good or bad?
- New Haven’s firefighter’s case
- Balance between compliance, business objectives, and diversity
- Bringing diversity programs down to hourly workers

**DHS - E-Verify - Presented by Vonnie Johnson of the DHS.** Her remarks follow:

Ms. Johnson gave an overview of the E-Verify system including how it works, employer responsibilities, employee rights, and also gave a live demonstration of the system. All employer participants should be able to go in and use the E-Verify system with little difficulty. She advised contractors to wait until the regulations become final and until they sign a government contract with the E-Verify clause in it before using (unless they want to become a voluntary user) since the final language may still change. Do NOT use on current employees. Employees hired before 1986 will always be exempt from this program because there will be no I-9 on file for these employees and you can’t use the E-Verify system without an I-9.

**DOL - OFCCP Regional Directors’ Panel - Participating Regional Directors included Joan Sessoms Ford (SW & Rocky Mtn), Michele Hodge (NE Deputy & Mid Atlantic Acting), William Smitherman (Pacific), Evelyn Teague (SE) and Sandra Zeigler (Midwest).**

First, each panelist talked to the audience for a few minutes about their region and the issues important to them. Outreach and education were a common theme. Many regions have conferences or training sessions for their local area coming up. Joan Sessoms Ford announced her retirement October 10. Then, ILG representatives from around the country supplied questions posed to the panel, as well as the audience. Some of the Q & A exchange included the following:

Q: Is the OFCCP authorized to ask for the VETS100 Report and outreach documentation in an audit?

A: Yes, the contractor must submit this report and any good faith efforts if asked.

- Q: Does the OFCCP intend to treat individuals identifying as 2 or more races as minorities?
- A: Yes, such individuals will be counted as a minority, but will be removed when we divide the data into sub-groups as we do for disparate impact testing.
- Q: What is the current AAP?
- A: The plan that is current on the date you receive the scheduling letter.
- Q: How many employees make up “class”?
- A: Two or more - discrimination is discrimination.
- Q: How does the OFCCP evaluate an on-line application system?
- A: Can an individual with a disability apply? Visually inspect kiosks, etc.
- Q: Have any investigations shown improper documentation of resume database searches?
- A: No, we haven’t had that yet.
- Q: Have any regions investigated recruiting/staffing agencies?
- A: Yes, if they are subcontractors, but not in lieu of contractors (i.e. - contractors are responsible for getting records from them).
- Q: What is considered an “affected class”?
- A: The disfavored group - regardless of sex or gender.
- Q: Do you plan to continue with webinars and compliance assistance?
- A: Yes, we plan to continue.
- Q: What trends have you been seeing in audits?
- A: We are finding discriminatory practices in multi-establishment contractors - make sure you look at your practices nation-wide; contractors delaying settling until they look at all establishments; denial of access to information; failure to maintain records; fewer hires and more terminations; failure to list with the state employment service; trend of contractors who need more time to submit in compliance evaluation - come on, you just have to have it prepared.
- Q: Are you required to submit copies of your actual government contracts to a compliance officer in an evaluation?
- A: No, you should not have to provide this - it is the compliance officer’s job to obtain it.
- Q: If applicants do not provide race/gender information, should we guess based on the name?
- A: Yes - the OFCCP will and it is reasonable that if the name is Jennifer, it is a female, etc. [Editor’s Note: This answer is directly opposite the OFCCP’s own Directive No. 2782 which clearly states “contractor should not guess or assume.”]
- Q: If we have an establishment listed on our Corporate Scheduling Announcement Letter (CSAL) that has not received a scheduling letter yet, will we get it next year or will we fall off the list?
- A: You will not fall off the list - plan on getting it next year. [Editor’s Note: When the same question was asked at an OFCCP webinar last year, the response was “you will go back into the pool, but will not be automatically scheduled during the next cycle.”]
- Q: If we find disparate impact, but we make changes, should we disclose it in an audit?
- A: Yes, we will give you credit that you fixed the problems.
- Q: In acquisitions, are we responsible for problems in the workforce and compensation?
- A: Explain the situation to us if it was a recent acquisition - it depends on the circumstances.

- Q: When conducting adverse impact, which test should we use?  
A: 80% and 2 standard deviations - but today we at the OFCCP rely on 2 standard deviations.
- Q: Is the OFCCP using the tipping point test for compensation?  
A: No, we do not use it. [Editor's Note: If this is a true statement, then it is a VERY RECENT change in OFCCP procedures. Our experience is otherwise — i.e. the Agency is using a trigger or tipping point test for compensation.]
- Q: What is the selection criteria being used to select for audits?  
A: Our national office uses EEO-1 data and it is done in a neutral way.
- Q: How many of you (Regional OFCCP Directors) have had corporate experience?  
A: Two of the five.
- Q: What are the effects of the Ricci case on the OFCCP?  
A: There is no official OFCCP policy that has come about because of it. We will do what has always been done and follow the UGESP.
- Q: If a person puts one race on their application, then changes it during employment, which one do we use?  
A: Use the most recent identification provided.

**Does Your ATS Help or Hurt? Presented by Valerie J. Hoffman of Seyfarth, Shaw LLP.**  
Her comments follow:

Applicant Tracking can seem like jumping through hoops, but there have been many lawsuits on failure-to-hire cases so you must maintain good electronic records. Accurate applicant tracking is difficult (garbage in = garbage out). Most ATS vendors do not have compliance professionals and do not know OFCCP rules. Do a self-audit now to check for problems. Make sure you are not over-counting or undercounting applicants. Include your internal applicants in pools if that is the way you hire (post internally and externally at the same or similar times). If you use "pipeline" requisitions (generic requisition for positions that are frequently open or need to be filled quickly) be sure to bring over those you considered into the hiring requisition. Use caution when using Contact Relation Management (CRM) systems - they are still considered to be an ATS and you must keep records accordingly. Use good disposition codes in your ATS or CRM. Address the when, who and why.

**From the Solicitor's Office: Update on Access and Compensation Issues - Presented by Channah S. Broyde of the U.S. Department of Labor, Office of the Solicitor.**

Ms. Broyde gave an update on some of the issues the Office of the Solicitor has seen recently in cases involving the OFCCP and contractors. There has been an increase in problems getting access to data from contractors. She discussed who is covered under the Executive Order, the difference between contractors and subcontractors, and the reasons why contractors cite when they are denying access to the OFCCP (not a contractor, 4<sup>th</sup> Amendment, Ledbetter, etc.). She went on to explain why these reasons are almost never valid.

**OFCCP Systemic Discrimination Enforcement - Presented by Bev Dankowitz of the U.S. Department of Labor.**

Also from the Solicitor's Office, Ms. Dankowitz presented an overview of many recent cases that have been settled. Their job is to prioritize the strongest cases for enforcement. In FY08 she covered three systemic discrimination cases - all were hiring cases and all were settled by Consent Decree: JB Labs, Vought Aircraft, and Foster Farms. Two cases were settled after litigation: TNT Crust and American State Bank (again, both were failure to hire cases). In FY09 there have been several more hiring cases: Earthgrains, Mission Foods, Kraft Foods, American Air Filters, Southside Bank, and Wackenhut. Ms. Dankowitz finished by discussing the importance of record keeping (and not destroying records), until the end of litigation. One other note of interest in this presentation: Ms. Dankowitz stated that the defense of separating hires by requisition number in order to conduct disparate impact testing will not work. She stated that the Solicitor's Office has been supporting the OFCCP statisticians to look across requisitions in order to find systemic discrimination. In her opinion, contractors can't separate by requisition number any longer.

If you have any questions, or would like more detail on any of the notes provided here, please give us a call.

Jennifer L. Newingham, PHR  
Sr. Consultant  
(301) 253-3183  
jnewingham@malyconsulting.com