



The 26<sup>th</sup> Annual National Industry Liaison Group (NILG) Conference was held from Tuesday July 29 through Friday August 1, 2008. The conference theme was Inclusion, Compliance and Convergence. The focus was on how EEO compliance is an element of diversity. The following is a summary of the sessions attended at the NILG conference :

Wednesday, July 30, 2008 during the opening general session, Charles E. James, Senior Deputy Assistant Secretary, U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), spoke about his accomplishments over the past seven-plus years which include:

1. **Active Case Management:** In 2003, OFCCP implemented a new program called Active Case Management (ACM) which shifted the focus of its field operations from the total number of cases to the number of cases with indicators of systemic discrimination. Under ACM principles, OFCCP uses automated statistical methods and ranks and prioritizes establishments for a more thorough analysis based on the probability that discrimination would be uncovered during a compliance review. As a result, 12.4% of OFCCP's completed evaluations closed with a conciliation agreement, compared with 6.7% of OFCCP's completed evaluations closed in fiscal year 2004.
2. **Contracts First Program:** launched 2006.
3. **Internet Applicant Definition:** On Friday, October 7, 2005, the Office of Federal Contract Compliance Programs issued its final rule regarding the definition of an Internet Applicant entitled "Obligation To Solicit Race and Gender Data for Agency Enforcement Purposes." The final rule went into effect on February 6, 2006.
4. **FAAP:** On March 21, 2002, Charles James, issued the procedural directive for processing what the OFCCP refers to as Functional Affirmative Action Program (FAAP) requests.

Charles James said the OFCCP is ready and will begin enforcement of Internet Applicant Definition regulations, and also mentioned he will push enforcement of the two new initiatives, G-Five and Ensuring Accessibility of Online Application Systems, until he steps down.

Charles James went on to say that when he leaves the OFCCP he plans on working as a mentor to high potential African American males to prepare them for the workplace.

**Naomi Earp – EEOC:** Ms. Earp discussed potential issues that may come from one of the current commissioners who is considered "pugilistic" without actually naming Stuart Ishimaru as the commissioner in question. She discussed how he wants to make sweeping changes which companies may not like, such as an EEO-1 with 45 data points to report on, etc. She then discussed the EEOC's move towards systemic discrimination enforcement; specifically looking at tests, pay and employee evaluations. She also discussed the issue of hierarchy of accents in the workplace and how that affects Asians and Africans and how that will become a focal point. She then discussed discrimination against Hispanics, in particular with assumption of citizenship, low level education and experience.

**Internet Applicant/Veterans Trends - Presented by Mickey Silberman of Jackson Lewis:** Mr. Silberman reiterated Charles James earlier statement regarding OFCCP's plan to begin enforcement of the Internet Applicant Definition and record retention requirements, and that contractors should focus on strategic issues not technical issues. He pointed out that 95% of settlements collected for affected parties (over \$51 million in 2007) was for discrimination identified in the selection process. Mr. Silberman recommends that

companies use three tools to reduce the reportable applicant pool, because larger applicant pools will generally lead to adverse impact (analysis results equal to, or greater than, 2 standard deviations). First, he recommends the use of "willingness" questions. These are yes/no questions for example, are you willing to travel 60% of the time? A "willingness" question covers applicant interest in the position and does not cover basic qualifications (BQs). If a person answers no to this question, the person takes himself out of consideration as an applicant, and there is no record keeping requirement. Second, review BQs to make sure that they are accurate and truly reflect the requirements of the position being posted. And, finally, use appropriate data management techniques such as random sampling (or perhaps selecting the first 50 resumes that were received) to reduce the amount to a manageable number of resumes to be considered and, in turn, to be retained.

Mr. Silberman also reminded attendees that the new VETS-100A form to be filled out in 2009 reporting cycle.

**Wage and Hour Class Action Update – Presented by John Fox, Esq., of Manatt Phelps Phillips, LLP:**

Mr. Fox stated that wage-hour class actions have borrowed heavily from the law of class actions that were originally built on race and sex discrimination case law. He went on to discuss the emerging wage and hour claims currently sweeping the country such as: call back time, reporting time, compensatory time, charitable time (volunteers), donning and doffing time, on-call time, training time, commute and travel time.

**OFCCP: Overview of Statistical Applications - Dr. Javaid Kaiser:** Dr. Kaiser is OFCCP's new Director of Statistical Analysis. Dr. Kaiser stated the OFCCP currently has only three statisticians but that he plans to add three more. Dr. Kaiser is also responsible for the case management system, and is currently working on implementing a new web-based case management tool, which he hopes will bring more consistency in case management. He discussed the selection process tests: IRA, Two Standard Deviation Test, and Fisher's Exact, which are being used by OFCCP during their analyses. The Two Standard Deviation is used for large samples, 30 or more, and Fishers Exact is for small samples, under 30. Four other analyses were also discussed, but only one which they use:

1. Logistics Regression, which measures disparity when all elements of selection criteria are identified (all data points are needed for this analysis),
2. Mantel Haenszel test, and
3. Breslow test which is similar to the Mantel Haenszel test.

They also use an Applicant Timing Test to compare applicant flow to hiring patterns which is basically a chart.

For compensation, OFCCP uses Two Standard Deviation and multiple regression (similar to logistics regression-12 factor letter) which needs full data. Dr. Kaiser is also looking at non-parametric tests which would be used for small sample size (under 30). Dr. Kaiser also commented on SSEGs, and stated that he is having a difficult time identifying whether SSEGs are appropriate.

**OFCCP: Tests and Their Impact on Selection - Dr. Richard Fischer OFCCP:** Mr. Fisher began his presentation by stating that any test that is properly validated will pass muster with OFCCP. Validity means the test measures what it was supposed to measure. During an audit, OFCCP will review the validation of a test — e.g. was an analysis conducted, how are passing scores set, how was the test developed, the validation strategy, etc. Mr. Fisher stated that OFCCP will **not** validate tests and will not ask for the test itself (although some offices improperly ask for it). However, OFCCP will request the validation study. If no adverse impact with statistical significance is identified, the test will not be an issue for the OFCCP. OFCCP will look at tests broken down by the various affected parties, not just minorities/non-minorities. Mr. Fischer also recommends having an validation study completed every 5-7 years or when changes to the position in question occur.

**OFCCP: Understanding Defenses from the Perspective of OFCCP Presented by Sandra Zeigler, Regional Director OFCCP:** During this presentation, Ms. Zeigler covered common defense postures used

by contractors which OFCCP may not agree with, and used the TNT Crust case during her presentation as an example. She also handed out copies of the TNT Crust consent decree to all attendees. Another defense that Ms Zeigler said OFCCP won't always accept is the 2 Standard Deviation Rule. That is, even if the contractors analysis results do not exceed the 2 standard deviations, OFCCP may still investigate further and request additional data including requesting resumes.