



# Jackson Lewis LLP

Presents

## ***Compliance Beyond the “Internet Applicant”: The OFCCP’s New, Aggressive Approach to Investigating Applicant Adverse Impact***

Speaker:

Mickey Silberman, Esq.  
[silbermm@jacksonlewis.com](mailto:silbermm@jacksonlewis.com)  
(631)247-4607

Jackson Lewis LLP

August 8, 2006

**jackson lewis**

Preventive strategies.  
Positive solutions.

Copyright 2006 Jackson Lewis LLP

# INTRODUCTORY STATEMENT

**THE MATERIALS CONTAINED IN THIS PRESENTATION WERE PREPARED BY THE LAW FIRM OF JACKSON LEWIS LLP FOR THE PARTICIPANTS' OWN REFERENCE IN CONNECTION WITH EDUCATION SEMINARS PRESENTED BY JACKSON LEWIS LLP. ATTENDEES SHOULD CONSULT WITH COUNSEL BEFORE TAKING ANY ACTIONS AND SHOULD NOT CONSIDER THESE MATERIALS OR DISCUSSIONS THEREABOUT TO BE LEGAL OR OTHER ADVICE.**

# About Jackson Lewis

Jackson Lewis LLP is dedicated to representing management exclusively in workplace law and related litigation. With 23 offices nationwide, the firm has a national perspective and sensitivity to the nuances of regional business environments.

Guided by the principle that a positive work environment results in enhanced morale and increased productivity, the firm devotes a significant portion of its practice to management education and preventive programs. This approach helps limit exposure to grievances, charges and lawsuits.

[www.jacksonlewis.com](http://www.jacksonlewis.com)

# Jackson Lewis Affirmative Action Practice Group

We have unparalleled experience preparing AAPs and defending them before the OFCCP in all industries and areas of the country. Our diverse team of 30 attorneys, paralegals, and support staff prepares approximately 1500 AAPs a year.

Since the beginning of 2004 alone, we have defended over 250 OFCCP audits, including successful defense of Corporate Management (“Glass Ceiling”) Compliance Evaluations. As a law firm, we offer more than consulting services, we offer strategic thinking and sophisticated legal representation.

# Introduction

- During the past few years, contractors have spent much of their energy and resources responding to the OFCCP's new Internet Applicant Rule and Systemic Pay Discrimination Guidelines
- While the Internet Applicant Rule and Pay Discrimination Guidelines have been the “hot topics” for the past few years, those areas are not “where the money is”
- Instead, the OFCCP changes during the past few years that have had the greatest impact on contractors have received surprisingly little press, comments or discussion....

# OFCCP's New, Aggressive Approach to Investigating Applicant Adverse Impact

- During the past few years, with little fanfare, the OFCCP has fundamentally changed the way it investigates applicant adverse impact
- The new approach often is significantly more burdensome for contractors during audits and typically produces much stronger “cases” which the OFCCP uses as leverage to demand large monetary settlements or, increasingly, takes to litigation

# Results from OFCCP's New Approach to Investigating Applicant Adverse Impact

- During the past few years, the OFCCP has used this new enforcement approach to bring back increasingly larger monetary settlements....
  - 2003 - \$26,220,356
  - 2004 - \$34,479,294
  - 2005 - \$45,156,462
  
- ....and refer more “systemic discrimination” cases for litigation
  - 2002 - 4
  - 2003 - 12
  - 2004 - 10
  - 2005 - 16

# The Genesis of the OFCCP's New Enforcement Approach

- Since 2000, OFCCP has transformed itself into a “Systemic Discrimination” enforcement agency
- The OFCCP is seeking broad patterns of discrimination in employee selection processes and pay practices
  - No longer focused on “one-sees” and two-sees”
  - Wants to find and eradicate “systemic” problems
  - Considers only statistically significant disparities
  - Needs a legally sound approach which it can take to enforcement
- While OFCCP had success in the past with its traditional approach to investigating applicant adverse impact, some basic flaws with the methodology....

# The OFCCP's Traditional Approach to Investigating Applicant Adverse Impact

- In the past, OFCCP's would examine whether there was adverse impact in the hiring process for a specific job group
- If so, OFCCP would request the personnel files of the hired applicants and the applications of the non-selected applicants
- OFCCP would expect the contractor to “match up” the non-selected applicants with the hires for each separate hiring decision to allow for a “cohort” analysis
- If the contractor could not explain the hiring decisions in the individual cohort analyses, the OFCCP would claim discrimination

# Problems with the OFCCP's Traditional Approach

- The traditional “cohort” approach broke down the potential “systemic” problems in the hiring process into the individual hiring decisions
- In essence, OFCCP was examining a series of “one-sees” and “two-sees”
- This approach was inconsistent with the OFCCP's increasing focus on systemic discrimination and was not well-supported by the existing regulations and court decisions

## OFCCP's Develops a New Approach

- OFCCP sought a new methodology for investigating adverse impact that emphasized systemic discrimination in a contractor's hiring process
- OFCCP turned to its statisticians and lawyers to help develop the new approach
- The new approach focused on the methodology described in the Uniform Guidelines on Employee Selection Procedures

# Uniform Guidelines on Employee Selection Procedures

- The Uniform Guidelines clearly describe the method for investigating adverse impact:

“If [the applicant and hire data] shows that the total selection process for a job has an adverse impact, the ***individual components of the selection process*** should be evaluated for adverse impact. If this information shows that the total selection process does not have an adverse impact, the Federal enforcement agencies....will not expect a user to evaluate the individual components for adverse impact, or to validate such individual components....”

# Individual “Components” of the Hiring Process

- OFCCP designed its new enforcement approach based upon statistical analyses of the individual “components” of the hiring process
- OFCCP interpreted components to mean the distinct selection “stages” that occur within the overall hiring process, for example
  - HR screening of employment applications
  - Pre-employment test
  - Managers’ screening of successful test takers for Interview
  - Managers’ in-person interview
  - Background check, drug screen, etc.

# OFCCP Investigates to Determine the Distinct Selection Stages in the Hiring Process

- OFCCP begins its investigation of adverse impact in the overall hiring process by determining the distinct selection stages in the hiring process
  - Conducts interviews with **all** personnel involved in the hiring process including HR, operations, senior management, hired employees and non-selected applicants
  - Demands **all** documents describing the hiring process or generated during the hiring process including, applications, resumes, interview forms, pre-employment tests and results, background check information, hiring guidelines for managers, HR hiring manuals, *etc.*

# Contractor Written Verification of the Distinct Stages in the Hiring Process

- As part of its investigation, OFCCP will require the contractor to provide in writing a detailed description of the distinct selection stages in the hiring process
- After the OFCCP has completed its investigation of the selection stages in the hiring process, OFCCP will require the contractor to verify in writing that the Agency correctly understands the distinct selection stages

# Selection Stage Adverse Impact Analyses

- The OFCCP will require the contractor to provide information for each applicant regarding the selection stage at which he/she “fell out” of the process
- If the contractor is unable or unwilling to provide that information, OFCCP will develop a “fall out stage” database based upon its analysis of the personnel documents produced as part of the investigation
  - The OFCCP will determine fall out stage results based upon the applications, pre-employment test results, interview notes, background checks, *etc.*

## OFCCP will Identify Statistically Significant Adverse Impact at Each Distinct Selection Stage

- After collecting the “fall out” stage data, OFCCP will conduct adverse impact analyses for each selection stage
- For each stage producing statistically significant adverse impact, OFCCP will expect the contractor to defend the selection stage on a “systemic” level, *i.e.*, validating the process used for that selection stage and demonstrating that the contractor consistently applied the process for all applicants
- OFCCP will not accept defenses based on “one-see” and “two-see” cohort comparisons

# OFCCP Will Demand Make-Whole Relief If the Contractor Cannot Defend Each Selection Stage

- If the contractor is unable to validate the selection process at each stage producing adverse impact and demonstrate the *consistent application* of that validated process, the OFCCP will allege systemic discrimination and demand back-pay relief and job offers for the “affected class”
- OFCCP will negotiate “hard” based on these findings because it believes it has a strong case to take to litigation if necessary

# So What Should Contractors Do?

- Examine your applicant tracking process to determine if you can easily determine the stage at which applicants “fell out” of the selection process
- As part of regular affirmative action plan preparation, consider “drilling down” to a selection stage adverse impact analysis in each job group in which there is an indicator of statistically significant adverse impact
- Investigate those selection stages that produce adverse impact to determine if you can defend during audits
- Conduct all these exercises under attorney-client privilege to avoid having to produce during audits or in subsequent litigation

---

# Questions?

Thank you for attending!