



## 406 Effective Strategies for Responding to Government Audits

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## Faculty Biographies

### Anne E. Celentino

Anne E. Celentino is a senior attorney with Cubic Corporation where she represents the company and its subsidiaries in all legal matters relating to labor and employment law. Cubic operates two major business segments, defense applications and transportation systems, and employs over 6,000 employees world-wide. Ms. Celentino advises management and human resources on employee relations issues as well as wage and hour, immigration, and employee benefits matters. She is responsible for conducting investigations and developing employment-related policies as well as compliance and training programs. Ms. Celentino also handles union negotiations, arbitrations, and agency charges of discrimination and manages all employment-related litigation.

Ms. Celentino previously specialized in labor and employment litigation at Sheppard, Mullin, Richter & Hampton before joining Cubic. She also worked in historical and legal research positions at the U.S. Senate and the United States Supreme Court.

She is a frequent speaker to industry and human resources groups on employment law topics and a past president of the ACC's San Diego Chapter.

Ms. Celentino received a B.A. from the University of California at Santa Barbara where she was elected to Phi Beta Kappa. She received her J.D. from Georgetown University.

### Allison Despard

Allison Despard is assistant general counsel at Covad Communications in San Jose, California and is responsible for all labor and employment matters. While at Covad she has successfully handled Department of Labor audits for Covad's affirmative action plans and 401(k) plans.

Prior to joining Covad, Ms. Despard was a partner in the Chicago office of Littler Mendelson, P.C., one of the nation's leading labor and employment law firms. At Littler, Ms. Despard litigated numerous cases in federal and state courts nationwide going to trial on average once a year, was extensively trained for litigation prevention, and was a speaker at national seminars. Ms. Despard started her career at Oppenheimer Wolff & Donnelly in Chicago engaging in general litigation.

Ms. Despard has provided pro bono services for the Seventh Circuit Court of appeals and for disability organizations. She is a member of ACC and serves as the co-chair for the labor & employment committee of ACC's San Francisco Chapter. She also authored "Sexual Harassment Developments After Faragher/Ellereth" published in the Illinois State Bar Journal.

Ms. Despard graduated from the College of William & Mary in Virginia. She received her J.D. from Loyola University School of Law where she served as editor in chief of The Loyola Consumer Reporter and received awards for Outstanding Woman Law Graduate and Loyola Law School Service Award.

### Matthew B. Halpern

Matthew B. Halpern is a partner in the Melville, Long Island office of Jackson Lewis LLP, a national law firm representing management exclusively in workplace law and related litigation. Mr. Halpern has been representing companies in matters relating to affirmative action, conducting effective workplace investigations, equal employment opportunity, wage/hour, and related matters. As the head of the firm's affirmative action practice, Mr. Halpern regularly advises and counsels employers from all industries throughout the country about this highly specialized area of the law. The practice also prepares plans for and defends audits against state, local, and city affirmative action agencies. The affirmative action team regularly conducts mock OFCCP vulnerability audits, analyzes selection procedures for adverse impact, advises about comparative compensation analysis, and defends claims of class-based discrimination at the OFCCP investigation stage. In addition to his affirmative action expertise, Mr. Halpern also specializes in counseling and defending employers in all matters related to compliance with State and federal wage hour laws, the Fair Credit Reporting Act and the Family and Medical Leave Act of 1993. Mr. Halpern also has extensive experience in counseling and defending employers in matters relating to I-9 compliance under the Immigration Reform and Control Act of 1986.

Mr. Halpern is a member of The Society for Human Resource Management-Long Island chapter and a frequent speaker at management education programs. He is the treasurer of the Northeast Region Corporate Industry Liaison Group, an industry association of Metropolitan New York based federal contractors with corporate headquarters in the tri-state area.

Mr. Halpern graduated with honors from the State University of New York at Buffalo and received his J.D. from the New England School of Law.

**EFFECTIVE STRATEGIES FOR RESPONDING TO GOVERNMENT AUDITS**

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**I. INTRODUCTION**

Employers increasingly are subject to the monitoring and enforcement mechanisms of government agencies in such areas as wage and hour compliance, workplace safety and health, and employment practices of federal government contractors. The activism of the United States Department of Labor (DOL), through such agencies as its Wage and Hour Division, the Office of Federal Contract Compliance Programs (OFCCP), the Occupational Safety & Health Administration (OSHA), etc. has underscored the need for employers to review and revise their compliance strategies in order to be prepared for the 'knock on the door' from government auditors and investigators. Employers also are subject to I-9 audits and audits by state and local agencies.

To help you better prepare your company for these audits, we have described below how to defend against wage/hour, OFCCP, OSHA and Employee Retirement Income Security Act (ERISA) audits and the kinds of issues you can expect to see addressed during such audits. Many of the principles discussed herein also may be applied during similar state audits.

**II. DEFENDING WAGE HOUR AUDITS****A. Wage And Hour Audits Most Common Audit Areas.**

Be aware of the most common areas of liability. For example:

1. Exempt v. non-exempt status
2. Failure to pay overtime
3. Failure to pay for all hours worked
4. Independent contractor vs. employee
5. I-9's
6. FMLA-policy and forms

**B. A Word About I-9's**

The DOL also is charged with reviewing I-9 forms during an on-site investigation. The DOL will pass along its findings to the Bureau of Immigration and Customs Enforcement (ICE). Therefore, we have provided a brief word about I-9's.

**1. Basics**

The I-9 form contains three sections. The employee completes Section 1, which is "biographical". Thereafter, the employee must within three business days of commencement of employment present documentation showing identity and authorization to work, which gets recorded in Section 2. Section 2 requires: One Document in LIST A (shows identity and authorization to work, such as a U.S. Passport) OR One Document in LIST B (shows identify, such as an unexpired driver's license) AND One Document in LIST C (shows authorization to work, such as a social security card). In Section 3, the employer representative must sign, print name, and give title and business address. When presented to the employee, both sides of the I-9 form must be given because the back contains explanatory information.

**2. Penalties****a. Civil Penalties-Insufficient Checking**

Missing or improperly completed forms can lead to recordkeeping violations of \$110 to \$1,100 per occurrence (i.e. per form). Moreover, if you are found to have knowingly employed an unauthorized alien, then in addition to the foregoing fines, you can be subject to fines as follows: First violation: \$275 to \$2,200 for each unauthorized alien; Second violation: \$2,200 to \$5,500 for each unauthorized alien; Third violation and beyond: \$3,300 to \$11,000 for each unauthorized alien.

**b. Criminal Penalties-Insufficient Checking**

If you are found to have engaged in a pattern or practice of knowingly employing unauthorized aliens there are criminal penalties of up to \$3,000 per individual and imprisonment of up to 6 months—in addition to the foregoing civil penalties.

**c. Civil Penalties-Overdocumentation and Discrimination**

For disparate impact on a protected class—i.e., requiring more documents than required by law or rejecting documents that "on their face appear to be genuine" for a particular group, there are civil penalties from \$110 to \$1,100 for each individual discriminated against. For Unfair Immigration Related Practices ("UIREP") the fines are as follows:

First violation: \$275 to \$2,200 per violation

Second violation: \$2,200 to \$5,500 per violation

Third violation and beyond: \$3,300 to \$11,000 per violation

**3. Preventative Steps**

Employers should adopt effective I-9 procedures and train employees who are responsible about how to properly complete I-9s. Also, you should conduct periodic audits and fix any I-9 errors. Remember when fixing, to review original documents, where applicable, and to initial and date where corrections are made. Make sure you are updating expired List A or

List C documents—except the Permanent Resident (“Green”) Card, which only has to be valid at the time individual is hired. Train managers to understand their responsibilities and review your overall business practices so that you are able to defend any “allegations that “should have known” certain employees were unlawful.

If you are notified of inspection, insist on the 3 days notice to which you are entitled. Fix any I-9 forms that can be fixed. You also should make and keep copies of all documents you give to an ICE or DOL agent and, if it is ICE, get the name, telephone number and card of the lead ICE agent. Do not consent to let the investigator speak to employees on premises—ask them to stop. You should prepare a memorandum setting forth what happened and call your immigration counsel—particularly if subpoenaed. If you allow inspection on site, sequester agents away from employees and other business records.

I-9 forms should be purged regularly. With regard to recordkeeping requirements, you must have a Form I-9 for all current employees. You are required to keep Form I-9 until at least (i) 1 year after termination of the employment relationship AND (ii) 3 years from the date of hire. Another alternative is to keep the forms for 3 years after the date of termination.

#### C. Audit Triggers:

Audits get triggered a number of ways. Sometimes there is an agency-wide compliance initiative, sometimes industries are targeted because of notable developments, but most often it's because of employee complaints. The most common audit trigger is where an “exempt” employee gets discharged is unhappy, complains to the DOL and an audit ensues. You can do a self audit to see if you are vulnerable. Look for:

1. Large numbers of exempt employees and few or no non-exempt employees
2. Many employees in the same exempt category
3. Exempt “managers” with responsibilities similar to the employees they manage
4. Exempt “managers” not supervising enough employees
5. Sudden increases in exempt worker characterization for large numbers of employees
6. Exempt employees not exercising independent judgment and discretion
7. Frequent (and likely improper) deductions from salary-based compensation.

#### D. Common Misconceptions in Employee Classifications:

Make sure you do not fall into any of the common misconception “traps.” For example, employers often mistakenly believe all salaried employees are exempt or that job titles make positions exempt or that employees’ written job descriptions govern employees’ duties. Actual job duties will control and as described below, the DOL will glean this information from employee interviews.

#### E. Preparing Your Company To Defend Against A Wage/Hour Investigation

The following, in question and answer form, is a brief summary of steps employers should take to minimize potential wage/hour issues and to be ready in the event an investigation is initiated by the DOL.

1. How adversarial should you be? While you certainly could demand that an investigator produce a warrant, they are obtained easily and may set the wrong tone for the audit.
2. What written policies do you have that could be evidence of unlawful treatment? For example, policies that allow for deductions in increments of less than a day from exempt level employees could destroy the salary basis crucial for their continuing treatment as exempt. Likewise policies that allow employers to deduct from wages break periods that are minimal in length violate the minimum wage provisions of the law.
3. Do you have a policy for contact with the press and handling adverse public relations? Managers often make comments to the media which they think help the company's position but actually may be admissions of unlawful treatment.
4. Are you able to identify the type of information sought by an agency during a government investigation? Unnecessary delays or feigned ignorance may lead the investigators to believe you are engaging in deception.
5. Do you know which documents to keep? There are civil monetary penalties for recordkeeping violations.

#### F. Disarming The "Sneak Attack": A Basic Checklist For Unexpected Inquiries And Investigations By Government Agencies

1. In each branch office or plant (for a multi-location operation), primary and alternate contacts should be designated for communication from government agencies. Generally, these people should be the manager and the assistant manager. At headquarters, or at a single-location operation, the persons designated should be at the senior executive level (usually the general counsel).

2. Other employees, notably receptionists, should be advised that upon the appearance on the premises of any government agent, the individual's name, title and department should be obtained. The agent should be told that he or she will be referred to the proper person. No questions should be answered nor any information given. It is also important that the employees be instructed not to be awed by any badge or identification shown or agency name given, nor by gruff manner. The rule is to be calm, cool and collected.
3. The designated contact person(s) should be notified immediately upon arrival of a government agent. Upon such notification, the designated contact person should promptly see the agent. This should be done in private, preferably in a room outside the earshot of any employees. The designated contact person should do only the following:
  - a. Ask for identification and obtain the agent's full name, department, title, badge or identification number, if any, agency address, and telephone number.
  - b. Request the nature or purpose of the visit. (A careful note should be made of the response).
  - c. Advise the agent that, as a matter of company policy, the home office must be advised and clearance obtained before an investigator can be granted access to the premises and the opportunity to review materials. In a single-location company, the agent should be advised that the company officer must speak with the company attorney before granting admission.
  - d. Advise the agent that someone from the company or its attorney will be in touch within 24 hours. In the event the agent declines to leave, he should be asked to wait in the reception room or some other segregated area.
  - e. Immediately call the responsible company officer at company headquarters. All the information obtained should be imparted to the company officer who should then contact the company's in-house or outside counsel. (In a single-location company, the responsible officer should do this directly.)
  - f. In the event of the service of a subpoena or other process, the same procedure should be followed. The designated contact person at the location should accept the subpoena or process and escort the agent out.
4. The responsible corporate officer, upon notification of a government audit, promptly should contact counsel to analyze the company's rights and obligations.

**G. Steps Counsel Can Take To Prepare In Advance For Wage/Hour Investigations**

1. Preventive approach: pre-investigation audit and inspection
  - a. Analyze the facility's operations and wage/hour recordkeeping and look for potential problem areas, such as overtime that is not recorded because of 'rounding' practices that always favor management.
  - b. Interview management concerning working hours, job duties, wages and payroll information for employees, the existence of any prior investigations and the existence of any recent complaints from employees regarding wages.
  - c. Review payroll and other records requested by the investigator along with any other documents which were not requested but which may be applicable.
  - d. Identify potential problem areas and be prepared to present information in sequence that best 'de-emphasizes' the problem areas.
2. Offer to conduct a self-audit in the areas identified and/or addressed by the investigator. To the extent problems are found, seek to restrict liability by applying any mitigating factors (i.e., if unpaid hours worked are discovered, try to offset with hours not worked such as lunch hours, sick, personal, holiday time, tardiness, etc.)
3. Recordkeeping - Make sure that your company has all employee records that must be preserved for two years as follows:
  - a. Name and identifying number or symbol.
  - b. Home address.
  - c. Date of birth if under 19 (at 18 years and younger the Child Labor laws apply).
  - d. Occupation in which employed.
  - e. Time of day and day of the week on which the employee's workweek begins.
  - f. Regular hourly rate of pay per week, when overtime is worked, basis on which wages are paid, and amount and nature of each payment not included in the regular rate.

- g. Hours worked each workday and total hours worked each workweek.
  - h. Total daily or weekly straight-time earnings or wages.
  - i. Total weekly overtime compensation.
  - j. Total additions to, or deductions from, wages paid each pay period.
  - k. Total wages paid each pay period.
  - l. Date of payment and the period covered by payment.
4. Recordkeeping - Make sure that your company has all records that must be preserved for three years as follows:
- a. Payroll records.
  - b. Certificates, agreements, plans and notices from their last effective date and in writing:
    - i. Collective bargaining agreements.
    - ii. Plans, trusts, and employment contracts.
    - iii. Individual contracts. Where such contracts or agreements are not in writing, a written memorandum summarizing their terms must be kept.
    - iv. Written agreements or memoranda summarizing the terms of oral agreements or understandings.
    - v. Certificates and notices.
5. Recordkeeping - Make sure your company has kept sales and purchase records, which must be preserved for two years as follows:
- a. Supplemental basic records including:
    - i. Basic employment and earnings records.
    - ii. Wage rate tables.
  - b. Order, shipping and billing records.
  - c. Records of additions to, or deductions from, wages paid.
  - d. All records used by the employer in determining the original cost, operating and maintenance costs, and depreciation interest charges,

if such costs and charges are involved in the additions to, or deductions from, wages paid.

**H. Defending The Investigation - On The Day Agreed Upon For The Investigation. When The Investigator Appears At The Facility To Conduct The Investigation, The Company Representative Should Do The Following:**

1. Request to inspect the investigator's credentials. Inspectors of the wage/hour division who are authorized to examine a company's payroll records are identified by a card which is signed by the wage/hour administrator and bears the signature and picture of the inspector carrying it.
2. Accompany the investigator on a tour of the facility if he or she requests.
3. Provide a private place for the investigator to work (out of the stream of employee traffic).
4. Avoid volunteering any information and limit responses to the questions the investigator asks concerning:
  - a. The identity of the owner of the facility and its address;
  - b. The officers of the facility (e.g., President, Executive Vice President and Controller);
  - c. A description of the business conducted at the facility and any other information which is directly related; and
  - d. Other worksites or operations.
5. Confirm, in writing, compliance with the investigator's request for records.
6. Produce the records requested and render any assistance in the form of an explanation either only if requested to do so or if you wish to guide the investigation (see below).
7. Conclusion. Probably the most important aspect of defending your company during an audit is to remember that you are not helpless. While investigators generally have a great deal of authority to review records, you still can be an advocate within the context of being cooperative. For example, if you are requested to provide several years worth of records, arrange them in an order that best portrays the company. Also, do not be too quick to concede that your company's practices are improper. As we have described, much of wage/hour law is open to interpretation.

**I. Employee Classification Best Practices**

There are certain steps your Company may wish to take to better position itself in the event of agency scrutiny.

1. Periodically review job classifications and wage levels.
2. Develop a detailed compliance plan in conjunction with human resources, outside counsel, or consultants.
3. Conduct internal wage and hour compliance audit of exempt and non-exempt employees. Consider timekeeping and pay procedures, and methods for calculating regular rate of pay. Audit surveys and questionnaires (a sample is attached), interviews, and a review of records and documents may be necessary. It is crucial that senior management support this process because the audit could highlight non-compliance issues and process issues that could impact operations and be costly to rectify.
4. Consider outsourcing compliance review to an HR consultant at the direction of in-house counsel or legal expert who will assist in making key decisions. HR and legal experts can explain the rules, the extent of any latitude that may exist, and provide guidance and options. An employment attorney may be best choice in order to protect legal analysis, recommendations and conclusions. To lessen costs and preserve any attorney-client privilege, audits can be performed by non-attorneys at the direction of counsel.
5. Review salary docking policies to ensure they are lawful and train processing payroll staff on the updated deduction policy limitations.
6. Review non-exempt and exempt positions to determine whether reclassification is necessary. Assess exempt executives' hire/fire authority and the weight of their recommendations. Analyze job titles, job duties, written job descriptions and the exempt/non-exempt classifications (a sample exemption analysis is attached). Reassess all borderline positions.
7. Minimize employee relations issues by explaining in advance the reasons for any changes. Employees who will no longer be eligible to receive overtime may become disgruntled. Employees previously classified as "white collar" may also resent their perceived loss of status.
8. Remember: Restructuring compensation for reclassified positions may improve morale. For example, consider raising the base pay for positions no longer receiving overtime or offering merit bonuses or other incentives to offset the lost overtime wages. Also, position restructuring with substantive changes to duties and job description can enhance an employer's stance that an employee is exempt. Similarly, restructuring a

position also can help explain a change from exempt (and not eligible for overtime) to non-exempt (and suddenly eligible for overtime).

**III. DEFENDING AN OFCCP AUDIT**

Affirmative action remains very much an issue for some 100,000+ federal contractor establishments. Over the past two years, the Office of Federal Contract Compliance Programs significantly has changed its approach to conducting compliance reviews. These developments have encompassed nearly every aspect of the OFCCP's enforcement practices, from how it targets contractors for audit, to how it analyzes and processes contractor data, to how it approaches discrimination settlements. Understanding these changes is essential to ensure that you are able to identify and resolve issues before the OFCCP becomes involved and to be able to develop a comprehensive defense to any agency action or allegations. (Refer to ACC Docket March 2004, "Affirmative Action Compliance: The Reinvented OFCCP," Pamela S. Poff, Anita I. Wilson and Matthew B. Halpern)

**A. How You Are Chosen**

The OFCCP historically has selected contractors for review based on information provided on the EEO-1 Report form. The EEO-1 form contains a question (Question 3 in Section C) that asks whether the company or any of its establishments has 50 or more employees and a government contract or prime subcontract of \$50,000 or more. A list of establishments that respond affirmatively to this question is compiled annually and given to the OFCCP's national office. The OFCCP organizes the data into separate geographical lists corresponding to the jurisdictional territory of each OFCCP local (District) office. The OFCCP then sends each District office a list of the establishments located in its jurisdiction ranked by potential problem areas.

The OFCCP identifies potential problem areas by factors, such as total gender and race/ethnicity composition, composition within each EEO-1 category, geographic comparisons of gender and race/ethnicity composition, and industry comparisons. It is from this list (formerly known as the Equal Employment Data System, or "EEDS" list, and now known as the Federal Contractor Selection System, or "FCSS") that OFCCP District offices select establishments for annual review, starting with establishments ranked the most likely to have problem areas. In July 2004 the OFCCP switched to the FCSS which in addition to the factors listed above, also considers past compliance history. Another helpful feature of the FCSS is advanced notice at the beginning of each "year" about which facilities are on the OFCCP's scheduling list. The OFCCP now sends to a contractor's corporate headquarters a 'Corporate Scheduling Announcement Letter' containing a list of the contractor's establishments selected for 'potential' review during the upcoming year. Appearance on the list does not guarantee audit. When an establishment on the list is scheduled for review at some point during the year, it will be notified by the OFCCP's standard scheduling letter, which provides the contractor 30 days from the date of receipt of the letter to submit its AAP to the OFCCP. If you believe any of the facilities on the list are not covered, begin the process of removing them sooner than later. While the Corporate Scheduling Announcement Letters were supposed to capture all potential audit subjects, this has not occurred. Contractors still are receiving scheduling letters outside of the list.

**B. Changes In Routine Compliance Reviews**

Under the old system, the routine compliance review usually began with a telephone or written inquiry from the OFCCP about the company's status as a federal contractor. After the company responded to the information request, it received a scheduling notice.<sup>1</sup> Historically, the OFCCP reviewed all aspects of plan compliance during an onsite visit, including the impact of personnel selection and compensation practices on minorities and females. Although the focus has changed, the scheduling notice is still used to notify the company that it has been selected for a compliance review. Consequently, the company must submit within 30 days its current affirmative action plan (AAP) and certain portions of the prior year's plan. In addition, contractors must submit summary compensation data, which the OFCCP will use to conduct a systemic compensation discrimination analysis. If you get the telephone call and do not believe you are covered, notify the OFCCP prior to its issuing a scheduling notice. It is easier for the Agency not to send the notice initially, then it is to administratively close a review after the notice has been sent.

Once a contractor submits its AAP, an OFCCP compliance officer reviews the AAP and supporting documentation to determine whether the AAP is current, complete, reasonable and acceptable. Here is where the OFCCP's new approach departs most drastically from its former approach. Formerly, after this 'desk audit' phase was complete, the compliance officer would contact the contractor about arranging a date for an onsite review. Now, as described in the next section, an onsite review is scheduled only where the OFCCP has found indicators of potential discrimination.

**C. The OFCCP's Changing Approach To Compliance Reviews**

The OFCCP has implemented a new approach to compliance reviews, focusing almost exclusively on finding and eradicating systemic discrimination in compensation or employee selection decisions. The OFCCP now schedules a greater number of federal contractors for compliance reviews, with the goal of uncovering as many discrimination cases as possible. From 2002 to 2003, the OFCCP almost doubled the number of compliance reviews (4,135 to 7,700) and cases referred for litigation (5 to 12), and significantly increased the number of corporate management reviews (42 to 52). The dramatic increase in the number of audits reflects the OFCCP's targeted approach to audits. If the OFCCP initially does not find 'statistically significant'<sup>2</sup> indicators of either potential compensation or employment selection discrimination, it will quickly seek to close the compliance review, usually without an onsite review. Thus, it is imperative for all selection decisions and compensation data to be reviewed prior to submission and any problem areas identified and resolved as well.

<sup>1</sup> It usually took anywhere from one to six weeks to receive a scheduling notice.

<sup>2</sup> Any areas where adverse impact in selection is found and the standard deviation is 2.0 or greater typically are considered "statistically significant" according to the OFCCP's standards. A standard deviation of 2.0 or more means that the disparity identified would be expected to occur less than 5% of the time, an occurrence too infrequent to be attributable to chance.

**D. Defending the On-Site Phase of the Compliance Review**

The purpose of the on-site phase of the compliance review is to investigate potential discrimination. If you are scheduled for an onsite, the OFCCP believes systemic discrimination exists at the establishment. The OFCCP usually will request supplemental information from the contractor before the on-site review is conducted. If the compliance officer has not done so, the employer should request such written documentation to help it better prepare for the on-site portion of the compliance review. The additional information relates to the identified areas of potential discrimination and may include personnel files, employment applications, resumes and materials not included in the original submission, such as copies of employment advertisements, position descriptions, policy manuals and the names of employees and applicants identified as potential victims. Before the compliance officer comes on-site, the company should investigate and confirm the legitimate business reasons it will articulate in response to inquiries from the compliance officer about areas in which adverse impact occurred.

During the on-site investigation the compliance officer usually will conduct a walk-through of the contractor's facility. To prepare for this, the contractor should make sure all required notices are posted and remove all inappropriate materials, including "beefcake" and "cheesecake" calendars or cartoons. The contractor should direct the tour to include all areas where the results of the company's affirmative action efforts are evident. The compliance officer should not be allowed to engage in spontaneous conversations with workers. Any interaction between employees and the compliance officer should occur only during formal interviews. These interviews should be scheduled in advance as early in the compliance review as possible.

One of the most important aspects of the on-site review is the compliance officer's interviews with managers and employees. During interviews with management and supervisory employees, management representatives and attorneys may be present. However, the OFCCP does not allow such representatives to be present during interviews with other employees. Interviews usually include questions about wages, job posting, promotional and other advancement opportunities, equal employment opportunity policies and perceptions about fair treatment. When each interview is completed, the investigator will ask the employee or manager to sign the notes taken by the investigator. Non-management employees should be told in advance that this will happen, that the interview is part of a routine audit, it is voluntary, the decision to sign and review the witness statement is their own, and they may request a copy of the notes. Managers should be told not to sign or review the OFCCP notes.

To complete the on-site review, the compliance officer holds an exit conference with the contractor and/or its attorney(s) to review the findings of the audit. During the exit conference, the compliance officer will itemize any apparent violations or advise the Company that it will receive a notice of compliance. Discrimination violations ultimately are addressed in a Conciliation Agreement (CA).<sup>3</sup> Preceding the CA, the contractor will receive a Notice of Violation (NOV) that lists the alleged violations and proposed remedies. Where "pattern and

<sup>3</sup> When an off site analysis is required, the compliance officer will notify the contractor in writing of any apparent violations discovered and the form of the closing document.



practice" or class-based discrimination is alleged, the OFCCP usually will send a Pre-determination Notice describing its findings and proposed outcome. These days this may necessitate utilization of a statistician.

Whether through a NOV or Pre-determination Notice, if the investigator has identified problem areas, the attorney should review these areas of concern and submit supplemental position statements and supporting data in response to the investigator's concerns. Through this process violations may be reduced, the closing document may be changed and the contractor's positions will be preserved in writing. If no problems have been found, or if the problems were minor and easily corrected, a letter of compliance will be issued.

#### **E. Responding To the OFCCP's Evolving Approach To Analyzing Compensation**

In November 2004, the OFCCP published for public comment in the Federal Register its proposed new standards for finding systemic discrimination in federal contractors' compensation systems. These new standards will govern the OFCCP's analysis of a contractor's compensation systems and the OFCCP's determination whether the contractor has engaged in systemic discrimination. In addition, the OFCCP has proposed separate guidelines for contractors to conduct self-audits of their compensation systems.

The 'Proposed Standards on Systemic Compensation Discrimination' define 'systemic compensation discrimination,' describe how proof of discrimination must be limited to similarly situated individuals, explain what constitutes 'statistical significance,' describe under what circumstances multiple regression will be used, and, generally, set forth standards for how the OFCCP will evaluate employer practices.<sup>4</sup> The 'Proposed Guidelines for Self-Evaluation' explain that a self-evaluation must be performed annually, must be based on 'similarly situated employee groupings,' and must use some form of statistical analysis.<sup>5</sup> The self-evaluation guidelines also require employers to remedy any identified disparities, document such actions and disclose this to the OFCCP upon request.

##### **1. Systemic Compensation Discrimination Standards**

Under the new approach, the OFCCP plans to use multiple regression analyses to determine the presence of potential discrimination. A multiple regression analysis tests the relationship between factors (such as those relevant to determining compensation) and generally allows the OFCCP to consider the impact of variables, such as years of work experience, seniority, education, past performance, race and sex, on compensation. Where "job-related" factors arguably do not have a "statistically" supportable influence on compensation, but sex or race does, the OFCCP will claim that pay discrimination exists.

<sup>4</sup> 69 F.R. 67246 (November 16, 2004).

<sup>5</sup> 69 F.R. 67252 (November 16, 2004).

The OFCCP says it will not allege compensation discrimination (except in rare instances) unless there is anecdotal evidence, as well as statistically significant compensation disparities. In addition, even in the absence of statistical support, the OFCCP will issue a pay discrimination violation, if a contractor has established compensation rates for jobs predominately occupied by protected group members where those rates are significantly lower than rates established for jobs predominately occupied by non-protected group members. In other words, if a company steers (or appears to steer) minorities or females to lower paying jobs, the OFCCP will investigate, even absent statistically significant disparities.

##### **2. Guidelines for Self-Evaluation**

Under the proposed guidelines, the OFCCP will find that a contractor's compensation practices comply with Executive Order 11246 if the practices 'reasonably meet the general standards' set forth in the guidelines. However, if the practices are 'marginally reasonable,' the practices will be reviewed again during subsequent compliance reviews.

To be acceptable, a self-audit must compare "similarly situated employee groupings (SSEGs) . . . large enough for a meaningful statistical analysis." According to the OFCCP, a SSEG of at least 30 employees overall, and containing five or more incumbents of either of the following pairs: male/female or minority/non-minority, is large enough to permit meaningful analysis. Employees are similarly situated within the meaning of the new guidelines when they perform similar work, have similar responsibility levels, and occupy positions requiring similar qualifications and skills. Thus, based on these factors, groupings of employees by job title or affirmative action plan job groups, for example, may be appropriate but will not be automatically accepted.

According to the OFCCP, self-analysis is mandatory. The guidelines state that contractors annually "must perform some type of statistical analysis that evaluates SSEGs and accounts for factors that legitimately affect the compensation of the members of the SSEGs under the contractor's compensation system, such as experience, education, performance, productivity, location, etc." Companies with 250 or more employees must perform multiple regression analyses.

From a practical standpoint, it is critical for contractors to investigate any statistically significant pay disparities produced by a self-evaluation analysis. If any disparity cannot be explained during a compliance review, the contractor must provide appropriate financial remedies. Under the proposal, the OFCCP will allow contractors to certify compliance with the compensation guidelines, rather than produce the results or the methodology of the self-evaluation during the compliance review. How this self-certification may be challenged by the OFCCP is not explained.

##### **3. Endeavor to Cloak Any Analysis In Privilege.**

While neither proposal is yet in effect, the OFCCP nevertheless is operating as if the 'Systemic Compensation Discrimination' guidelines are applicable. The self-evaluation guidelines have not yet been applied by the OFCCP. While these guidelines have generated a great deal of comment about their highly technical nature, the biggest concern facing employers

is that the result may be a self-analysis that identifies compensation disparities and may be discoverable in litigation because it is not privileged. To the extent your company decides to conduct a compensation self-analysis, it should do so at direction of counsel so that it can attempt to cloak the analysis and results in privilege. Companies have learned this the hard way, and according to a February 2005 article in The New York Times, plaintiffs in a case filed in 2001, in an attempt to obtain class certification, introduced a memorandum from the Company EEO director written in the mid-1990s that identified and suggested ways to alleviate areas of vulnerability based on race. Since the suggestions arguably were not followed, plaintiffs alleged that the company was aware there was a problem and chose to ignore it, a decision which supports class certification.

**F. Understanding And Responding To The OFCCP's New Approach To Evaluating Potential Discrimination In Hiring, Promotion And Termination**

For years, the OFCCP has been reviewing the impact of employee policies on minorities and females. If a contractor's neutral policy has a disproportionately negative impact upon minorities or females, the OFCCP will investigate. Historically, the agency has used the 80% rule of thumb first to identify adverse impact and then to conduct further investigation to determine statistical significance (see footnote 2, above). While these tests are still being used, how the results are interpreted has changed. OFCCP statisticians have announced new approaches to address recurring issues in this area; however, the agency has not yet promulgated regulations or guidance describing a step-by-step approach with respect to its investigation of a contractor's personnel decisions.

The OFCCP has announced the use of new statistical and practical approaches to addressing recurring issues regarding what is 'significant' adverse impact. These issues are: (1) that the rate of hiring may not be uniform throughout the year; (2) qualifying criteria may be applied differently (and legitimately) at different times; and (3) small sample sizes sometimes make meaningful analysis difficult. To address the first issue, the OFCCP has proposed methods for dividing hiring patterns into distinct time periods and comparing the ratio of applicants to hires. To address the second issue, the OFCCP has proposed a tool which allows compliance officers to analyze to what extent stated factors significantly influence hiring decisions even where application of the factors is inconsistent. Finally, to address the third issue, the OFCCP has sanctioned the use of statistical tests -- the Mantel-Haenszel and Breslow Day -- to allow for aggregation of data from multiple events. The use of these new statistical models should improve the consistency of the OFCCP's approach to analyzing employers' selection, promotion and termination decisions. In the meantime, you may wish to start employing these tests and methods of analysis.

**G. Affirmative Action Best Practices**

1. Design and implement a compliant Affirmative Action Plan (AAP). Avoid common mistakes of treating plan as merely a series of separate reports and of collecting data and *never analyzing it*.
2. Design realistic programs for outreach and recruitment that are tailored to the region.

3. Remember to submit a VETS-100 form. Under VEVRAA, a contractor must list all externally advertised non-management jobs with state job services and annually complete and file a VETS-100 form, which is similar to the EEO-1 form and breaks down the workforce by EEO-1 code and covered veteran categories, rather than by race and gender.
4. Identify and resolve areas of adverse impact and compensation inequities while they are occurring, not at the time of audit. Shortcomings in this area can lead to significant back pay and other make-whole liability.
5. Compare adverse impact trends and compensation disparities on a year-to-year basis. Assess effectiveness of affirmative action efforts made during previous years and catch data errors ahead of time.
6. Focus on hiring, promotion, and termination decisions. These areas are critical as OFCCP's method for identifying adverse impact is through the impact ratio analysis which tests whether company's selection procedures result in disproportionately negative impact upon protected group members.
7. Analyze company's definition of applicant. OFCCP requires broader definition of applicant than that of many employers. Also, the increase of Internet-based recruiting and hiring only complicates the process of identifying and tracking applicants. One possible applicant definition: an individual who follows company's rules for applying, specifically identifies an open position, and meets the minimum job qualifications.
8. Ensure HR is maintaining complete files that document the applicant pool for each job opening. This is particularly critical with small and/or remote sites. Those who were clearly unqualified, such as those with criminal convictions, unavailability work required shifts, and so forth, should not be included (could skew adverse impact analysis).
9. Evaluate compensation decisions. Because OFCCP seeks monetary relief for compensation disparities, review this area in detail. Ask whether individuals in job "groupings" perform substantially equal work or are of similar value to the organization. Also, try to ensure that differences between the median salaries of protected and nonprotected group members can be attributed to factors such as years in the position, years in grade, previous related experience or performance reviews.
10. Other ways to minimize exposure in compensation area:
  - a. Review written materials describing the compensation system to ascertain whether they are accurate and reflect the factors that affect compensation.

- b. Interview appropriate compensation department officials to confirm factors they consider in establishing starting compensation, subsequent adjustments while in same job title, compensation upon advancement, and compensation for new jobs or titles.
- c. Look for less obvious factors that may control compensation, such as premiums paid for hard to fill or highly technical jobs or for greater responsibility.
- d. Identify and remove non-similarly situated individuals, such as part-timers, employees on severance, those paid under different geographic or regional pay scales, or "red circled" employees—that is, those employees whose salary is frozen because of demotion or hitting the maximum of a salary range.
- e. If differences still remain, have managers who make compensation decisions in the affected areas review the results and identify reasons for the differences.
- f. If salary equity adjustments are made, remember that how you communicate your decisions is crucial. You will have to anticipate coworker reaction from those who do not get adjustments and suspicion from those who do.

#### **H. An Affirmative Action Plan Implementation And Pre-Audit Checklist**

Counsel may utilize the following as an "Affirmative Action Plan Implementation and Pre-Audit Checklist." It can help you determine your company's level of preparedness for an affirmative action audit. The checklist incorporates the requirements of the OFCCP's regulations and is an easy method of checking the status of the company's affirmative action awareness.

1. Has a top level manager been appointed EEO coordinator and assigned the responsibilities of plan implementation and monitoring? Name and Title
2. Has the president or chief executive officer signed and dated the company's affirmative action plan?
3. Is there an EEO/AA policy statement containing the company's EEO policy, identifying the EEO officer or manager and stating the company's commitment to affirmative action? Has the statement been signed by the president or CEO and posted on a bulletin board where it can be seen by applicants and employees?
4. Is a notice advising special disabled and Vietnam era veterans about the existence of an affirmative action plan and inviting them to be considered under the plan posted on a bulletin board where it can be seen by applicants and employees?
5. Is a notice advising disabled individuals about the existence of an affirmative action plan and inviting them to be considered under the plan posted on a bulletin board that can be seen by applicants and employees?
6. Is the company policy statement on sexual harassment posted or included in the employee handbook?
7. Is the facility maintaining a daily log recording each applicant's name, date of application, race, sex, position interviewed, EEO-1 category and disposition of application? If the logs are not completed on a daily basis, how often are they completed?
8. For all new hires, has a log been maintained to record each newly hired worker's name, race, sex, date of hire, and EEO-1 classification?
9. Are you able to identify who were the actual 'applicants' for openings, both externally and internally?
10. For all transfers, has a log been maintained to record each transferred worker's name, race, sex, date of transfer and the former and new job titles, EEO-1 classifications, job groups, departments and salaries?
11. For all promotions, has a log been maintained to record each promoted worker's name, race, sex, date of promotion and the former and new job titles, EEO-1 classifications, job groups, departments and salaries?
12. For all terminations, has a log been maintained to record each terminated worker's name, race, sex, former job title, EEO-1 classification and basis for termination?
13. Are letters requesting referrals of qualified minorities, females, veterans and disabled individuals sent to organizations that provide such referrals? If so, is a list of these organizations maintained?
14. Are records maintained of the results of these referrals?
15. Is a log maintained to record other affirmative action recruitment efforts, such as participation in job fairs and recruitment at educational institutions having significant minority and female enrollment?
16. Are jobs for which the company externally advertises referred to the state job service? If so, is a log of such referrals maintained?
17. Are the applicant flow, new hire, transfer, termination and promotion logs analyzed quarterly to determine whether minorities or women have a lesser selection or greater rejection rate (and, thus, adverse impact) than non-minorities or males?

18. Has an affirmative action plan been prepared for your facility for the current year? (Indicate the period of time this plan covers.) If statistically significant underutilization existed which resulted in goals being established in specific job groups, were the following actions taken?
  - a. Were goals discussed with all levels of management?
  - b. Were actions taken to recruit applicants for those specific job groups underutilized?
  - c. Were steps taken periodically to monitor the company's success at reaching these goals to prioritize where resources should be directed?
19. Does management receive training regarding its EEO and affirmative action plan responsibilities? If so, when?
20. Is the annual EEO-1 report completed accurately and submitted on time?
21. Are applicants with disabilities able to gain access to the facility and to your application process? If not, what alternatives are in place to provide access?
22. Is there parking for individuals with disabilities?
23. Is the VETS 100 form prepared accurately and submitted on time?
24. Are there any pending state or federal administrative agency EEO discrimination complaints against the company?
25. Does your facility advertise in any publications aimed at women, minorities and other protected groups? If so, is a list of these publications maintained?
26. Do all newspaper advertisements contain a tagline stating, "EEO M/F/V/D", "Equal Opportunity Employer" or similar language?
27. Have you listed in your veterans and disabled affirmative action plans a schedule of review for your job descriptions to ensure that they accurately reflect the precise requirements of each specific job and do not contain non-job related mental or physical requirements that could be an impediment to advancement?
28. Do interview forms or applicant logs contain rejection codes or specific reasons for not offering applicants employment?
29. Are federal, state and local EEO posters conspicuously displayed where applicants and employees can see them?

30. Have you conducted an impact ratio or similar analysis of your selection procedures? Can you defend or explain or refine "away" the results?
31. Have you conducted an analysis of your Company's compensation system? Can you defend or explain or refine "away" the results?

#### IV. SAFETY & HEALTH AUDITS

##### A. Who Audits:

The Occupational Safety and Hazard Administration (OSHA) another Department of Labor agency conducts "safety audits" (refer to ACCA Docket September 2003, "OSHA inspections: How to Prepare" Kim R. Kolb, William K. Principe).

##### B. Types of Audits:

The types of activities that can trigger audits are as follows:

- a. Imminent danger
- b. Fatality and catastrophe
- c. Fatality or hospitalization of 5 or more employees
- d. Complaint and referral
- e. Employee complaint
- f. Referral by government agency EPA, state workers compensation, local police or fire department and hospitals
- g. Programmed inspections in industries with a high incidence of lost work days or days of restricted activity

##### C. Prior To Inspection

1. Display the official OSHA poster where notices to employees are customarily posted.
2. Obtain upper management commitment to workplace safety and display commitment statement.
3. Conduct formal or informal survey/audit of the facility to spot and correct apparent safety and health hazards. It is important that hazards identified are addressed or corrected in a timely manner. Consult with upper management before undertaking a survey/audit.

4. Ensure that a management official has been assigned responsibility for safety and health compliance and for dealing with employees, OSHA, and other individuals on the subject of workplace safety and health.
5. Determine which OSHA standards and regulations apply to the facility and ensure that all required written programs, plans, training and recordkeeping are complete and updated on an annual basis. Ensure that the facility's personal protective equipment assessment certification has been completed.
6. Train designated management personnel on how to properly handle and respond to an OSHA inspection.
7. Determine the company policy on requiring OSHA to have a warrant prior to allowing an inspection to be conducted.
8. Foster employee participation in safety and health management and instill commitment in employees to safe work practices.
9. Establish a crisis management team to deal with catastrophic occurrences, fatalities, and OSHA-related publicity.
10. Ensure that injuries and illnesses are properly recorded and supporting documentation is available.
11. Notify OSHA within eight (8) hours if a fatality occurs or three (3) or more employees are hospitalized from the same incident. Where fatality or hospitalization occurs, consult with the company's OSHA counsel to determine what investigation should be conducted and what accident reports need to be prepared.
12. Provide appropriate equipment, i.e. camera, video, monitoring, etc., for conducting OSHA inspections.
13. Review previous OSHA citations and ensure abatement has been completed and hazards cited have not reoccurred.

**D. Conducting The Inspection.**

1. Initial Contact and Opening Conference
  - a. Refer the OSHA compliance officer arriving on the premises to the company's designated safety officer.
  - b. No employees, other than the facility manager and/or the designated management safety officer, should communicate with the OSHA compliance officer prior to the opening conference.

- c. The safety officer should obtain the compliance officer's credentials as well as his or her business card with an address and phone number to ensure that the compliance officer is on an official inspection.
- d. Determine from the compliance officer the purpose, scope, and the circumstances of the visit to the facility. If the inspection is based on a complaint, obtain a copy of the complaint.
- e. Determine if the compliance officer has a warrant to conduct the inspection. If yes, find out the scope of the warrant.
- f. Notify the company's OSHA counsel. This should be done prior to the opening conference in order to receive any instructions or to raise some defense or objection.
- g. Notify the employees' designated representative (if applicable) of OSHA's presence.
- h. Have an opening conference with the OSHA compliance officer to establish:
  - i. the focus areas of the inspection;
  - ii. the scope and route of the walk-around inspection;
  - iii. the designated trade-secret areas;
  - iv. the procedure for conducting employee interviews and producing documents;
  - v. the schedule of interviews;
  - vi. the documents for review by OSHA;
  - vii. the procedure for requesting copies of any employee complaints; and
  - viii. the facility's rules and procedures OSHA will be expected to follow.
- i. Conduct all necessary safety and health advising/training of OSHA compliance officers prior to access to restricted areas. Ensure that the OSHA compliance officer wears all necessary personal protective equipment and follows all company safety and health policies.

2. Walk-Around Inspection

- a. A designated safety officer should stay with each OSHA compliance officer at all times during the inspection except during hourly employee interviews.
- b. The designated safety officer should take detailed notes, including date(s) of inspection, areas inspected, items discussed and employees interviewed.
- c. If a compliance officer deviates from area(s) covered by the complaint then the company safety officer should inquire as for the reason for the deviation.
- d. When appropriate, photographs should be taken of areas inspected by the OSHA compliance officer as well as all items photographed by the compliance officer. Video also should be utilized, if used by the compliance officer.
- e. The designated safety officer should immediately have corrected any alleged violations identified by the compliance officer to the extent possible.
- f. No management or supervisory employee should give information or make statements to the compliance officer without approval from the designated safety officer or the company's OSHA counsel.
- g. All work rules and safety procedures should be enforced and applicable to the compliance officer and walk-around team during the inspection.
- h. The compliance officer should be asked to put all requests for company information and/or documents in writing.
- i. The company's OSHA counsel should review all requests for documents and information as well as all information and documents provided.
- j. Document all samples or monitoring tests taken by the OSHA compliance officer and request copies of all sampling and monitoring results as well as all photographs and videos taken. The company should request the OSHA compliance officer to schedule sampling and monitoring at a time when the company can conduct its own sampling and monitoring.

3. Closing Conference

- a. Remind the compliance officer of the scope of the inspection as stated in the opening conference.
- b. Request copies of all OSHA sample and monitoring reports from the compliance officer.
- c. Provide additional information and documentation relevant and supportive of the company's position as well as any information which shows abatement of any alleged violation.
- d. Obtain from the OSHA compliance officer an acknowledgment of receipt of the documents provided.
- e. Take detailed notes on the alleged hazards identified and the problem areas indicated by the compliance officer along with the applicable standards and suggested abatement procedures.
- f. Provide the OSHA compliance officer with the name, title, full address, and phone and fax numbers of the person to whom all OSHA correspondence should be directed.

E. After The Inspection

1. Obtain all sample and monitoring reports from OSHA. File a FOIA request, if necessary.
2. Review all areas noted by the compliance officer and make appropriate abatement.
3. Provide the company's OSHA counsel with copies of all of the documents provided to OSHA and all of the notes, photographs, videos, etc., taken during the inspection.
4. The company's OSHA counsel should make a written request to OSHA to ensure that all trade secrets and proprietary information disclosed during the inspection are kept confidential.
5. If you are issued citations by OSHA, the following should be done:
  - a. Post the citation (with penalty amounts deleted) where notices normally are posted near the site(s) of the alleged violation(s). Note: in state plan states, check the state rule on posting requirements.)
  - b. Immediately notify the company's OSHA counsel about the citation and send a copy of the citation to them.

- c. With the advice of counsel, schedule an informal conference with OSHA.
- d. Post Notice to Employees of informal hearing.
- e. Where an agreement cannot be obtained quickly, to protect your rights file a Notice of Contest of the citations within fifteen working days of the receipt of citations. THIS PERIOD CANNOT BE EXTENDED.

(Note: in state plan states, check state filing requirements to contest citations.)

V. **ERISA QUALIFIED PLAN AUDITS (USUALLY 401(K) PLANS, BUT CAN BE SEVERANCE PLANS, ETC).**

A. **Who Audits:**

DOL-enforces fiduciary, recordkeeping, and reporting and prohibited transactions.

B. **Types of Audits/Areas of Focus:**

1. Employee contributions-particularly if employer in financial difficulty.
2. Rapid ERISA Action Team (REACT) focuses on employers in financial difficulty.
3. Orphan Plans—focuses on abandoned plans to get money to participants.
4. Multiple Employer Welfare Arrangements (MEWA)—focuses on fraudulent MEWA usually marketing health insurance to small business and self-employed.
5. Employee stock ownership plans (ESOP) focuses on incorrect evaluation of employer's securities.
6. Health and disclosure claims issues.
7. Reporting and disclosure enforcement. IRS enforces and interprets minimum standard provisions of ERISA and parallel provisions of the code.
8. Fiduciary review
  - a. Does the plan have a named fiduciary?
  - b. Is there an investment policy statement?
  - c. Have investment policy and procedures been established?

- d. Are the procedures followed and documented?
  - e. Does the plan provide for adequate returns?
  - f. Does the plan provide for adequate diversification?
9. Review of Section 404(c)
    - a. Must satisfy 20-230 criteria
    - b. Often overlooked is the disclosure requirement to plan participants. Make sure included in Summary Plan Description (SPD)
    - c. Review on-going education requirement
      - i. Is it frequent enough?
      - ii. Is it comprehensive enough to meet the needs of all employees?
      - iii. Are the meetings documented?
    - d. Review for plan defects: usual in these areas
      - i. Is there proper documentation?
      - ii. Operational issues
        - (a) Are the payroll contributions timely enough—like 24 hours?
      - iii. Demographics
        - (a) Year end review?
        - (b) Is it top heavy?

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**PRELIMINARY EXEMPTION ANALYSIS**

**I. IT & Other Internally Focused Positions**

Position Title	A	E	LP	CP	Comments	Further Review
1. Sr. Personal Computer Specialist	Y	N	N	Pos	Primary Duties: Complex administration of computer hardware and software. Evaluates, recommends configurations, procures and installs and maintains records regarding configurations. Evaluates technology for use at the Company. Helps plan installations and network management tasks.  NOTE: Discrepancy between job description and performance evaluation regarding level of job duties. Is employee really performing senior level work?	
2. Personal Computer Specialist	PN	N	N	N	Primary Duties: Routine level operating and maintenance of personal computers.  LP: Insufficient education requirement.  CP: Not high-level work (e.g. not analyzing, designing,	

Position Title	A	E	LP	CP	Comments	Further Review
					testing computer hardware, software or systems). Employee is operating computers, which is expressly excluded from exempt duties.  A: Probably not regularly exercising independent judgment and discretion regarding matters of significance concerning policy or business operations. (e.g. No planning, advising, negotiating, representing, analyzing)	
3. Senior Systems Integrator	Y	N	Pos	Pos	Primary Duties: Administrator of multiple computer servers and software packages. Diagnoses and resolves system problems. Evaluates, tests and recommends server upgrades.  (NOTE: Revise language on job description regarding independent judgment and discretion.)	
4. Systems Integrator	Y	N	Pos	PN	Primary Duties: Administrator of multiple computer servers and software packages. Diagnoses and resolves system problems. Evaluates, tests and recommends server upgrades.  (NOTE: Revise language on job description regarding independent judgment and discretion.)	
5. Associate Buyer	PN	N	N	N	Primary Duties: Purchases low cost, routine items per established guidelines under immediately supervision.  A: Work does not affect substantial importance of the management or operations of the business. Lacks sufficient independent judgment and discretion regarding	Review for federal exemptions



Position Title	A	E	LP	CP	Comments	Further Review
					matters of significance. Must follow detailed policies and procedures.	
6. Accountant	Pos	N	Pos	N	Primary Duties: Prepares financial statements and related schedules. LP: Is specialized degree actually required or is equivalent experience acceptable? A: May lack sufficient independent judgment and discretion. Works under "close supervision" of up to three managers. NOTE: Need more information.	Yes – factual
7. Legal Assistant	Pos	N	N	N	Primary Duties: Support legal department. Clerical tasks and special assignments. A: May lack sufficient independent judgment and discretion. Nearly half of listed duties don't involve the independent judgment and discretion. Is she a clerical assistant most of the time or a true paralegal-type assistant?	Yes - factual
8. Web Designer	Pos	N	N	N	Primary duties: Designing web pages for its customers. A: Job description is silent on the issue of independent judgment and discretion. The main issue is whether over 50% of his work relates to the company or its customers' business operations. It appears he may spend most of his	Yes – legal and factual research

Position Title	A	E	LP	CP	Comments	Further Review
					time designing graphics to be placed in web page. CP: Expressly excludes work highly dependent upon CAD. Note: The Associate level Web Designer has identical job description.	
9. Network Administrator	Y	N	Pos	Pos	Primary Duties: Implement, configure, maintain and monitor computer servers and networks in the Company. LP: Is a specialized degree actually required? CP: Duties appear sufficient. Issues are independent judgment and discretion, which is probably sufficient, but unclear from job description. And, hourly wage rate of \$44.63?	Yes – factual
10. Network Support Engineer	Y	N	Pos	Pos	Primary Duties: Installs, administers and monitors physical network equipment. Performs special assignments. Some design, testing and repairs NOTE: Job description could be made more useful tool in establishing exemption.	

**II. Other Positions**

Position Title	A	E	LP	CP	Comments	Further Review
11. Sr. Technical Editor	N	N	PN	N	Primary Duties: Edits technical text and artwork, as well as public relations content. A: Employee performing non-exempt "production" work. LP: Employee could have a 4-year degree in English or related field, so a specialized degree is not actually required.	
12. Technical Writer	N	N	Pos	N	Primary Duties: Writing technical manuals and operations handbooks. PC: Technician writers are specifically excluded. P: Issue is actual requirement and use of specialized degree. Job Description says equivalent work experience is okay. A: This is "production" work.	

Position Title	A	E	LP	CP	Comments	Further Review
13. Engineering Administrator, System Test	N	N	PN	N	Primary Duties: Edits engineering tests and user documentation. Minimal supervision. A: Employee is performing "production work". P: Is Business Administration "or related field" a sufficiently specialized degree? It's probably not required to perform the job. Also, performance review focuses on editing and style, which are not high-level administrative tasks.	
14. Marketing Representative	Y	N	N	N	Primary Duties: Event and demo coordination; administrative assistant to marketing VP. A: Likely exempt as an administrative assistant rather than marketing personnel. Conducts special assignments using regular independent judgment and discretion. Note: Job description duties don't match duties in performance review.	
15. Marketing/Proposal Administrator	Pos	N	N	N	Primary Duties: Support creation and development of proposals and marketing materials. A: Merely assisting putting together proposals for contracts, which is not exempt administrative work, but "production" work. True marketing work is administrative. It is also unclear if this employee exercises sufficient independent judgment and discretion. NOTE: No additional supporting documents. Need more	Yes – factual

**Sample Job Audit Form**

Date \_\_\_\_\_ Company \_\_\_\_\_

Job code \_\_\_\_\_ Audited Job Title \_\_\_\_\_

Supervisor/Mgr. Name \_\_\_\_\_

Supervisor/Mgr. Title \_\_\_\_\_

Position Title	A	E	LP	CP	Comments	Further Review
					information.	
16. Associate Cost Administrator	N	N	N	N	Primary Duties: Assists with standardized cost proposals. Applies specific policies and procedures under "close supervision." This work is likely "production" not administrative. Specialized 4 year degree is likely not required.	
17. Contracts Analyst	PN	N	N	N	Primary Duties: Monitors contracts under supervision of Contracts Manager and Senior Contract Administrator. LP: No advanced or specialized degree required to perform the job. A: Likely lacks sufficient independent judgment and discretion with respect to matters of significance. Appears to have close supervision and/or follow specialized policies and procedures. Unlike Contracts Administrator, doesn't analyze and make recommendations. Level of work doesn't affect or directly relate to business policy or general business operations. Unlike Contracts Administrator, is not the customer's point of contact on contracts.	

1. List the employee(s) in the audited job currently reporting to you:

2. Describe the primary purpose of the job:

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3. Does the employee's job description (attached) accurately and completely describe the employee(s) duties and responsibilities? Yes \_\_\_\_\_ No \_\_\_\_\_  
If no, describe why and indicate any additional or revised duties performed.

4. Are the physical and mental requirements listed in the job description appropriate and necessary? Yes \_\_\_\_\_ No \_\_\_\_\_  
If not, please provide more detail.

5. Please provide examples of independent judgement and decision making involved in this job. How do these actions/decisions impact the company?  
What is the impact of errors?

6. List the job's primary duties, the estimated percentage of time required for each one, and whether the duty requires independent judgment/discretion. (Do not list any single duty that represents less than 5% of total work time).

<u>Primary Duties</u>	<u>% of time</u>	<u>Ind. Judg. Y/N</u>

Total % \_\_\_\_\_

7. Are there any other important aspects of the job? If so, describe:

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## Effective Strategies For Responding To Government Audits

October 18, 2005

*Presented by:*

**Anne Celentino, Senior Attorney, Cubic Corporation**

**Allison Despard, HR Attorney, Intel Corporation**

**Matthew Halpern, Partner, Jackson Lewis LLP**

Effective Strategies  
For Responding To  
Government Audits  
2005

October 18, 2005  
Washington, DC

**Speaker(s):**  
Anne Celentino, Esq.  
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## Defending Wage/Hour Audits:

▪ Wage/Hour Audits –  
The Most Common Audit Areas

Be aware of the most common areas of liability. For example:

- Exempt v. non-exempt status
- Failure to pay overtime
- Failure to pay for all hours worked
- Independent contractor vs. employee
- FMLA policy and forms
- I-9's

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## A Word About I-9's

### Triggering events:

DOL reviews them as an "agent" of ICE  
(can be part of any DOL audit, including  
Wage/Hour and OFCCP)

**OR**

Can be triggered by an Immigration &  
Customs Enforcement audit or a  
complaint to Office of Special Counsel



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## A Word About I-9's (Cont'd)

### Liability:

- Missing or improperly completed forms or disparate impact:  
\$110 to \$1,100 per occurrence
- Knowingly employed Unauthorized Alien or unfair immigration-related practices:
- First violation: \$275 to \$2,200 for each unauthorized alien;
- Second violation; \$2,200 to \$5,500;
- Third violation and beyond: \$3,300 to \$11,000



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## A Word About I-9's (Cont'd)

### Best Practices:

- After notification of inspection, insist on the 3 days' notice to which you are entitled
- Fix any I-9 forms that can be fixed
- Make and keep copies of all documents given to an ICE or DOL agent
- Do not consent to let the investigator speak with employees
- Sequester agents doing an on-site inspection from your employees
- I-9 forms should be purged regularly



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## A Word About I-9's (Cont'd)

### Preventive Steps:

- Train employees in I-9 compliance
- Periodically audit your I-9 files
- Correct incorrectly completed forms (date and initial any changes)



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## Back to Wage/Hour...

### Wage/Hour Audit Triggers

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- Large numbers of exempt employees and few or no non-exempt employees
- Many employees in the same exempt category
- Exempt “managers” with responsibilities similar to the employees they manage
- Exempt “managers” not supervising enough employees
- Sudden increases in exempt worker characterization for large numbers of employees
- Exempt employees not exercising independent judgment and discretion
- Frequent (and likely improper) deductions from salary-based compensation
- Complaints



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## Preparing Your Company To Defend Against A Wage/Hour Investigation

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- How adversarial should you be?
- What written policies do you have that could be evidence of unlawful treatment?
- Do you have a policy for contact with the press and handling adverse public relations?
- Are you able to identify the type of information sought by an agency during a government investigation?
- Do you know which documents to keep?





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## Disarming the “Sneak Attack”

- Initial response to unexpected inquiries and investigations
- Steps counsel can take to prepare in advance for Wage/Hour investigations
- Defending the investigation
- Employee classification best practices

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## Disarming the “Sneak Attack” – Unexpected Investigations

- Designate a primary contact for government agencies at each facility
- Advise receptionists and other employees of how to deal with government agents
- Designated contact should be notified immediately
  - Meet with agent in private
  - Ask for credentials and purpose of visit
  - Advise agent of policy regarding contact with home facility or counsel prior to allowing any inspection
  - Promptly notify in-house or outside counsel

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## Disarming the “Sneak Attack” – Steps Counsel Can Take

- Pre-investigation audit and inspection
  - Analyze facility operations and recordkeeping
  - Interview management and review payroll records
  - Identify problem areas
- Offer to self-audit in problem areas
- Recordkeeping policies up-to-date?

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## Disarming the “Sneak Attack” – Investigation Day

- Request the investigator’s credentials
- Accompany the investigator during their tour of the facility
- Provide a private place for the investigator to review records, away from employees
- Avoid volunteering information not directly responsive to investigator’s questions
- Confirm compliance with investigator’s requests in writing
- Don’t be too quick to concede improper practices

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## Disarming the “Sneak Attack” – Employee Classification Best Practices

- Periodically review job classifications (exempt/nonexempt) and wage levels
- Internal audit of timekeeping and pay procedures (including salary docking policies)
- Consider using outside counsel for compliance audits
- Minimize employee relations issues by explaining any resulting changes to employees in advance



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## OFCCP Audits

- How You Are Chosen
- Liability Triggers
- New, Expedited Audit Procedure
- Audit Defense
- Affirmative Action Best Practices



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## How You Are Chosen

- The OFCCP historically has selected contractors for review based on information provided on the EEO-1 Report form.
- The Federal Contractor Selection System, or “FCSS”
- Corporate Scheduling Announcement Letters



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## Triggers For Liability In OFCCP Compliance Reviews

- Adverse impact in employee selection decisions (promotions, terminations, and especially hiring)
- Compensation disparities
- Unvalidated testing



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## The OFCCP's Changing Approach To Compliance Reviews

- Expedited audit procedure
  - Looks for statistically significant adverse impact
  - Looks for statistically significant compensation disparities
  - Looks for testing vehicles with statistically significant adverse impact
- If any of these is found, the OFCCP will seek a make-whole remedy of backpay, frontpay, reinstatement (or job offers), and more:
  - Conciliation Agreement
  - Notice of Violation
  - Predetermination Notice



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## Defending The OFCCP Compliance Review

- Review files
- Prepare and train managers
- Reconcile data (Is there a piece of paper for every entry?)
- Interviews with management and supervisory employees
- Non-management employees
- Exit conference



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## OFCCP Enforcement Efforts

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- New Department of Statistics
- PhD-level statisticians with a focus on selection trends, compensation, and testing



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## Affirmative Action Best Practices

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- Be suspicious of your own data and reconcile it
- After other data is clean, turn to applicant flow
  - Low apps-to-hires ratio?
  - High % of race/gender unknowns?
- Run Hires Adverse Impact Analysis
  - Address any areas over 2.0 SDs
- Validation Studies check out OK?
- Compensation Analyses: Tailor them to the organization



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## Affirmative Action Best Practices (Cont'd)

- Promotions and Terminations Adverse Impact: Do It (To a Point)
- Explain Adverse Impact and Pay Disparities Up Front
- Obtain best possible privilege protection
- Et Cetera: Utilization analyses, placement goals, good faith efforts, plan text, sample personnel documents...
- Returning emphasis on good faith efforts



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## Other Government Audits

- Safety & Health Audits (OSHA)
- ERISA
- State Audits