ASSOCIATION OF CORPORATE COUNSEL

TITLE: **The "Systemic Discrimination" Revolution: Confronting the Rising Number of Class-Based OFCCP & EEOC Claims**

DATE: **May 22nd, 2008**

PRESENTED BY: **ACC's Employment & Labor Law Committee**

SPONSORED BY: **Jackson Lewis LLP**

FACULTY: **Matt Halpern**, Partner, Jackson Lewis LLP

MODERATOR: **Ed Farren**, Assistant General Counsel, Capitol One Financial Corporation

****

Operator: Just a reminder, today's conference is being recorded.

Female: Welcome to this ACC Webcast. Ed, please go ahead.

Ed Farrin: Good afternoon. Welcome to our presentation of today's Webinar "The Systemic Discrimination Revolution, Confronting The Rising Number Of Class-Based OFFCP and EOC Claims." My name is Ed Farrin and I'm an Assistant General Counsel with Capital One and a member of the Association of Corporate Counsel.

Before introducing our speaker today, Matt Halpern, I'd like just to briefly mention two housekeeping measures. The first is with respect to questions. We welcome questions in today's session. And I'd like to call your attention on the screen to the box on the lower left-hand corner marked questions. There you can enter your questions and type send. And we'll be presenting the materials for 45 minutes today, and Matt will be answering those questions that you submit in the last 15 minutes of today's presentation.

I'd like to also call your attention to the links box on the left-hand side of your screen. And the first item called out there is the Webcast evaluation. And we'd like to see if you would spend a few minutes after today's presentation filling out an evaluation form.

Today's presenter, Matt Halpern, is a nationally recognized authority on federal affirmative action policy and related issues. Matt is a senior partner at the law firm of Jackson & Lewis and heads up the firm's nationwide affirmative action practice group. Matt has an extensive practice in terms of advice and litigation, and he is an excellent speaker. Today's subject promises to be very interesting.

And without further, I'd like to introduce Matt Halpern.

Matt Halpern: Well, thank you very much, Ed. Just I have a few housekeeping points myself. I just wanted to remind everybody that today's seminar is not legal advice. It is a hopefully informative opinion of this speaker who is a subject matter expert in the area. But if you do have actual legal issues that you need consultation on, then you need to consult with your own counsel where there's an attorney-client relationship involved.

And just a little bit more about me and who I am and why I'm here. As Ed mentioned, I head up the firm's affirmative action OFCCP and diversity planning practice group. And in that position I have the privilege of supervising the production of 1,500 affirmative action plans each year. And we've defended about 250 audits in the past several years. So I get to see the impact of the OFCCP's decisions on a day-to-day basis. I also throughout my career have dealt with the EEOC both an individual basis and then dealing with them in commissioner charged situations. And then, finally, the other way that I get involved in dealing with situations like this is from a preventive standpoint. I have been my entire career, and continue to do so to this very moment, been involved in preventive vulnerability audits with companies so that they can identify the kind of exposure or potential exposure or liability that we're going to talk about today.

And as we go along, please – I invite your questions. I may not get to them until the end of the program. If something happens to pop up that's relevant to what I'm talking about at the moment and can be quickly addressed, I'll try to address it. If not, I'll try to get to all your questions at the end.

So we're using the term systemic discrimination revolution because we're talking about the focus of the two primary federal equal employment opportunity enforcement agencies on systemic discrimination as opposed to individual discrimination. In the beginning, and as we know – and it's really not so much the beginning with the EEOC, but more so of late – the EEOC has been responding and driven mainly by individual claims. And as we know for those of us who deal with the OFCCP, which is the federal department of labor agency that administers and enforces the affirmative action obligations for federal contractors, that for years the OFCCP had been focused on technical record keeping violations. And when there were allegations of adverse impact or something of a class-like basis, the methodology that the agency used is much different from what they're using now. And both agencies are increasingly becoming robust enforcement agencies focusing on systemic discrimination.

And so the first question we need to ask is, you know, why the change. You know, what has prompted each of these agencies to take either a new look or a renewed look at systemic discrimination in the workplace.

Starting with the OFCCP. Until a few years ago, the OFCCP's focus was more of an administrative nature in the sense that it focused more on affirmative action compliance rather than necessarily the EEO aspects, although it did that, too. But in the old days a typical audit involved a submission of your affirmative action plan and then a – an on-site was pretty much guaranteed. And the compliance officer would look at technical issues. Did you make good faith efforts, did you list job openings with the state's employment services, did you post what you were supposed to post on bulletin boards, were you putting a proper weight on the different factors that made up your availability analysis, were you picking the right census titles. And it was more a venture of seeing if the employer was meeting its technical compliance obligations.

Nowadays the focus has moved towards finding and eradicating systemic discrimination. And while the agency can look at systemic discrimination in any area, it has been focusing more on and employer's application and hiring process. And we'll, you know, get into that more. Now, the OFCCP has always had the mandate to look at group-like discrimination in the workplace. It's just its methodologies for doing so have changed.

Since 2002, the OFCCP's methods for identifying and eradication broad patterns of discrimination in employee selection processes and pay practices have changed. Nowadays we see an increased focus on applicants and hires as opposed to other areas. The OFCCP has an obligation to make sure that employers are undertaking coopertunity as regards their treatment on a group basis of hires, promotions, and terminations. And that has always existed as part of the agency's mandate. And while the agency certainly will look at terminations and promotions as well as hires, the fact of the matter is that in terms of sheer volume and in terms of documentation, it's more advantageous for the agency to look at applicants/hires from a more

bang from it – for its buck standpoint. Because by and large, if asked, most employers can explain why they made promotional decisions. And there's usually some level of documentation to support promotional decisions.

Similarly, most employers when asked can explain termination decisions. And there usually is some level documentation regarding termination decisions. The irony is, is that the activity that happens most often in an employer, the personnel activity that happens most frequently as an employer is in the applicant hire area. And if you think about it, more applicants are rejected in any given work environment, which is a form of personnel activity, than probably any other form of personnel activity in the workplace. There's more applicants rejected and – on a given year generally than there are individuals promoted or terminated, or obviously hired. And the irony is the personnel activity that tends to be most frequent in an employer's workplace also historically has been in the area where employers tended to have the least amount of supporting documentation.

So in terms of focus, it makes sense for the OFCCP to focus on an area where there's a lot of activity. And there tend not – tends not to be a lot of documentation or explanation. And it's not so much that the agency focuses there so that they can get you and they know it's easy to get you there, but there's an expectation that with so much going on and so little documentation that there's a greater likelihood that there can be discrimination occurring.

The OFCCP is also no longer using the same methodology for proving adverse impact when it finds it. In the old days when the agency found an adverse impact, it would look at it on a job group basis. And the job group is generally a subdivision of an EO1 category – like instead of having just managers, you'd have executive managers, senior managers, junior managers, entry level managers. And, you know, different levels of engineers. So in the old days if the agency found adverse impact among senior engineers, it would ask you to explain what your selection criteria were and then it would look at all the senior engineers, male senior engineers who were picked, and in the case of adverse impact against female all the female engineers who were rejected. And then they would just lay them out in an array and they would create a chart and they would look at all the males, when they applied, what their qualifications were, whether they met the qualifications that the employer specified and all the incumbent or attended dates. And then they'd do the same thing with the females. And they would start picking out situations where hired males didn't seem to have the qualifications that were identified, on the one hand, and then identify females who did seem to have the qualifications and were ready, willing and available on the other hand. And that's how they began to frame their case.

And so what it boils to was a comparison of cohorts where the agency would say how come you hired Matt and you didn't hire Mary. And then the agency and the employer would argue about Matt and Mary or Matt and other Marys. And it became almost a process of taking what appeared to be systemic discrimination and boiling it down to individual arguments. It was like taking systemic discrimination and boiling it down to individual EEO charges. Which is not really systemic at that that point, and it's also extremely laborious and it puts the agency on the weaker end of the legal argument. Because if it comes to an argument between an employer's decision making process about what's job related and the agency's superimposition of its opinion on what it thinks is job related or necessary for the job, then from a legal standpoint the employer's going to win.

So the agency was finding that it was trying to prove systemic discrimination using a very labor intensive legally weak method to identify discrimination. And the agency recognized its mandate to find and eradicate systemic problems in the workplace. And so that has led to a change in focus. In the old days you could be pretty much assured that when you submitted a plan you were going to get a call from the agency to schedule an on-site. These days the OFCCP uses a red flagging system where they're only going on site except for, you know, certain limited exceptions because they believe that there's discrimination occurring. And what the agency does when they get your plan is they turn to two sections. They turn to the personnel activity data

section and they turn to the comp summary section, and they look in both of those areas to see if there are indications of systemic discrimination. And in the case of hires and applicants, they're looking to see if there's adverse impact, and if that adverse impact is triggering at their 80 level, whether it's also triggering at the two standard deviations level. And two standard deviations simply means that the difference in selection rates between the protected and the non-protected group would – one would expect to occur less than five percent of the time by chance or more than five percent of the time by chance. If you have more than two standard deviations, then the formula goes that what's occurring would occur less than five percent of the time by chance. And from the agency's standpoint, and from many courts' standpoint, that allows one to draw an inference of discrimination.

The chances of this happening by chance are too slim to be attributable by chance. Therefore it must be something that the employer is doing. On the other hand, with comp analysis, the OFCCP has its own methodology, which we won't go into today, that's a little different that helps them zero in on those employers where there's comp disparities that need to be investigated further. But in each – in either event, if the OFCCP wants to come on site, it means that has gone through your plans, it has zeroed in on those two areas, and it has found indications of what it believes it to be systemic discrimination.

Ed Farrin: Matt, with this new found approach and the use of the red flags that you've described to target where the OFCCP's going to apply its resources to come on site and take a deeper dive, what kind of results have you seen?

Matt Halpern: Well, that's an excellent question, Ed. And there's that old adage the proof is in the pudding. What we've seen is a doubling in the amount of back pay that the agency has been able to obtain on the behalf of alleged victims. If you look at the chart that's up there, in 2003 it was able to pull in about $26 million as a result of – and these – these are the results of audits. And audits are scheduled not on a random basis, but they're not scheduled because somebody's complained. Your number comes up using the algorithmic system that the agency uses to review EEO1 forms on which several contractors have to identify their federal contracting status. And it's based on that that you get identified for audit. But you're not getting identified for audit because somebody's complained about discriminatory treatment. So based on routine – the routine identification and scheduling process, in 2003 they pulled in $26 million in back pay for victims. By 2006 they've almost doubled that to 51.5 million and then in 2007 again $51.78 million. And that's a significant difference over a four or five-year period.

Similarly, during that roughly same period of time, the number of victims, if you will, who obtained the benefit of the monetary settlements more than doubled, from 9,600 in 2004 to 22,251 in 2007. And this has – by and large has come from the failure-to-hire cases analyzing hires versus applicants. And the – what has changed principally is that the agency is no longer using a cohort analysis method of finding discrimination in the hire – in hiring practices. Rather, once it finds that there's adverse impacts overall – and I use the example of engineer – then it does a deep dive to try to determine where that's coming from. And to do a deep dive, it asks employers what is your selection process. And the selection process is at what stage is this adverse impact occurring. It may be occurring at different stages. And the way to look at the hiring process is, it's like dropping a – you know, a pebble in a pond. And where the pebble strikes, that's the hire, and every emanation out from where the pebble hits is some point in the selection process, which could include offers and it can include interviews, obviously, and it can include engineering tests, and it can include interviews, and it can management interviews, and HR interviews, all the way back to the applicant stage and then beyond.

And so what the agency is doing is a step or selection stage analysis where when it finds adverse impact at the overall stage, it's diving to find at what point in the selection process the adverse impact is triggering, what is feeding into that overall finding of statistical significance. And at the point where it finds it, it's seeking the employer's response and explanation as to what is the job related reason that's consistent with business necessity that is causing this statistically significant

adverse impact. And as we will discuss as we move along, that can be a daunting task for employers.

At the same time that the EEO – that the OFCCP has been flexing its systemic discrimination muscle, so has the EEOC. And in the past the EEOC certainly had systemic discrimination cases and had, you know, very impressive results. But – you know, such as the WalMart case in December 2001 which started with an individual charge, where somebody complained that the information being collected as part of the application process violated the ADA. And I'm – the Morgan Stanley case, same thing. It started with an individual charging party and it grew into a class case. And same with Abercrombie & Fitch. And the agency has methods for bringing charges where an individual him or herself hasn't brought it. Commissioner charges for title seven and the ADA-directed charges under the ADEA and the EPA. And I had mentioned in the beginning that it's not so much a new focus for the EEOC as a renewed focus. Because certainly they did a lot more of this in the – in the '70s. But as of late or until recently, there wasn't a huge push for systemic discrimination cases from the agency.

But all changed. In 2005 the agency established systemic discrimination taskforce to look at the agency's approach to class action type discrimination. And one of the interesting aspects of this is it's not surprising given that the chair of the EEOC during this period of time was a former high ranking official from the OFCCP, Carrie Dominguez, who had spent a good part of her career working on at agency like the OFCCP that was more geared up towards doing the systemic discrimination investigations. And so I believe that Carrie brought her special brand of experience and was the catalyst for the systemic discrimination taskforce by the EEOC. And the EEOC got together and they spoke to – and took feedback from their own work force, sister agencies, their stakeholders such as, you know, the plaintiffs bar, the management bar, the civil rights agencies, and produced a taskforce report where several conclusions were reached.

Number one, the EEOC was not effectively using its access to its own data to identify systemic discrimination. You have the EEO1 form, which has got information. You've got the – you've got the IMS system, which has information on charges filed all around the country. You've got the Office of Research and Information Planning, overweight known as ORIP, filled with social scientists that spend their time doing reports on trends and activity and statistical analysis. And this was not all talking together.

The EEOC also lacked the appropriate technology to support systemic litigation. It was having trouble finding it because the different databases didn't talk to each other. They didn't have systems in place for logging, reporting, and keeping track. And then, finally, they weren't appropriately staffing. The systemic discrimination cases tended to arise from the national law. And so what the taskforce decided with their findings in March or April of '06 was that it couldn't combat systemic discrimination without a nationwide shift in the way it was going to seek out and eradicate.

For one thing they switched the focus from the national into the field under the notion that the field's going to have a better sense of what is going on. And as a result, the EEOC developed and implemented systemic discrimination plans for each of its 15 district offices. The enhanced focus focuses more on disparate impact. And because the agency is focusing more on disparate impact, it naturally is a lead-in for looking at applicant hire numbers.

Other things that the agency did was creating an incentive system to incentivize its field offices to bring out – to bring – to find systemic discrimination cases. The agency looked at changing the way it staffs and it's now using what's called the law firm model, where though a case may arise in New York, if there are people who have experience in doing this who work in DC because they did it during the '70s or somebody in San Francisco recently worked on one, they're now flying in auditors from – or flying in investigators or specialists from around the country because they have the experience. You know, it's – they're – the EEOC's approach is more like what a law-firm

would do when it's staffing a big case, which is bring in the talent from wherever the talent's located, not because of some, you know, geographical limitation.

And so the agency also created an advisory committee to look at the cases and make sure that they're progressing properly. And then put into place the ability for the investigators to look at charge history and pick up indications that the problems that are occurring may not necessarily be isolated to a single location, but because – could be more nationwide.

Ed Farrin: Matt, has the EEOC been willing to share the detail of some of the plans that each of their district offices have developed?

Matt Halpern: Well, the detail is in the – the numbers. And on – the EEOC – well, first of all, in terms of success, when you're dealing with the systemic cases, we're talking about public settlements now. And so the EEOC is happy in the form of news releases to publish the success of its effort. It also is happy to publish the success of its efforts in terms of the statistics that are available on its Web site. And I've put out one in particular that shows the impact of the systemic discrimination taskforce findings on the EEOC's own accomplishments. And, for example, in terms of the number of commissioner charges, which are charges where the EEOC begins the lawsuit rather than waiting – than waiting for an individual to do so, in fiscal year 2006 11 commissioner charges were signed and then one year later more than doubled; 24 were signed. If you look at the number of suit filings with 20-plus victims, it went from 11 in 2006 to 14 in 2007. In terms of suit resolutions with 20-Lupus victims, it nearly tripled, going from seven to 20 in 2007. And then in terms of suit resolutions with 100-plus victims, zero in fiscal year 2006 to four in 2007.

So the agency needs to publicize what it is doing so that it can have continual support for what it's doing. And by publicizing, it's not only in the numbers but in the press releases where will list the whole litany of things that are required in EEOC settlements. Obviously the money, the compensatory make whole damages and, you know, mental anguish damages and injunctive damages, any consent decrees that were entered into in the terms and conditions of those consent decrees, such as having to undertake affirmative action or do training or create funds for the support of different groups. So in answer to your question, Ed, absolutely. The EEOC is publicizing what it's doing because it needs to do so to get continued support for what it's doing].

Now, what's the practical implication of the EEOC's new focus? We've seen an uptick in the agency looking at the applicant hiring process. And in fact that's unusual, because in 21-plus years of doing this, you know, I can count on no hands the number of failure to hire cases that I've had with the EEOC. We started to see popping up around the country the EEOC has coming – has begun to come in and start looking at the applicant and hire process. The garden variety individual failure to hire EEOC charges now are growing into the systemic charges. The EEOC looks at the individual situation, looks for a response from the employer of, hey, we just treated this individual like we treated everybody else. Right? We didn't disparately treat them. Right? We had a process and we consistently applied it to them. That's an invitation now to the agency to change its focus from individual to systemic. Really. You have an approach. Really. You have a policy and it applies to everybody, and the impact of your policy was that this person didn't get hired. Well, gee, let's see what the impact is on others who are similarly situated to that individual.

Added into the mix is that the EEOC is now – has identified hot selection criteria. In December of 2007 it published its fact sheet on employment test and selection procedures. And it – and in doing so the agency is stating that it believes that certain kinds of pre-hire or hiring criteria may have a disproportionately negative impact on racial or ethnic minorities or other protected groups. And if you read the employment test and selection procedure guide, it's illuminating of the kinds of things that the agency is considering to be a "test." Such as cognitive tests, reading and writing and arithmetic tests, physical ability tests, performing sample job tasks, simulations, work samples, medical inquiries and physical examinations, personality tests, integrity tests, interviews, structured interviews, criminal background checks, credit checks, performance

appraisals, English proficiency tests. All of these are on the EEOC's radar. And what the agency is looking for is whether this neutrally arguably job related device is having a disproportionately negative impact on a protected group.

Now, how can you tell where you may be on the radar screen? Well, typically when you get a charge you get a request for information. And if you're like many of us, we get the request for information and we ignore it and we just simply respond with the information in hand. You don't need to this list of things the EEOC. What you do need is our position statement and here's what our response is and here's the documents we think are relevant.

Well, if the agencies got a systemic discrimination case in its radar, that's not going to satisfy them. So if you look at the RFI, the request for information, and it's seeking information concerning policies or selection criteria, cites beyond the one reference in the charge, that's an indication of the agency's focus. If they're asking for applicant trend data involving other applicants or other positions or other locations beyond that specified in the charge, especially when they're saying give it to me in electronic form, give me an Excel spreadsheet, give it to me on a CD-ROM, that's an indication that the agency's focus is beyond the individual charging party. And that really is the issue here. Things are coming in individually and they're turning into – they're turning into systemic.

If they ask have you had any pre-employment test validation studies or if you're giving tests, if they ask questions like how the selection criterion is related to job performance and they're starting to noodle along the test validation route, and if they're asking about third party background checks or testing vendors, then what they're trying to do is gather information about selection processes that may be having that disproportionately negative impact. And, remember, the issue with disparate impact is not whether you intended to discriminate, but whether your neutral selection process, badly or well intended, had a disproportionately negative impact on a protected group.

Now, how have the agencies begun to accomplish this more effectively? The agencies we say have muscled up. They're increasing the tools they use to investigate complex systemic discrimination claims. They both have retained Ph.D. level statisticians and testing experts. And, interestingly enough, the EEOC has been utilizing the OFCCP testing experts. And we know from experience the position of the OFCCP's testing experts, because we've heard and given – give speeches on this, is that he views everything in the selection process to be a test. And really it's not really- it's not tests that we worry about. It's screening devices. It's devices that cause somebody to fall out of the process. Which, by the way, goes hand in hand with this notion of selection stage analysis. Both agencies are going to be looking at your entire process. They – not only do you have subject matter experts, Ph.D. statisticians and testing experts, but the attorneys are getting involved much more early in the process. And you need to be on the lookout for an indication that a testing expert is involved or a statistician is involved. And generally you can – you can tell that the agency's gearing up for a class action type analysis by the kind of data they're requesting and the terminology that they use. If they use – start using terms that are obvious, like has this been validated. Right? Or if they start asking for a lot of detailed personnel activity data and they're starting to ask for the different fields so that they can look to see what might be driving the results, or if they're asking about what the stages are in your selection process, then that's where the agency is heading.

Ed Farrin: Matt, have you seen any connection between this initiative and the frequency with – when they are offering mediation in charges?

Matt Halpern: I have not. Have you, Ed?

Ed Farrin: No, no, I have not either.

Matt Halpern: Yes. And be – if anybody else wants to weigh in on this – I mean, as Ed was referring to, there's three different charges of flown into three different categories. They're thrown into the – oh, this seems, you know, like it's not a bad – you know, a big deal category. This looks like it's really serious. And then the middle category, which is the majority of them. And it's the middle category that are – get sent to mediation. And this doesn't seem like a big deal from the agency standpoint, they don't get ferried to mediation. This looks like it's a real problem doesn't get sent to mediation, because the agency has an additional stake in it. If I had to guess, Ed, it's the – a systemic discrimination claim's probably going to fall into that third category of this is a serious matter, so we don't want to go to mediation. So probably – and that's a very astute question, because that's probably another way that the agency – that you can get a sense that the agency's moving on a systemic track.

Now, what is it about applicant tracking and systemic discrimination that is so attractive to the agencies, and why we call it the perfect storm. And the reason is that for many years employers, especially government contractors, have had the obligation to maintain race and gender data of employment applicants. Neither agency paid much attention to applicant tracking data. Historically. During the past few years all that has changed. And the reason why it's changed we'll get into in a minute. But now the agencies are focusing on employment trends in all areas, and the systemic focus is bringing back big financial settlements for the agencies from those investigations.

The systemic discrimination initiative is causing the EEOC and OFCCP to focus on failure to hire trends within an employer's data. And the reason why it's causing them to focus is because the data allows both agencies to demonstrate systematic discrimination within employer hiring, promotion, termination or compensation employment practices, oftentimes resulting in hug financial settlements on these investigations. And although the agency has – the OFCCP has been focusing on compensation over the past two years, applicant and hire cases are much more attractive. Because compensation cases are very, very complex.

Pay systems are unique. It is – it's a more complex form of analysis to show that there's statistically significant adverse impact or, rather, disparities in a compensation system. You can count on one hand the number of systemic discrimination cases that there have been in the compensation area, at least with the OFCCP. And you can count on all your hands and all your toes and then go to your neighbor the number of failure to hire cases. Because applicant and hire data is straight forward and it lends itself to systemic discrimination findings.

The other aspect to this is the change in technology and the ability to for employers to track the decision making with applicants is both a – has both an advantage and a disadvantage to employers, because technology makes it all easier. Gone are the written applicant flow laws that employers had to contend with in the past. And one of the greatest benefits of being a federal contractor was you were required to keep track of who your applicants were and why you were rejecting them. And I always said that that's not such a bad thing. You really ought to know why people are being rejected. You want – you should have some method of understanding what's going on in the hiring managers world, why are they making decisions, so that you can monitor what's going on.

So technology is beneficial to employers because it allows them to track what is actually happening. Employers are also increasing their use of pre-employment tests and tracking the results of tests. And I'm – I – I'm living through this on a – on an ongoing basis. The world is becoming more competitive. Employers are trying to find that edge. How am I going to find the best people in the tight market against my competitors. And so they're turning towards pre-employment tests and their turning towards third party vendors to help them identify the best candidates. Vendors who administer drug screens, criminal background checks, or who are actually doing the selections themselves.

Now, one of the great ironies, again – and this is kind of similar to the notion of, you know, that other irony of the activity which happens most frequently, which is, you know, rejection of applicants, tends to be recorded the least. But as we have – the Internet rolls into the landscape and we're able to look at a lot more potential applicants, and therefore we can't do it all ourselves. So we subcontract it out to vendors. Those vendors are out there and they're making selection decisions on our behalf, and we have to be keeping track of it. Because you won't continue to employ a vendor who sends you everybody. You want them to send you the best candidates.

So what you've done is say to them go out there and make selection decisions on our behalf, and ultimately you're liable. And the problem – so the – the problem with all this is that the OFCCP and the EEOC know that that information is out there. And so knowing that it's out there, it can request that information. So the benefit is that the technology and keeping track of everything is that you can keep track of it and you can store it. The disadvantage, obviously, is the agency knows that and they can come after it. And so as I said before, historically employers track applicant data by hand, or they inputted the data with key entry operators into an electronic spreadsheet, and it was minimalistic and it didn't really gel with the different stages in the process and an applicant was selected or rejected. But now with these new programs in place, employers are able to store huge amounts of detailed data and hopefully easily retrieve and analyze the data.

As a result, employers can quickly and easily analyze large amounts of applicant data to determine who's most qualified. Equally and – as easily and quickly, so too can the EEOC, the OFCCP, and private plaintiffs and attorneys. And they know if there's an obligation out there to keep this data that they can request this data during litigation. And they can perform the same kind of analysis on it to determine if minority or female applicants or others are being disproportionately impacted. And in fact sometimes we design our system so well that we make the job of the EEOC or the OFCCP or plaintiff's counsel that must more easier.

The increase in the use of pre-employment tests and third party vendors to administer the tests, et cetera, has been caused because employers believe that the tests are neutral objective selection devices, and therefore they insulate them from liability. And the other aspect to this is that even though the employer may not be doing this on a global level, one of the things to watch out for is it may be occurring on an individual level. Another phenomenon that we've seen is that as – in competition increases, as markets shrink, as managers are held more responsible and their income is based on how well their area's doing, the other monster in the closet that we've been seeing is that managers have been making up their own tests and using them, unknown to corporate or unknown to legal or unknown to compliance. And so another avenue that employers need to explore is are there testing or are there tests out there that have been created that they're not even aware about.

Third party vendors are administrating – administering larger portions of the applicant process, even with criminal background checks where a lot of employers are asking the third party vendors to make the selection decisions about whose criminal backgrounds or records are job related and for the jobs at hand. And that can not only be a problem on an adverse impact level from a systemic discrimination standpoint at the fed level, but it many state laws regulate what kind of decisions can be made.

So what do we do. What approaches should we take to dealing with these pockets of liability that exist. Well, given the EEOC and OFCCP's increased focused on systemic discrimination, there's a number of things that we advise. Strategically use the definition of applicant under the new Internet applicant rule. The Internet applicant rule allows you, first of all, to determine who your applicants are and what procedures they still have to follow. And so if you want to everybody to be an applicant, that's fine. You can look at unsolicited resumes, you can count everybody at a job fair, you can count everybody at college recruiting, you can count anybody who applies for an open position. But you can – you can determine that in order to be an applicant you have to apply one way and one way only. You apply through the Internet, you apply through our Web

site, you apply during a specific timeframe, you have to identify the job that you are applying for, and you – it has to be clear because you've identified some identifying number or word that associates you with the job. And if you don't follow those protocols, then you're not an applicant.

The Internet applicant rule allows you to decide – or in fact requires you to decide what the basic qualifications are of a position. And in order to be an Internet applicant, you have to have applied through the Internet or other related data technology – shown interest, that is – you have to be considered for a particular position, you have to possess basic qualifications, and you can't have removed yourself from consideration or showed lack of interest prior to being made an offer of employment. Make sure that you are employing all those limiting factors in your definition of applicant. You know, keep track of what the basic qualifications are. Don't include people as applicants who don't meet your basic qualifications.

If you've got tests out there, make sure that the tests are valid. And the big question is what are your tests, what are your screening tools, do you have structured interviews. What's a structured interview? You've given instructions to interviewers on the questions they should ask, how they should ask them, when they should ask them, the kinds of answers they should they expect and the weight that should be given – given based on the types of answers. Right? Those structured interviews, for example, are a screening device and might have to be validated if they have an adverse impact on minorities or females or any other protected group.

Look at the selection stages in which applicants fall out and the specific reasons for the falling out of the process. And then when you're doing these kinds of self-analyses, cloak them under the attorney-client privilege.

So as I said, use the Internet applicant rules strategically to limit the number of potential applicants that may have been subject to systemic discrimination. When you're doing an Internet search under the Internet applicant rule, you're only required to keep the applications of those who you consider who meet basic qualifications. And then you're only required to move them forward into the applicant bucket if they possess the other two factors in the Internet definition. If you can reduce the total number of individuals who are in the applicant bucket, you reduce the potential liability. Make sure that your recruiters and your HR compliance folks understand that the Internet applicant rule is not an invitation to dump everybody into the application bucket. And if you're using tests, check to see if the test is causing adverse impact. And if it is, get it – you know, see if it has a validation study. And at the very least, compare the validation study with the provisions of the uniform guidelines on employee selection procedures. Not because we're statisticians or testing experts, because we can read. And you can read the validation study in a test and say – and see that it's missing six of the sections that the uniform guidelines say should be in there. And if you do have tests and they're not validated or you suspect the quality of the validation and they're having adverse impact, then you might have to get it validated.

And even if it is validated, don't forget that the test is – you know, is this – is this vehicle having an adverse impact. If it is, you've got a number of choices. You can just stop using it, you can get rid of the components that are having it, or you can get it validated. But even if you get it validated, which is a form of showing that it's job related and consistent with business necessity, you're obligated under title seven to explore where there were equally effective alternatives to the test that wouldn't have caused the adverse impact.

You need to know what your selection stages are in order to be able to defend yourself. And it begs the question, if you don't know what the selection stages are in your own system, then how can you possibly defend yourself. What are the different stages, number one. Number two, if you do know what the stages are in your selection process, can you collect data at the different stages. I mean, they may exist. You may be able to figure out what they are. But do you know how many people went in and then how many people were rejected versus how many people were selected, because that's what the EEOC and the OFCCP are going to look at. The selection rates and the rejection rates.

So the first battle is figuring out what your process is. The second battle is figuring out if you've got the data to defend it at each stage, both on the numbers standpoint and do you have a method for recording why people were rejected.

And then, finally, anytime you're doing a self-evaluation, anytime you're doing a self-critical analysis, you don't want to make the venture of trying to figure out what's wrong, the evidence in the discrimination case against you. So make sure that if you've got compliance folks running around doing this kind of stuff that they are taking advantage of the cloak of attorney-client privilege. Because that'll reduce the likelihood that the analyses will be used against you in an EEOC or OFCCP investigation or in a traditional lawsuit.

I take a page from the situation involved one of the pharmaceutical companies a number of years back where they – their compliance individual did a analysis of where there was potential race discrimination problems at the company and passed it along to start management. They passed it along, senior management understood what the – what the director was saying in terms of where there were areas where there might be potential race discrimination. They adopted some of her suggestions on how to combat the potential race discrimination in the workplace, but didn't adopt others.

Fast-followed about 10 years later and there's a race discrimination class action and plaintiff's counsel is trying to get the memo written by the compliance officer into evidence. Because it was a pattern and practice case, and in a pattern and practice case, plaintiff has to show that there is a pattern of – that is actually the policy, rather, of the – or practice of the organization to discriminate against the individuals who are the – you know, in the plaintiff's category. And so the plaintiff's counsel sought to admit this document under the theory that, look, your honor, the company was aware that it was discriminating against individuals based on race back, you know, this many years ago and they didn't adopt all the suggestions that were made. And that is an indication that they willingly undertook a policy of discrimination. Because discrimination was pointed out to them – to senior management and senior management opted not to take all the actions that were recommended. Therefore it was the policy of the organization to discriminate.

It was a shame that that analysis had not been done under the attorney-client privilege. At least they would have had an argument to trying to keep it out of the litigation. And so what you don't want to do is wind up in a situation where you're doing some kind of self-critical analysis looking for examples of potential discrimination and have that used against you in – ultimately in litigation. And so when – if you're going to do an analysis of your selection process to figure out what the different stages are, if you're going to identify tests that are being used, if you're going to have race and sex and other data pulled about the tests, if you're going to have somebody come to a conclusion whether information is problematic or not, try to cloak it in the attorney-client privilege. At least it will give you the argument that the venture is privileged in any kind of subsequent litigation.

The – and when we're looking at the privilege, just remember that – make sure that the attorney who you've asked to render legal advice and who therefore says we need to do these kinds of self-critical analyses is some – a subject matter expert, which can mean an in-house or an outside attorney. But make sure that the person in charge, the attorney who's ostensibly giving legal advice, is well grounded in the area. So if they ever have to defend the privilege, it will ring true that the self-critical analyses that were done were done for the purpose of giving legal advice.

And that brings us to the conclusion of our presentation. I'm happy to take any questions now if any of you have them.

OK. Here's a question. Have we seen an uptick in discrimination – I'm paraphrasing – in systemic discrimination claims from the EEOC in any particular area of the country.

Well, I can't account for all areas, but we – I know in the New York area we have some very aggressive in-house EEOC counsel who are viewing many cases as possible systemic discrimination cases. And we've had a number in – out of our office alone, and the agency has been, you know, pretty tough when it comes to the kinds of remedies that they're looking at and their willingness to negotiate.

And, you know, that's a – similar with the OFCCP take. One of the outcomes of the agency – of both agencies, quite frankly, taking a more legalistic, you know, approach to these discrimination cases is it's harder to settle with them. In the old days when the OFCCP brought a case and they knew that they were going to have to argue over the individual treatment of, you know, 50 different Matts and, you know, 200 different Marys, it – they had their own incentive – or disincentive, if you will, for going forward. So that cases tended to settle for, you know, much fewer pennies on the dollar. One of the realities of the agency pursuing these systemic discrimination claims in a more systemic fashion, when you're looking at validation and you're looking at whether a test is supported statistically, I makes for a legally stronger case. And therefore it makes for an agency that's more sure of itself and less likely to capitulate. And therefore in the past in many instances we were able to negotiate five cents on the dollar settlements. We're getting a lot more resistance from the agency. Because not only do they feel that their cases are stronger, but they also feel that they're able to defend or actually prosecute their cases with fewer resources involved. So it's less expensive for them to bring them forward and they're more legally sufficient.

We have a question. Any litigation – litigated cases in which drug tests were a key factor in alleging or proving systemic discrimination.

None that I'm aware of. Ed, are you aware of any?

Ed Farrin: No, I have not – I've not seen any reports of those sort of cases.

Matt Halpern: OK. And I think that is the last question that we have. So with that, thank you very much for your attendance. And – go on, Ed.

Ed Farrin: Matt, thank you so much for just a thorough and very informative presentation. We really do appreciate it.

At this time I've been asked to remind folks that if you look at the left side of the – of the link box there is a Webcast evaluation form. And if you would just take a couple of extra moments to pull that up and submit that, it would be much appreciated. And we are at 2:55. And, Matt, unless we have anything else, I think we can conclude this presentation.

Matt Halpern: No, other than thank you very much for attending. And there is contact information for both Ed and I. And if you do have questions that occur to you after this, please feel free to contact me or Ed. And also I believe that we're supposed to remind you to fill out the evaluation forms if you haven't.

Ed Farrin: Excellent. Thanks so much, and this concludes our presentation for this afternoon.

Matt Halpern: Bye-bye now.

END