GUIDANCE ON CONDUCTING ADVERSE DIVERSITY ANALYSIS

The Uniform Guidelines for Employee Selection Procedures adopted by the Equal Employment Opportunity Commission (EEOC), Department of Labor's Office of Federal Contract Compliance Programs (OFCCP), and U.S. Department of Justice in 1978 set out accepted statistical tests for assessing possible discriminatory impact of employment actions on protected classifications of employees. See 29 CFR Part 1607. Agencies and litigants commonly use statistical tools in any enforcement action or claim raised. Significantly, an enforcement agency may in fact draw an inference of adverse impact of the selection process where an employer has failed to use those statistical tools, if the employer actions have a statistically disproportionate impact on protected classifications of employees. In short, these Guidelines show that the use of statistics is not only a best practice, but the failure to make use of those tools presents a real risk in litigation and in federal enforcement proceedings.

Where a contractor proposes to involuntarily separate fifty or more employees in a 12-month period, these statistical tools should be used to review proposed contractor involuntary separation programs for potential adverse impact on protected classes such as race, age or sex. The most basic test, called the "two standard deviation" test approved in many Supreme Court decisions is generally quite useful. *See, e.g., Hazelwood School District v. United States,* 433 U.S. 299, 311 n. 17 (1977). This test compares the employee group tentatively selected for separation with the entire group of employees. If protected class participation in the proposed cohort of employees to be separated exceeds protected class participation in the entire employee population by more than two standard deviations, case law holds that there is a prima facie case that the selection procedure used to determine who will be separated has an unlawful disparate impact and we have found it to be very helpful in evaluating the risk of discriminatory treatment.

The following are important points:

- Using this two standard deviation test has the great advantage of allowing for the anomalous characteristics of a predominately older or female work force, for example. Because the median age of the contractor work force at DOE/NNSA sites is slightly over age 50, it is especially useful to look at age by five-year bands (i.e., ages 50-54, 55-59, etc.); a simple over 40/under 40 comparison is not an adequate tool for measuring disparate impact for such a population.
- Represented employees covered by collective bargaining agreements requiring that they be separated according to seniority should be excluded from the diversity statistics, as are individuals separating as part of a self-select separation program.
- Where entire operational units are being eliminated and there is no individual selection among such employees involved, it may provide a more precise analysis of the contractor's selection of individual employees to separate out the individuals from the eliminated units in performing the statistical analysis.
- Operational units should be very carefully defined and should reflect selections made by the same management team using the same selection procedures.
- It is important to accurately define selection procedures – when operations are changing, individuals who decline offers of jobs that are considerably different with lower rates of pay will probably not be seen as having voluntarily quit, as opposed to involuntary separations.

In doing the diversity analysis, there will frequently be several categories of statistics that show disparate impact, and then the task is to show the business justification for those results. In such cases, it is especially important to ensure that the business case for the specific actions is well documented.

Use of the accepted statistical tests of discrimination facilitates expeditious review of the likelihood of discriminatory impact. Where there is statistical anomaly, additional statistical tools can also be used to more fully understand the impact and dispose of concerns about possible discriminatory treatment, e.g., to demonstrate that job classifications for work that is being eliminated were disproportionately populated by employees in protected classifications who may not possess the skills required for future mission needs.

Government contractors are prohibited from engaging in discrimination in the workplace and a diversity analysis may assist the contractor in ensuring compliance with Executive Order 11246, implemented through FAR clause 52.222.26. Current Policy set by former Secretary Chu does not require contractors to submit their diversity analysis to the Office of General Counsel for approval. Contractors, however, must continue to perform a diversity analysis when the involuntary separation action affects 50 or more contractor employees within a rolling 12-month period. A copy ofthe analysis shall be provided to the DOE/NNSA site counsel (to protect Attorney-Client privilege) upon its completion to assist in determinations regarding cost allowability.

In this regard, contractors should be aware of a recent development that significantly restricts the allowability of costs involved in settling legal claims. In *Geren* v. *Tecom, Inc.,* 566 F.3d 1037 (Fed. Cir. 2009), the Federal Circuit held that a government contractor's costs for settling an EEO case were not allowable contract costs, unless the contracting officer determined that there was "very little likelihood of success on the merits." In analyzing contractor requests for reimbursement of costs associated with settlement of employment discrimination litigation, DOE will take into account the results of any Office of General Counsel review of the contractor's diversity analysis.

An example of a completed diversity analysis and a blank copy is provided in Attachment 8(a) and (b).

Another example of a statistical program can be found at:
http://www.hr-software.net/EmploymentStatistics/DisparateImpact.htm
.