

# Proskauer Presents Highlights from the 28th Annual Industry Liaison Group National Conference

**August 17, 2010**

The 28th Annual Industry Liaison Group National Conference was held on August 3-6, 2010 at the Red Rocks Resort & Spa in Las Vegas. The event featured informative presentations from Office of Federal Contract Compliance Programs (OFCCP) staff, contractors, and specialty consulting firms. Shunning the adage, “What happens in Vegas, stays in Vegas,” the speakers encouraged participants to pass on information about the OFCCP’s updated regulatory agenda, in addition to the speakers’ practical advice on promoting equal opportunity in the workplace.

Highlights from the conference include:

**Focus on Pay Equity:** OFCCP Director Patricia Shiu’s opening remarks indicated the agency’s continued focus on pay equity. She explained that pay equity is not only a family issue, but an economic recovery issue: “Critical decisions of access depend on how much an individual earns.” Her comments addressed the fact that the OFCCP and the Equal Employment Opportunity Commission (EEOC) have embarked on a “new era of friendship,” and together these agencies will increase enforcement efforts with respect to pay discrimination. EEOC Chair Jacqueline A. Berrien announced in her keynote address a new focus on wage discrimination in EEOC systemic enforcement and litigation. This focus on systemic pay discrimination will likely mean an increased number of “Commissioner’s Charges.” Under Title VII, the Commissioner has authority to file a charge on his or her own initiative when there is reason to believe that an employer has engaged in a “pattern or practice” of employment discrimination.[\[1\]](#)

*For employers, Director Shiu and Chair Berrien’s comments indicate it is time for all employers to examine their pay systems with counsel, conduct meaningful pay equity studies on a periodic basis, and re-examine document retention policies in light of the Ledbetter Fair Pay Act (2009). For more information on conducting pay equity studies, please contact your Proskauer Relationship Partner.*

Additionally, employers should note that the recent creation of the [National Pay Equity Task Force](#), which brings together the EEOC, the Department of Justice (DOJ), the Department of Labor (DOL), and the Office of Personnel Management (OPM), demonstrates the Obama administration's commitment to eliminating pay discrimination. The National Pay Equity Task Force's stated mission is to "implement President Obama's pledge in the [2010] State of the Union address to crack down on violations of equal pay laws."

**Affirmative Action for Individuals with Disabilities:** Director Shiu provided the startling statistic that as of March 2010 only 22 percent of individuals with disabilities were employed, as compared to almost 77.2 percent of individuals without disabilities. This dramatic difference has sparked the agency's interest in collecting data on hiring practices with respect to individuals with disabilities.

On July 23, 2010, the OFCCP published an advance notice of proposed rulemaking (ANPRM) related to affirmative action for individuals with disabilities under Section 503 of the Rehabilitation Act and implementing regulations. Director Shiu invited the contractor community to comment on the OFCCP's proposed changes to the Section 503 regulations, including the agency's proposals to adopt measures similar to the affirmative action obligations required of government contractors under Executive Order 11246. The most controversial of these is OFCCP's proposal to require contractors and subcontractors to conduct a utilization analysis, in which a contractor would compare the percentage of individuals with disabilities in each job group with the availability of individuals with disabilities in the relevant recruitment area who are qualified to work in those jobs. The feasibility of such an analysis is questionable, given that it is unclear what data could be used to determine availability of individuals with disabilities.

*If you have questions about the ANPRM, Section 503 of the Rehabilitation Act and implementing regulations, or providing comments to the proposed regulations, please contact your Proskauer Relationship Partner.*

**Background Checks/Credit Checks Are Not “Tests”:** Richard J. Fischer, Ph.D., OFCCP, gave a presentation on a government contractor’s obligations with respect to testing under the Uniform Guidelines on Employee Selection Procedures. Significantly, Dr. Fischer noted that criminal background and credit checks are not “tests” under the Uniform Guidelines, but that they nevertheless should be limited to those positions where the check is job-related and performed out of business necessity (or legal mandate). Dr. Fischer also informed participants that actual tests need not be provided to the OFCCP, even if requested by a compliance officer.

**Revised Scheduling Letter:** Javaid Kaiser, Ph.D., OFCCP, announced that a revised scheduling letter is in the works, and could be ready for release as early as 2011. In particular, Dr. Kaiser suggested that the contents of request No. 11, which addresses pay data, may be revised.

[1] 42 U.S.C. § 2000e-5(b) and 6(e).