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2013 Compliance and
Audit Symposium

EEOC (DFEH) &
OFCCP Compliance

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UCOP
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WHY ARE WE HERE?

Knowledgeable supervisors and managers who approach employment decisions thoughtfully and with the intent of treating subordinates with fairness and equality also are likely to **minimize potential legal exposure.**

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LEARNING OBJECTIVES

- Recognize federal and state laws that govern the employment relationship between the University/Medical Center and its employees.
- Review the relevant UC policies regarding employment action and internal processes.
- Recognize the importance of utilizing University/Medical Center resources when you need assistance.
- Understand Executive Order 11246 and the obligations imposed on Federal Contractors.
- Review OFCCP Audits and what may be asked of you if your Campus is audited.

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Employment Laws and Policies



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THEORIES OF EMPLOYMENT DISCRIMINATION

1. **Disparate Impact** – a facially neutral employment practice that has a disproportionate impact on a protected group.
 - Largely a statistical analysis and unintentional
2. **Disparate Treatment** – an individual of a protected group is shown to have been singled out and treated less favorably than others similarly situated on the basis of an impermissible criterion.
 - Most common type of discrimination claim and is intentional

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EMPLOYMENT LAWS AND POLICIES

- Anti-discrimination laws (a subsection of employment law) are designed to protect prospective employees and employees from being treated unfairly based upon a personal characteristic and were enacted to ensure equality in employment.
- Supervisors and managers play an integral role in ensuring compliance with employment laws by setting the appropriate tone and fairly and consistently applying:
 - Recruiting Practices
 - Performance Management (progressive discipline, appraisals and day-to-day supervision)
 - Application of Personnel Policies and Practices

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- **Title VII of The Civil Rights Act of 1964 ("Title VII")** – prohibits discrimination in employment based upon race, color, sex, religion, and national origin.
- **Age Discrimination in Employment of 1963 ("ADEA")** – prohibits discrimination against people age 40 years or older.
- **Americans with Disabilities Act of 1990 ("ADA")** – prohibits discrimination against qualified individuals with disabilities.
- **Family Medical Leave Act** – in part, prohibits employment actions based upon the taking of protected family medical leave.
- **Equal Pay Act of 1963** – prohibits wage discrimination based upon gender.
- **Lily Ledbetter Fair Pay Act** – discrimination in violation of Title VII, ADEA and ADA (compensation) will accrue every time an employee receives a paycheck that is discriminatory. Redefined the statute of limitations.
- **Uniform Services Employment and Reemployment Rights Act ("USERRA")** - prohibits discrimination in employment based upon current or former military service.
- **Genetic Information Non-Disclosure Act ("GINA")**- prohibits employment decisions based on genetic information (including family medical history).

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CALIFORNIA ANTI-DISCRIMINATION LAW

- California's Fair Employment and Housing Act ("FEHA") prohibits discrimination or harassment on the basis of personal characteristics.
- FEHA provides broader protections for employees than the Federal Statutes and most legal actions are brought under state law as opposed to federal laws (Title VII, ADEA, ADA etc).
 - i.e., Title VII does not prohibit employment discrimination based upon sexual orientation, while FEHA does.

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UNIVERSITY ANTI-DISCRIMINATION POLICIES

- A number of University Policies prohibit discrimination in employment based upon personal characteristics.
- Non-Discrimination Policy and Affirmative Action Policy Re Academic and Staff Employment (PPSM 12 and 14) – prohibits discrimination on the basis of race, color, sex, sexual orientation, gender identity, physical/mental disability, marital status, Religion, Citizenship, genetic information, physical/medical condition, pregnancy, uniformed services, etc.
- PPSM 14 (Affirmative Action),
- PPSM 20 (Recruitment)
- PPSM 21 (Appointment)
- Principals of Community
- Sexual Harassment Policy

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DISCRIMINATION VS. HARASSMENT

- **Discrimination** - is official actions based upon a protected characteristic, as opposed to a legitimate work-related reasons. For example:
 - Termination
 - Hiring
 - Promotion
 - Work Assignments
 - Pay Determinations
- **Harassment** (a type of discrimination) – is workplace behavior by any person based on a protected characteristic that unreasonably interferes with work performance or creates an intimidating, hostile or offensive work environment.

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HOSTILE WORK ENVIRONMENT

- Is a type of discrimination/harassment.
- Anti-discrimination/Anti-harassment laws don't require civil or tasteful behavior. But forbids discriminatory workplace behaviors that are objectively offensive so as to negatively affect the conditions of employment.
- The severity of the conduct is judged by a reasonable person considering all the circumstances involved in the situation.
- Whether the conduct is severe or pervasive, supervisors should never tolerate conduct or behavior that is unwelcome, offensive and directed at an employee because of any protected status!

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THE UNIVERSITY'S OBLIGATIONS

- The law provides that once an employer knows or should have known of unlawful discriminatory or harassing conduct, the employer **must** take prompt and effective remedial action.
- The remedy used must be reasonably calculated to end the harassment and must offer more than a temporary solution or result. This may require corrective action or discipline.

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HARASSMENT

- ▣ Workplace Harassment is more than "sexual harassment" but is actually harassment based on all protected characteristics and is prohibited by law.
- ▣ All claims of Sexual Harassment must be promptly reported to the Title IX Compliance Coordinator (Sexual Harassment Officer) or other appropriate official.

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SUPERVISORS/MANAGERS ARE KEY PLAYERS IN PREVENTING DISCRIMINATION

- ▣ Be aware of unacceptable behaviors.
- ▣ Be a role model and teach by example.
- ▣ Make sure that staff understand the range of behaviors that will not be tolerated.
- ▣ Do not allow sexist, stereotyped, or sexual remarks.
- ▣ Do not participate in sending or forwarding email jokes, cartoons, or articles that could be considered offensive.
- ▣ Make it a practice to consistently and promptly address discriminatory or harassing remarks or behaviors.

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DUTY TO INVESTIGATE

- ▣ State and Federal law require an employer to promptly and fairly investigate a charge of discrimination or harassment.
- ▣ California Law:
 - ▣ Requires an employer to "take all reasonable steps to prevent discrimination."
 - ▣ Some California courts have held that a duty to prevent discrimination includes the duty to investigate allegations of discrimination or harassment.
- ▣ Duty to investigate simply means that supervisor/managers must become aware before they act.
- ▣ The Investigation must be "adequate" to objectively determine central facts.

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DUTY TO INVESTIGATE

- Adequate investigation leads to good decision-making, but also helps as an affirmative defense if a lawsuit is eventually filed. It will show that the University acted in good faith when it learned of the situation.
- Managers and supervisors are “**first responders**” in discrimination and harassment complaints. They must learn enough about the facts to determine whether a more extensive investigation is needed. If so, immediately contact HR and/or Title IX Officer for assistance.
- Must also consider whether you, as the manager or supervisor, should conduct any investigation. Are you biased? Are you competent to deal with the complexity or seriousness of the issue(s)? Have you been sufficiently trained to investigate the matter? Would you be required to give evidence about a disputed factual matter?

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WHAT DO YOU DO IF YOU LEARN THAT DISCRIMINATORY OR HARASSING BEHAVIOR MAY BE HAPPENING IN YOUR UNIT OR DEPARTMENT?

1. Interview the complaining employee immediately.
2. Ask the accused for his/her side of the story before you decide proper action.
3. Document your findings and actions.
4. Collect relevant documentation.
5. Follow up, depending on the severity of the action, to see if the behavior has stopped. Document the follow-up conversations.
6. Don't consider the complaint as “minor” or “insignificant” until you know the facts.
 - Complaints of discrimination or harassment must be investigated to the extent reasonably possible, even when the victim is reluctant or declines to cooperate.
 - Complaints of discrimination or harassment must be looked into even if you believe the immediate problem is resolved!
7. **DON'T HESITATE TO GET HELP FROM HUMAN RESOURCES !**

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Disability Management



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DISABILITY MANAGEMENT

- Every Campus has Resident Experts on Disability Management – call them early and often.
- It can be complicated. Expect to be unsure what to do and get help!
- Disability Discrimination is the most frequent alleged discrimination claim at the UC.
- The Interaction Process is the Key!

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DISABILITY DEFINED:

A person is considered disabled in California if he/she:

- Has a physical or mental impairment that limits one or more of the major life activities;
- Has a record of such an impairment;
- Is regarded as having such an impairment (perceived);
- Is regarded or treated by the employer as having some condition that has no present disabling effect, but may become a physical disability; or
- Has any health impairment that requires special education or related services.

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□ Disability puts employees in a protected category along with sexual orientation, race, religion, etc. There is a similar protection for pregnant employees.

□ Job accommodations for disabled employees are mandated by:

- Federal Law: Americans With Disabilities Act (ADA)
- State Law: Fair Employment & Housing Act (FEHA)
- UC Policy: PPSM 81 – Reasonable Accommodation and Collective Bargaining Agreement

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WHAT IS THE INTERACTIVE PROCESS (IP)?

- It is the "heart" of the Accommodation process.
- Ongoing dialogue between the employer and employee regarding how the employee is limited in his ability to perform the essential functions of his position and what, if any, reasonable accommodations could enable him to perform those essential functions.
- If no reasonable accommodations could enable her to perform the essential functions of the current position, the IP then includes an exploration of whether there are alternative positions that are open for which the employee is qualified.

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THE INTERACTIVE PROCESS (IP)

- Three Basic Steps to the IP:
 - Step 1: Identify the essential functions of the job
 - Step 2: Determine the employee's limitations
 - Step 3: Explore whether employee's limitations can be reasonably accommodated.

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Leaves of Absences



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LEAVES OF ABSENCE

- There are many different Leaves of Absence that are available to employees. It is very complicated and it is more than FMLA.
- It is important that supervisors and managers understand the basic provisions and know when to consult with Human Resources re: how to navigate the policies to ensure employees are given the full benefits to which they are entitled.

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LOTS OF DIFFERENT TYPES OF LEAVE

- Pregnancy Disability Leave
- Parental Bonding Leave
- Family and Leave Act
 - Employee's Health Condition
 - Family/Serious Health Condition
 - Military Care Giver
 - Work-Related Injury or Illness
 - Bereavement Leave
 - Personal Leave
- Military Leave, Civil Duty and Service Leaves
- Vacation Leave
- Sick Leave
- Administrative Leave
- Holidays

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FAMILY MEDICAL LEAVE ACT (FMLA)

- Maximum benefit is 12 weeks.
- Qualification criteria:
 - Must have 12 months of service prior to the start of the leave
 - Must have a minimum of 1,250 hours of work time during the 12 months prior to the start of the requested leave.
- Intermittent use of leave is permissible in some cases.
- **Key Point:** This protects an employee's job. How the employee is paid is a separate issue.

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FMLA LEAVE RELATED TO PREGNANCY

- An employee may take up to 12 weeks of leave for the birth of a child.
- For a normal pregnancy, the protected period relating to the birth of a child under FMLA is usually two weeks prior to the birth, and six to eight weeks after the birth.
- Serious health conditions may render a different result – on a case-by-case basis.

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CALIFORNIA FAMILY RIGHTS ACT (CFRA)

- Up to 12 weeks of Family and Medical Leave for reasons unrelated to pregnancy disability.
- Employee must qualify for CFRA using FMLA qualifications criteria.
- CFRA begins when PDL ends and runs concurrent with any remaining FMLA leave.

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Pregnancy Disability Leave (PDL)

- Elements – employee disabled due to pregnancy, childbirth, or related to medical condition. May take unpaid leave for the period of actual disability or up to 16 weeks.

Parental Bonding Leave

- Maximum of 12 weeks for bonding and newborn care purposes.
- Must be taken w/in 12 months of the birth or placement of the child.
- UC staff will be allowed to use up to 30 days of sick leave to care for and bond with a newborn, adopted or foster child.

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DO THE MATH – IT’S COMPLICATED!

- PDL – Up to 4 months.
- CFRA – Up to 12 weeks for issues related to health of the child or employee (starting at the close of PDL).
- Parental Bonding Leave – Balance of FMLA.
- Maximum of 7 months of pregnancy/parental leave (12 weeks – PDL/FMLA – max since they run concurrently; then 12 weeks of CFRA.
- Potential effect on benefits.
- Recording Procedures for exempt and non-exempt employees can vary.
- Amount of leave available for absences varies by leave type.
- For Represented Employees, you must consult CBA for provisions (i.e., might be required to exhaust sick leave before taking non-paid leave).

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MEDICAL SEPARATIONS

- When an employee has exhausted available leaves and it is determined that he or she can no longer perform the essential assigned functions due to a disability or medical condition that cannot be accommodated, it is time to consider medical separation.
- Get help from your Campus Disability Consultants and HR in determining whether Med Sep is an option.

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WHAT IS RETALIATION?

- Retaliation occurs when a supervisor or employer engages in an activity which, intended or not, has the effect of discouraging an employee from exercising a right protected by law.
- **Important Note:** A claim of retaliation might be sustained even if the employee’s underlying report is unsubstantiated.

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ELEMENTS OF A RETALIATION CLAIM

1. Employee made a protected disclosure or engaged in a protected act;
2. Employer took adverse action against employee; and
3. Causal connection – Employer took adverse action b/c Employee engaged in a legally protected activity.

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EXAMPLES OF PROTECTED DISCLOSURES

- An employee filed a whistleblower claim accusing the Department Head of misusing Medicare Funds.
- Employee filed a grievance or claim that he or she was denied overtime pay.
- Employee used one or all of the complaint processes provided by federal or state law or University policy.
- An employee exercised a right guaranteed by Federal law, State law, University Policy or Labor Agreement.
- An employee complained about discrimination or the discriminatory treatment of others.

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EXAMPLES OF ADVERSE ACTIONS

- Demotion
- Layoff/Termination
- Transfer
- Mediocre Performance Review
- Failure to Promote
- Change in a victim's work assignments
- Avoidance of the victim
- Sarcasm toward the victim
- Declining to invite the victim to an office party, lunch or business meeting
- A Series of smaller actions that subtly change the terms and conditions of an employee's job over time.

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THE CAUSAL CONNECTION – “BECAUSE OF”

- The claimant must provide some evidence that there is a connection between the protected disclosure or act and the adverse action.
- If the claimant provides enough information to establish a connection, the University must show the non-retaliatory reasons for the action.
- Key point: Any adverse action taken against any employee should be motivated by only legitimate, documented business reasons.

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JUST CAUSE / PROGRESSIVE ACTION

- Pursuant to University Policy, corrective action and/or dismissal may not be undertaken in the absence of “**just cause**” with respect to most career employees.
- “Just Cause” is not required to informally address performance or behavior.
- Correction action (also called “progressive corrective action”) is the imposition of defined steps of increasing punitive severity – with the overall goal of changing behavior. Not used where behavior at issue constitutes “serious misconduct”.
- **Just Cause Standard:** 1) Was the employee on notice that behavior was wrong? 2) Is the rule reasonably calculated to achieve a business purpose? 3) Is the employee capable of meeting behavior or performance standard? 4) Did the University/Medical Center adequately investigate before deciding the employee did something wrong? 5) Has the Medical Center applied its rules, policies, and penalties in an evenhanded and non-discriminatory manner? 6) Is the degree of discipline proposed in line with the seriousness of the offense? 7) Are there aggravating and/or mitigating circumstances?
- **Contact Labor Relations or Employees Relations** with questions re: the scope of corrective action and the just cause standard.

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Complaint Processes



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COMPLAINT PROCESSES

- Any University Employee has the right to redress workplace grievances in one or more of the following ways:
 - UC Informal Complaint Resolution Processes
 - UC Formal Complaint Resolution Processes
 - External Complaint Processes
- Formal Complaint Processes – University employees can lodge complaints re: violations of University Personnel Policies or Labor Agreements through a variety of mechanisms
 - Academic Personnel
 - Labor Agreements
 - PPSM
 - Whistleblower and Whistleblower Retaliation

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EXTERNAL COMPLAINT PROCESSES

- The U.S. Equal Employment Opportunity Commission (EEOC).
- The U.S. Department of Labor (DOL).
- California Department of Fair Employment and Housing (DFEH).

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**OFCCP Audits
Affirmative Action**



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EXECUTIVE ORDER 11246

- Prohibits federal contractors and subcontractors who have contracts of \$10,000 in one year from discriminating in employment decisions on the basis of race, color, religion, sex or national origin, disability and veteran status.
- Also requires federal contractors to take affirmative steps to ensure that equal opportunity is provided in all aspects of their employment.
- Federal contractors with at least 50 employees and government contracts of \$50,000 must develop a written Affirmative Action Plan (AAP) for each of its establishments.
- Department of Labor's Office of Federal Contractor Compliance is tasked with enforcement.

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UNDERSTANDING FEDERAL CONTRACT COMPLIANCE

- Federal regulations and agencies govern recruitment, selection and related employment areas.
- Equal employment opportunity is the goal of affirmative action and uses a two pronged approach:
 1. Non-discrimination (Race, ethnicity, color, religion, sex, age, national origin, disabilities, marital status, veteran status, pregnancy, etc.);
 2. Affirmative action in recruitment for under-represented women and ethnic/racial group members; and for veterans and individuals with disabilities.

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REGULATIONS ENFORCED BY THE OFCCP (PARTIAL)

LAW	REQUIREMENT	CATEGORY
Executive Order 11246	Non-discrimination/affirmative action to ensure employment opportunity on the basis of race, color, religion, sex, or national origin.	Race, Ethnicity, Color, Religion, Sex, or National Origin
Section 503 of the Rehabilitation Act of 1973 (Section 503)	Non-discrimination affirmative action to employ and advance individuals with disabilities.	Disability
Vietnam Era Veterans	Non-discrimination/affirmative action to employ and advance veterans.	Veterans
Readjustment Assistance Act of 1974 (VEVRAA)	1) Disabled veterans; 2) Armed Forces service medal veteran; 3) Recently separated veterans; 4) Other protected veterans	Veterans

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UNDERSTANDING AFFIRMATIVE ACTION

- Purpose
 - Remedy or prevent discriminatory practices and results in hiring and other employment practices.
- What is it?
 - Creation of systems/process to prevent discrimination (AA, HR, Org Unit, Department).
 - Targeted active action to improve employment for:
 - 1. Women & racial/ethnic members underutilized in job groups.
 - 2. Veterans and individuals with disabilities.

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UNDERSTANDING AFFIRMATIVE ACTION

- How is Affirmative Action progress evaluated?
 - A federal contractor's progress is summarized annually in their Affirmative Action Plan (AAP)
 - Includes Documentation related to employment activities – selection, promotions, termination, demotions etc.
 - Recruitment advertising sources
 - Recruitment outreach strategy
 - Policies and procedures
 - Proof of processes

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COMPONENTS OF AN AAP

- Designation of Responsibility for the AA Program (41 CFR 60-2.11)
- **Organizational Profile/Workforce Analysis** (41 CFR 60-2.11(c))
- **Workforce Analysis** is broken down by male/female and by race/ethnic groups (Black, Hispanic, Asian/Pacific Islander, American Indian/Alaska Native), giving the percentage in each work group.
- **Availability** – an estimate of the # of qualified women and minorities available for employment by job group expressed as a % of all qualified persons for employees in the job group.
- **Utilization Analysis** - compares the number of women and minorities in each job group and the % of women and minorities available in the relevant job market.
 - Identifies underutilized areas for the review period.
 - Underutilization occurs when the % of women and minorities employed in job group is less than would be reasonably expected given their availability % in the job market (by at least one person).
 - For each area of underutilized areas in job groups, goals must be developed to increase the representation of women and minorities in those areas.

ENFORCEMENT AND COMPLIANCE

OFCCP compliance reviews proceed in up to three sequential stages:

1. **The Desk Audit** - commences following the receipt of a contractor's or subcontractor's AAP. Typically a desk audit lasts from 2 to 12 months. However, desk audits have been known to last, on occasion, for a number of years.
2. **On-Site Audit** - OFCCP come on-site to a contractor place of business to collect additional information of interest and to confirm what it identified at the Desk Audit phase. In the past, only 20% of the compliance reviews conducted advance to this stage. However, under the Obama Administration, there is a mandate to perform more onsite audits and most desk audits advanced to onsite audits. Audits can last anywhere from one to two days to six or more months. Compliance officers examine personnel files and other documents and interview Management Officials, employees, form employees, and Union representatives.
3. **Off-Site Audit** - after an on-site visit the OFCCP analyzes all the data collected and proposes an audit resolution to the contractor.

ENFORCEMENT PROCESSES

- After the desk and/or on-site and off-site audits, the OFCCP determines whether to issue a letter of compliance or a Notice of Violations.
- **Notice of Violations** - will detail the specific violations that the OFCCP has identified.
- **Cconciliation** - OFCCP prefers to enter into C.A.'s (with appropriate remedies for violations).
- **Show Cause Notices** - if OFCCP and a federal contractor are unable to enter into a conciliation agreement, formal charges are filed with DOL Administrative Law Judge and the contractor is issued a Show Cause Notice.
- **Administrative Hearing** - A DOL ALJ schedules a hearing on the Show Cause Notice and issues a recommendation (decision) to the DOL. The DOL has the choice to either accept or reject the ALJ's recommendation.
- **Appeals** - Federal Contractor can appeal the ALJ's adverse recommendation/DOL adoption to Federal District Court.

PROPOSED REGS RE: VETERANS

- In April 2011, OFCCP published a Notice of Proposed Rulemaking that would significantly change federal contractors' compliance obligations re: veterans.
- First modification to Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) since 1976.
- Those protected by VEVRAA include the disabled, the recently discharged, and those who served during a war campaign or expedition for which a campaign badge is authorized.



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PROPOSED REGS RE: VETERANS

1. Solicit Applicants to self-identify their status as a protected veteran; solicit new hires (post offer), and provide incumbent employees who previously declined to self-identify the opportunity to self-identify.
2. Imposed new mandatory data collection and analyses – the proposed regulations would require contractors to benchmark Veteran Hiring and track referrals of protected veterans from veterans' organizations; applicants that self-identified as protected veterans, etc.
3. Enhanced Outreach Efforts for Veterans – to veterans' organizations.
4. Schedule annual meetings with all employees to discuss its affirmative action policies, explain contractor and individual responsibilities under these policies and identify opportunities for advancement.
5. Conduct meetings with executive, management and supervisory personnel to explain the intent of the policy and conduct sensitivity trainings.

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PROPOSED REGS RE: THE DISABLED

- The OFCCP proposes:
 1. Instituting a utilization goal of 7% disabled employees for each job group and for the workforce as a whole. (OFCCP is not set on 7% - is considering goals between 4% and 10%).
 2. Applicant self-identification of disabled status pre-offer and post-offer as well as an annual survey of disabled status for current employees.
 3. Job listings, linkage agreements and on-going relationships with identified agencies and organizations.
 4. Annual review of personnel and technological processes - and outreach effectiveness.
 5. Written statement of reasons for rejections of individuals with disabilities for employment, promotion or training, with statement available to rejected individual on request.
 7. Written statement of reasons for denial of reasonable accommodations, including notification to individual of right to file a complaint with the OFCCP.
 8. Inclusion of affirmative action policy in policy manuals and required training.

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