



OFCCP FY 2020: ENFORCEMENT UPDATE

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David B. Cohen

David Cohen is President of DCI Consulting Group, Inc. and co-founder of The Institute for Workplace Equality (The Institute). He provides consulting services to employers and management law firms on a wide range of human resource risk management strategies, particularly in the areas of EEO/affirmative action program development, systemic compensation statistical analyses, comprehensive human resources self-audits, and employee selection and test validation.

Recognized as a national EEO and affirmative action compliance expert, Mr. Cohen speaks frequently before corporate leaders from Fortune 500 companies, and at regional and national ILG conferences and OFCCP events. In 2006, he co-authored a book entitled *Understanding Statistics: A Guide for I/O Psychologists and Human Resource Professionals*, which was published by Thomson Wadsworth. Mr. Cohen is also the Associate Editor of the *Applied HRM Research*.



Patricia J. Davidson

Deputy Director

Department of Labor/OFCCP

Patricia “Patty” Davidson has been a part of the Department of Labor since 1987, when she began her federal career as an investigator for the Wage and Hour Division. Throughout her time with the Department, she has held a variety of management positions focused on enforcement and education at the District, Regional and National levels.

In February of 2020, Patty joined the Office of Federal Contract Compliance Programs as the Deputy Director. As the career Deputy and an experienced, ethical, and transitional leader, Patty leads OFCCP to achieve its mission to promote and facilitate maximum federal contractor compliance with OFCCP requirements in alignment with the guiding principles of transparency, certainty, efficiency, and recognition.



Robert M. LaJeunesse

Dr. Robert (Bob) LaJeunesse is Director of Enforcement for Office of Federal Contract Compliance. He oversees the OFCCP's statistical and economic analysis program and serves as the agency's expert technical advisor in the development and resolution of systemic discrimination cases. Before joining OFCCP, Bob was a labor economist at the Equal Employment Opportunity Commission (EEOC), working in the Office of General Council as a consulting and testifying expert on Title VII cases. He also served as an Economist for the U.S. Treasury and the AFL-CIO. Prior to joining federal service, Dr. LaJeunesse was an assistant professor of economics at the State University of New York (New Paltz) and a senior lecturer at the University of Newcastle in Australia. Bob's scholarly publications are primarily in the field of labor economics, including a book on the socioeconomic and ecological virtues of work time regulation. Bob holds a Ph.D. in Economics from Colorado State University, and he also completed two years of service in the Peace Corps in Liepaja, Latvia.

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Agenda

- OFCCP Update
- OFCCP Enforcement Statistics
- Significant Cases
- ERCA Settlements
- Mediation and Conciliation
- Efficiency in Audit Directive
- Focused Reviews
- Enforcement Update

OFCCP Update

FOIA and OFCCP Conciliation Agreements

- OFCCP publishes ALL conciliation agreements on its website
 - <https://www.dol.gov/ofccp/foia/foialibrary/index.html#FY2019>
 - FY 2020
 - Financial Agreements – 24 posted agreements
 - Technical Agreements – 54 posted agreements
- Department of Labor Public Enforcement Database
 - <https://enforcedata.dol.gov/homePage.php>
- **NOTE: THESE TWO SOURCES OF DATA DO NOT MATCH**



OFCCP Enforcement Statistics

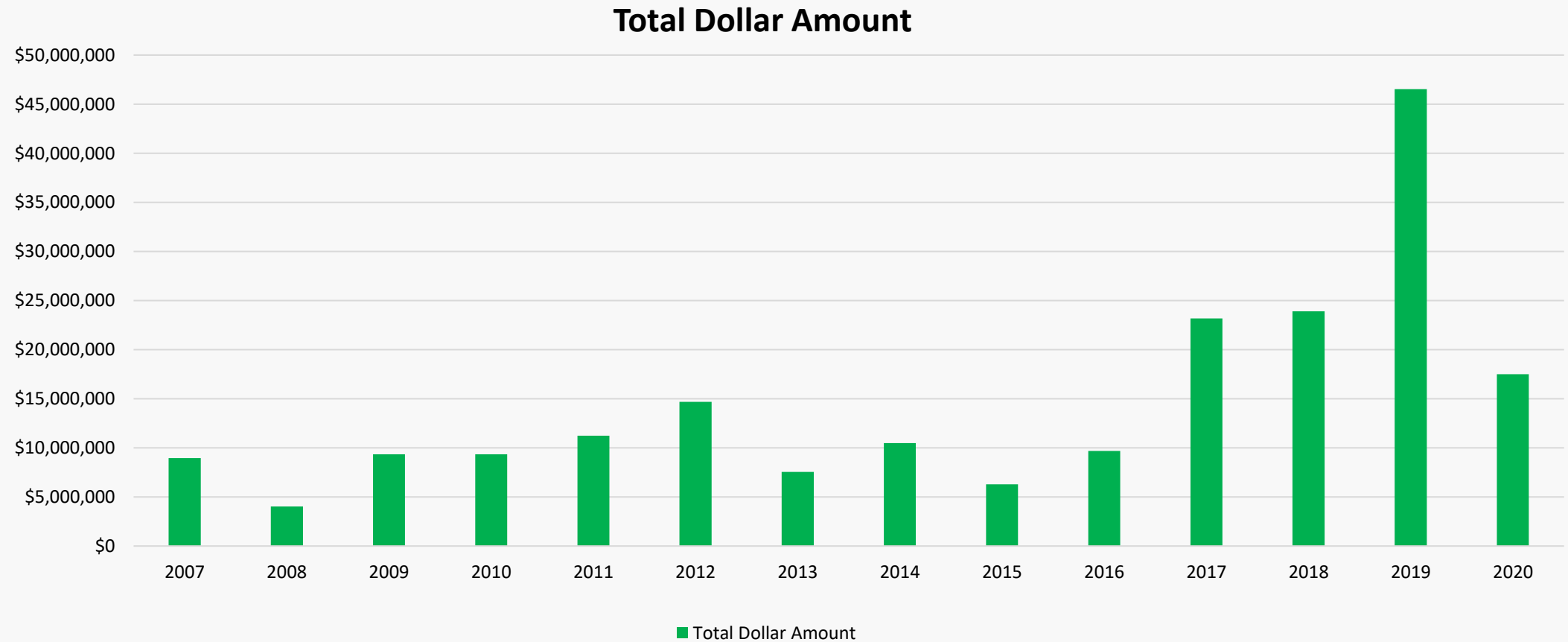
Fiscal Year	Letter of Compliance		Consent Decree		Conciliation Agreement				Total Compliance Evaluations
					Non-Financial Remedy		Financial Remedy		
	#	%	#	%	#	%	#	%	
2004	4,938	93.63%	0	0.00%	277	5.25%	59	1.12%	5,274
2005	1,921	90.61%	0	0.00%	146	6.89%	53	2.50%	2,120
2006	3,559	88.64%	0	0.00%	383	9.54%	73	1.82%	4,015
2007	4,390	89.17%	0	0.00%	471	9.57%	62	1.26%	4,923
2008	3,701	85.57%	5	0.12%	539	12.46%	80	1.85%	4,325
2009	3,204	82.01%	9	0.23%	618	15.82%	76	1.95%	3,907
2010	4,019	81.32%	3	0.06%	839	16.98%	81	1.64%	4,942
2011	2,898	72.32%	9	0.22%	999	24.93%	101	2.52%	4,007
2012	2,676	66.78%	6	0.15%	1199	29.92%	126	3.14%	4,007
2013	2,965	72.32%	2	0.05%	1037	25.29%	96	2.34%	4,100
2014	3,245	85.35%	2	0.05%	501	13.18%	54	1.42%	3,802
2015	2,136	82.06%	1	0.04%	431	16.56%	35	1.34%	2,603
2016	1,338	78.89%	2	0.12%	317	18.69%	39	2.30%	1,696
2017	882	77.23%	5	0.44%	220	19.26%	36	3.15%	1,142
2018	644	79.31%	0	0.00%	120	14.78%	48	5.91%	812
2019	1125	86.01%	3	0.23%	98	7.49%	82	6.27%	1308
2020*	1093	94.31%	0	0.00%	62	5.35%	32	2.76%	1159
Total	44,734	82.62%	47	0.09%	8,257	15.25%	1133	2.09%	54,142

* As of 8/7/2020

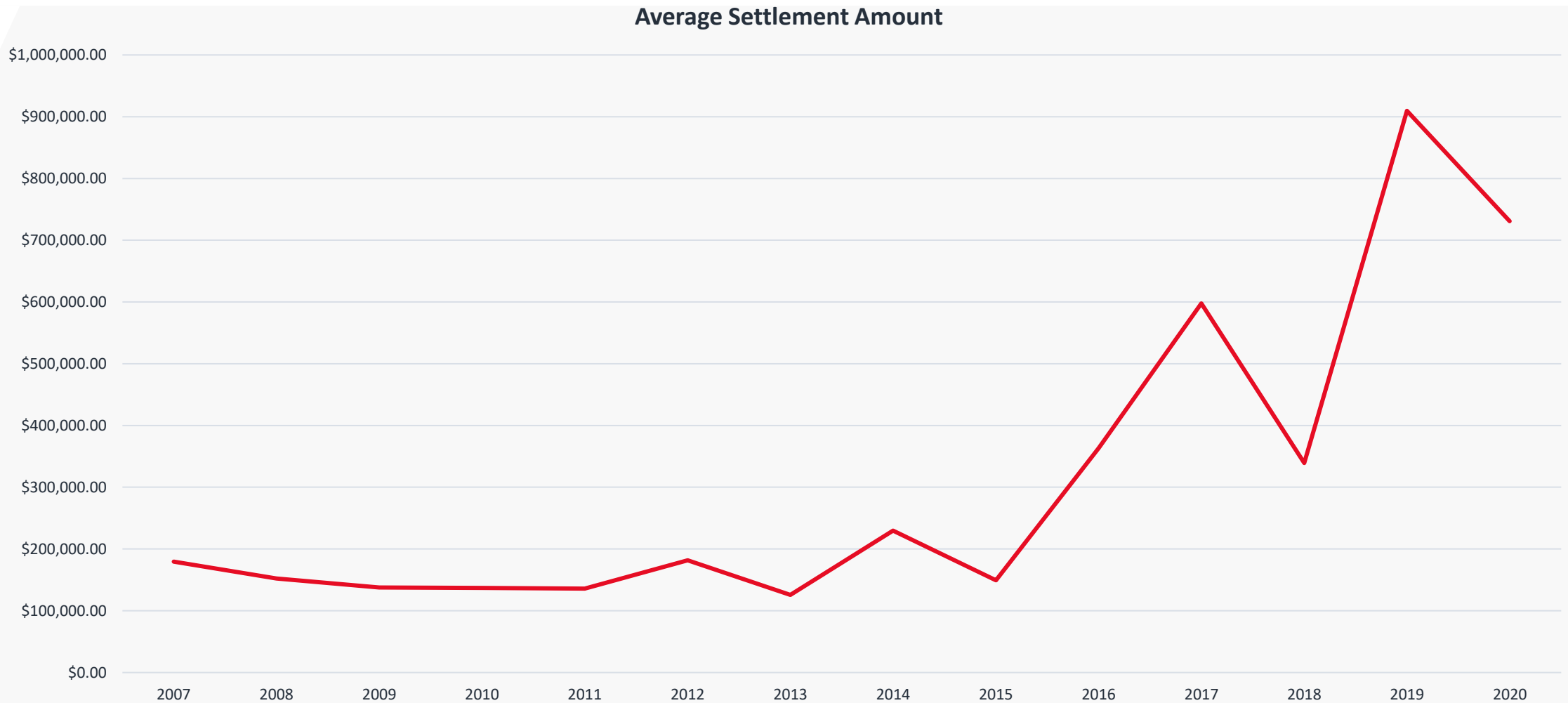
FY 2020 Enforcement Summary

- Total Financial Settlements – 24 (as of today)
- Total Settlement Amount – \$17.5 million
- Types of Cases
 - Hiring – 17
 - Over \$10.2 million in back-pay and interest
 - Compensation – 4
 - Over \$6.7 million in back-pay and interest
 - Compensation & Hiring – 2
 - \$574,000
 - Failure to provide an accommodation to a disabled veteran - 1
 - \$1,500

Financial Settlements



Average Financial Settlement Amount Per Year



FY2020 Technical Violations

- Total Technical Conciliation Agreements – 54 (as of today)
- Types of Violations
 - Outreach and Recruitment – 38
 - EO 11246, Section 503, VEVRAA
 - Record Keeping – 23
 - EO 11246, Section 503, VEVRAA
 - Listing with the State– 21
 - VEVRAA

*Each CA can have multiple violations

FY2020 Technical Violations

Technical Violations	
Violation	Count
Outreach and Recruitment	38
Record Keeping	23
Listing with the State	21
Non-Compliant AAP	20
Adverse Impact Analysis	10
Invite Applicants to Self ID	8
Filing EEO-1	3
VEVRAA Hiring Benchmark	2
Compensation Related	2
Filing Vets-4212	1

*Each CA can have multiple violations

OFCCP Administrative Complaints

Fiscal Year	Total Cases Filed	# of Administrative Cases Filed (Denial of Access)	# of Substantive Discrimination Cases Filed
2020	0	0	0
2019	2	1	1
2018	1	1	0
2017	11	5	6
2016	9	1	8
2015	11	9	2



Significant Conciliation Agreements and Consent Decrees

Conciliation Agreements

- Wells Fargo agreed to pay \$7,800,000.00 to remedy the hiring discrimination against unsuccessful Black applicants and in one location Black and female applicants. There are 34,501 Class Members and Wells Fargo agreed to 1,288 jobs. The OFCCP compliance evaluations were in three regions: SWARM, Southeast and Midwest regions. The enhanced compliance agreement covers 42 FAAPs and 98,582 employees nationwide. These employees will benefit from Wells Fargo's monitoring and implementing new hiring and compensation practices. Wells Fargo will report on these FAAPs and employees for a period of 5 years.
- Cisco – ERCA Agreement for \$4.75 million (San Jose, California)
 - Allegation of compensation discrimination - \$2 million
 - Females, Blacks and Hispanics
 - Cross Functional, Customer Advocacy, Engineering, Marketing, Services and Supply Chain roles.
 - Allocate \$550k in pay adjustments for five years
- Northern Indiana Public Service Corporation – \$1 million
 - 2 different establishments
 - Allegation of hiring discrimination against females and Blacks
 - Temporary Meter Reader (Female and Black) and Customer Service Reps (Blacks)
- Shamrock Foods Company - \$858,492
 - 2 different establishments
 - Phoenix – General Plant (female) and Cold Room Order Selector (female and Black)
 - East Vale, Ca – General Warehouse Nights (females, Blacks and Whites) and Deliver Driver (Blacks and Whites)

Mphasis (DAVE'S OPINION ON THE CASE)

- OFCCP alleged that Mphasis discriminated against white applicants in favor of Asian applicants, particularly Asian Indians, based upon race in its hiring practices in the Computer System Analysis positions.
 - OFCCP's statistical findings found hiring discrimination against white applicants. Mphasis hired 47 applicants into the Computer Systems Analyst job group. Of those hired:
 - 9% were white
 - 89% were Asian (Asian Indians were over of 90% of the Asian hires)
- Mphasis agreed to pay \$171,300 to resolve the matter and make job offers to 14 white applicants.

Affirmative Action Violation?

4. AFFIRMATIVE ACTION VIOLATIONS

4.1 ESTABLISHMENT OF SEPARATE GOALS

- A. STATEMENT OF VIOLATIONS. Mphasis – San Jose did not establish separate utilization goals for particular minority groups or for men or women of a particular minority group when establishing placement goals.
- B. OFCCP’S SPECIFIC FINDINGS. Specifically, OFCCP alleges that for the period of January 1, 2014 through May 31, 2017, Mphasis - San Jose failed to establish goals for white applicants in the Computer Systems Analyst job group when there was a substantial disparity in their utilization as required by 41 CFR § 60-2.16.
- C. REMEDY. In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, Mphasis – San Jose will establish separate goals for such groups. The method used in establishing those goals will be the same that Mphasis - San Jose uses in determining availability for the rest of Mphasis – San Jose’s workforce pursuant to 41 CFR § 60-2.14 and 41 CFR§ 60-2.15.

§60-2.16 Placement goals.

(a) Purpose: Placement goals serve as objectives or targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work. Placement goals also are used to measure progress toward achieving equal employment opportunity.

(b) A contractor's determination under §60-2.15 that a placement goal is required constitutes neither a finding nor an admission of discrimination.

(c) Where, pursuant to §60-2.15, a contractor is required to establish a placement goal for a particular job group, the contractor must establish a percentage annual placement goal at least equal to the availability figure derived for women or minorities, as appropriate, for that job group.

(d) The placement goal-setting process described above contemplates that contractors will, where required, establish a single goal for all minorities. In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, a contractor may be required to establish separate goals for those groups.

Definition of Minority



FCCM Definition

Minorities

Minorities include individuals who are Black, Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native. As used in this Manual, the term may mean members of these groups in the aggregate or members of an individual group. See 41 CFR 60-2.11(b)(3) and 41 CFR 60-4.3(a)1d.

CFR 60-4.3 (a)1d

d. "Minority" includes:

- (i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
- (ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);
- (iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
- (iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).

ALJ Orders

WMS Solutions

- The ALJ found WMS violated EO 11246 by:
 - i. Discriminating against White, Black, Asian, and American Indian/Alaskan Native laborers in favor of hiring Hispanic laborers,
 - ii. Discriminating against female laborers based on their sex and male laborers based on their race or ethnicity concerning compensation,
 - iii. Failing to ensure and maintain a working environment free of harassment, intimidation, and coercion at construction sites where WMS's largely Guatemalan laborers worked, and
 - iv. Failing to preserve and maintain all personnel and employment records for a period of two years from the date of creating the record or the relevant personnel action.



ERCA Updates

ERCA

- Early Resolution Procedures Results as of August 11, 2020
- OFCCP signed 21 ERCAs from inception in 2018 through August 11, 2020, covering about 416,000 employees under monitoring and reporting at over 850 establishments covered by the ERCAs.
- The ERCAs have secured \$40 million (\$39,930,500) in back pay, and an additional \$5 million in salary adjustment commitments over the next five years.
- Potential class members total 62,000

Anywhere from 8-12 more to come!

ERCA Summary- Compensation

Contractor	<u>Lead Region</u>	Open Reviews	Issues	Class	Shortfall	Protected Status	Backpay and Interest	Sal. Adj. if not in Backpay	Completion Date
Merck	MA	1	Comp	307	N/A	Female	435756		09/27/2019
Dell-EMC	NE	9	Comp	5475	N/A	Female/Race	\$ 6,338,434		09/28/2019
Goldman Sachs	NE	2	Comp	604	N/A	Female/Race	\$ 9,999,995		09/28/2019
Dominion Power	MA	3	Comp	27	N/A	Female	\$368,966		09/30/2019
Intel	PA	6	Comp	919	N/A	Female/Race	\$ 3,500,000	\$ 1,500,000	09/30/2019
Cisco	PA	3	Comp	1529	N/a	female/race	\$ 2,500,000	\$ 2,750,000	03/01/2020
Nova Southeastern University (13 campuses)	SE	1	Comp	86	N/A	Female	\$300,000		07/09/2020

ERCA Summary- Hiring

Contractor	Lead Region	Open Reviews	Issues	Class	Shortfall	Protected Status	Backpay and Interest	Completion Date
Cintas	NE	4	steering	205	205	Female	\$ 225,000	08/01/2019
U. S. Foods	SE	6	hiring	150	10	Female	\$ 116,600	07/25/2019
Dupont Specialty Products USA	MA	1	hiring	1012	15	Black	\$ 260,000	09/23/2019
Span America Medical Systems, Inc.	PA	0	Hiring	131	16	Bk/White	\$ 62,269.17	09/26/2019
Co-Star	MA	1	hiring	187	15	Black	\$ 249,000	09/27/2019
Frontier	MA	1	hiring	141	12	Female	\$ 100,000	09/27/2019
Bank of America Global Conciliation	SE	8	hiring	5180		Female/Race	\$ 4,200,000	09/27/2019
American Airlines	MA	2	hiring	1427	40	Black/Female	\$296,000	09/30/2019
Cargill	SWARM	2	hiring	2529			\$ 300,000	09/30/2019
Performance Food Group (ERP)	SE	5	Hiring	1320	64	Blacks/Female	\$ 599,989	01/03/2020
Charter/TWC	SE	16	hiring	2855	51	Black/female	\$ 745,000	02/12/2020
Verizon	SWARM	7	hiring	1948	45	male/race	\$ 675,000	06/03/2020
Shamrock Farms Dairy	PA	2	Hiring	1454	78	Fem/Bk/White	\$ 858,492	06/26/2020
Wells Fargo	SWARM	9	Hiring/Comp	34501	1288	Bk/White	\$ 7,800,000	08/11/2020



Pros and Cons of ERCAs



Mediation and Conciliation

Mediation Directive

- Pre-Referral Mediation Directive (2020-03) issued in April 2020 to provide guidance on specific instances OFCCP will be looking to refer cases to mediation.
- OFCCP firmly supports mediation as a process for resolution.
 - Once good faith efforts have been devoted to conciliation as an initial resolution attempt.
- Mediation provides an opportunity for the parties, OFCCP and a contractor, to work out remaining differences with the help of a neutral mediator.



Efficiency in Audit Directive

OFCCP Stats

- FY 2018, the average time to close a compliance evaluation was 516 days, with the average time to complete a desk audit ranging from 142 days (in evaluations without an NOV) to 229 days (in evaluations with a NOV).
- FY 2019, OFCCP was able to decrease these timeframes significantly: evaluations took an average of 399 days to close (a decrease of 23%), desk audits with NOVs took an average of 158 days to complete (a decrease of 31%), and desk audits without NOVs took an average of 68 days to complete (a decrease of 51%).
- Q1 of FY 2020, OFCCP completed the average desk audit in 35 days.



Focused Reviews

Focused Reviews FY 2020

- Section 503
 - Updated self-id form implementation date was August 4, 2020
- VEVRAA
 - OFCCP began scheduling VEVRAA focused reviews in July 2020

Upcoming Focused Reviews

- Accommodations
 - Religious
 - Disability
- Promotions



Enforcement Priorities and Other Recent Initiatives

FY 2020 – FY 2021

- Hiring and Compensation
- Conciliations
- Terms and Conditions of Work



Questions

SAVE THE DATE!

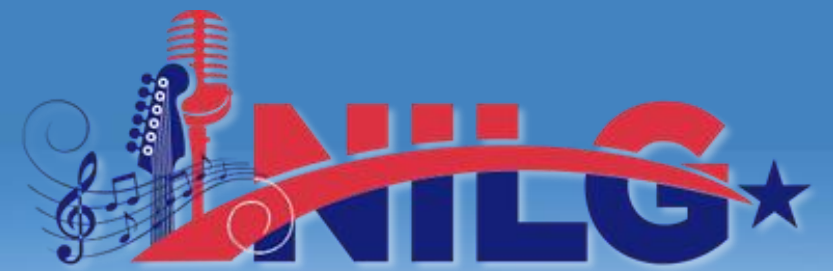
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