

EO Survey 2.0 – Is it Coming Back?

By David Cohen – President

On July 10, 2010 Secretary of Labor Hilda Solis announced that the OFCCP will publish an Advanced Notice of Proposed Rulemaking (ANPM) early next year that will seek input from stakeholders on how to improve the [Equal Opportunity \(EO\) survey](#). For those of you that are not familiar with the EO Survey, it was developed and implemented during the Clinton administration in the late 90's. The information to be filled out by the contractor was establishment specific and the goal of the agency was to send out about 50,000 per year. It was estimated by OFCCP and approved by OMB that it would average approximately 21 hours to complete the survey. Contractors were given 45 days to fill out and return upon receipt.

The EO survey contained four different sections. Those sections were:

Certification of EO Survey – this section required that a specific individual within the corporation be named as a certifying officer and that individual had to certify that the information in the report was accurate and complete and was prepared in accordance with the instructions. The survey instructions went on to state that *“Willfully false statements on this report are punishable by law. U.S. Code, Title 18, Section 1001.”*

Part A: General Information – this section collected basic information about contractor status, expiration date of your current affirmative action program, and information pertaining to the posting of your jobs with the state employment office. ***Note that the certifying officer (under penalty of perjury) had to verify that a current affirmative action plan was in place at the specified establishment!***

Part B: Personnel Activity Data – this section collected personnel activity data on applicants, promotions, hires, terminations and current employment by EEO category broken down by specific race/ethnicity and gender.

Part C: Compensation Data By EEO-1 Category – this section collected summarized compensation and tenure data by EEO category.

The OFCCP piloted the EO survey in 1999 by sending it to a select number of contractors to be filled out on a voluntary basis. Soon after the pilot of the EO Survey, the OFCCP did a major overhaul of its regulations and added the EO Survey. CFR 41 60-2.18 (a) stated:

Each year, OFCCP will designate a substantial portion of all nonconstruction contractor establishments to prepare and file an Equal Opportunity Survey. OFCCP will notify those establishments required to prepare and file the Equal Opportunity Survey. The Survey will provide OFCCP compliance data early in the compliance evaluation process, thus allowing the agency to more effectively identify contractor establishments for further evaluation. The Survey will also provide contractors with a useful tool for self-evaluation.

Now codified into the regulations the EO Survey was no longer voluntary. Thereafter, starting in April of 2000, the OFCCP began to send out the survey. Below is a chart that summarizes OFCCP's use of the EO Survey during its five year tenure. This chart summarizes the number of surveys mailed and the number and percentage of non-respondents¹.

Date Mailed	Surveys Mailed	Non-Respondents
April 14, 2000	6,863	516 (8%)
December 28, 200	49,972	3,802 (8%)
December 3-4, 2002	10,018 ²	1,004 (10%)
December 29-30, 2003	10,006	1,495 (15%)
December 29-30, 2005	10,002	1,717 (17%)

During this five year span, OFCCP spent over \$5 million dollars on the development, mailing and agency labor costs to send out these surveys from 2000-2004.

In 2002, OFCCP retained Abt Consulting to conduct a study to determine the validity of the EO Survey. In April 2006, the OFCCP made a decision to discontinue the use of the EO survey based upon the results of a study done by Abt Consulting. Abt Consulting came to the conclusion that the EO Survey was not a valid tool and did not predict non-compliance and/or systemic discrimination. As you can imagine there was an outcry by certain groups claiming that the study was flawed and that the survey was indeed valid. The bottom line is that the survey was dead and it was subsequently removed from the regulations.

Fast forward to 2010 and it looks like the EO Survey is coming back. For those of you who have read the other DCI blog articles/client alerts you probably noticed that the EO Survey is embedded in the Paycheck Fairness Act (PFA). The PFA requires that one half of all federal contractor establishments get the EO Survey every single year. In my opinion the OFCCP will most likely bring back the EO Survey regardless of the passage of the passage of the PFA. Case in point is that the Secretary of Labor has stated that the DOL is preparing the Announced Notice of Proposed Rulemaking (ANPM) before the PFA goes before the Senate for a vote. It's coming!

In my opinion it is not a matter of if it will come out but in what form. Meaning is it the original EO Survey from 1999 (with or without minor modifications) or does the agency start from scratch. Only time will tell.

Here is some food for thought on the original survey that would most likely need to be addressed:

1. The survey defined an employee as "full time" only and required the removal of "part-time" employees from the data. This doesn't make sense and certainly didn't line up with the affirmative action plan. As you know, affirmative action plans include both full-time and part-

¹ Information obtained by OFCCP from a Freedom of Information Act (FOIA) request

² The Bush Administration reduced the number of surveys sent via a notice published in the Federal Register. The notice stated that the OFCCP was currently studying the validity of the survey and needed a sample size of 10,000 to conduct a meaningful analysis.

time employees. In addition, the survey required that you identify which applicants were full-time versus part-time. I do not know a single contractor that keeps that information in its ATS system so it is nearly impossible to provide that information.

2. The survey defined an applicant as follows :

“The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunity. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer’s practice.”

This does not line up with the new Internet Applicant Regulations and will have to be modified.

3. Part C of the survey required the submittal of compensation data by broad EEO category. However, OFCCP did allow contractors to submit the compensation data by affirmative action job group if they were willing to fill out and submit their survey electronically. However, neither EEO category nor affirmative action job group makes sense for purposes of looking at compensation data. Therefore, these types of analyses would most likely lead to false positives and false negatives. My gut tells me that this will be the most difficult and controversial portion of the survey that OFCCP will most likely grapple with.

The bottom line is that the OFCCP wants it back and contractors should be prepared to provide the agency some constructive feedback during the proposed rulemaking process.