

Legal Focus (Part 1): Employee Selection & Promotion

Almost every employer wants employees who are dedicated, hard working, and will remain with the organization through thick and thin. The challenge is to hire and retain the most effective employees possible while addressing the applicable federal, state, and local laws and guidelines concerning the selection or promotion of employees. These laws and guidelines include, but are not limited to:

- Civil Rights Act of 1964 (CRA 1964; Title VII)
- Civil Rights Act of 1991 (CRA 1991)
- *Americans with Disabilities Act* (ADA)
- *Age Discrimination in Employment Act* (ADEA)
- *Federal Uniform Guidelines for Employee Selection Procedures*
- OFCCP Federal Contractor Requirements and Regulations (these are applicable to some federal contractors)

Of course, there are also state and local laws and ordinances that agencies should address whenever conducting an employment decision, and agencies should always consult with their legal advisor whenever developing a plan for selecting or promoting employees. Furthermore, some courts have recommended that employers should also consider following professional guidelines concerning the selection and promotion of employees, such as:

- *Principles for Validation and Use of Personnel Selection Procedures* of the Society for Industrial and Organizational Psychology (1987)
- American Educational Research Association /

American Psychological Association’s *Standards for Educational and Psychological Testing* (1999)

What kinds of selection decisions do these laws and standards cover? According to the federal Uniform Guidelines, “*Employment decisions include but are not limited to hiring, promotion, demotion, membership (for example, in a labor organization), referral, retention, and licensing and certification, to the extent that licensing and certification may be covered by Federal equal employment opportunity law. Other selection decisions, such as selection for training or transfer, may also be considered employment decisions if they lead to any of the decisions listed above.*” The Uniform Guidelines “*apply to all selection procedures used*

to make employment decisions, including interviews, review of experience or education from application forms, work samples, physical requirements, and evaluations of performance.” In other words, just about every action you take when attempting to attract and select potential employees are covered under these laws.

Navigating these laws can be complex and confusing, which is why many prudent employers seek assistance from employee selection specialists before getting into a legal jam.

Keep in mind that, according to the federal Equal Employment Opportunity Commission, if the selection device you use has adverse impact against members of a protected group, it is your

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Editorial Note:

Biddle Consulting Group, Inc. (BCG) strives to provide human resource professionals with the most updated information in the specialty fields of Equal Employment Opportunity (EEO), Affirmative Action Planning (AAP), and Personnel Selection.

This issue of the EEO & Testing Quarterly Review newsletter focuses on relevant issues in the test validation and affirmative action fields of human resources.

You are invited to read through the newsletter and e-mail us at QReview@biddle.com with your article and content suggestions for future issues of the Quarterly Review.

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National Industry Liaison Group Review

Biddle Consulting Group, Inc. attended the 2003 National Industry Liaison Group conference in Charleston, South Carolina August 12-13. Every year officers from the OFCCP get together with managers from federal contractors across the country in order to discuss all the latest happenings in Affirmative Action Planning.

This year members from BCG attended several important sessions with guest speakers from the OFCCP and various law firms and consultants. A great deal was learned about what plans are in store with the OFCCP for 2004 as well as how leading authorities suggest that those audited by the OFCCP should prepare.

Mr. Charles James, Deputy Assistant Secretary of the OFCCP, gave a keynote address on the state of the union at OFCCP. Mr. James focused on the topic of how the OFCCP is focusing on larger organizations with systemic issues. Here are a few quotes:

- *Catching fish is nice, but I want the fillet -*
- *Our mission is systemic casework -*
 - *The OFCCP is the moral guardian of America -*
 - *Equal Opportunity and work ethic can make success -*
 - *Objective criteria to determine results -*
 - *Teamwork through pooled competencies -*

With these phrases Mr. James was making a clear case that larger organizations with systemic issues in

discrimination are without question the priority at OFCCP. If you are part of a large organization, BCG highly suggests you prepare for the watchful eye of Mr. James and his team.

Within the last two quotes, Mr. James is talking about new methodologies for auditing federal contractors. Instead of the old formula of a lone auditor spending days, weeks or months at your facility, the OFCCP is employing a more efficient plan. Larger organizations will now be audited by specialized teams that include individuals who are experts in the regulations, data management and other needed skills. This is both a plus and minus for larger companies. While it may shorten their stay and increase the effectiveness of the auditors it will also increase their ability to shine a very bright spotlight on an organization and its employment history.

The focus on larger organizations by no means leaves mid-sized and smaller companies audit free. According to recent events and Mr. James's speech, the new plan is to audit companies under the desk audit format that has been heavily deployed over the last 12 months or so. By sending out audit letters and having contractors mail in their plans to be reviewed at the OFCCP's convenience, the government now has the ability to solicit large numbers of plans and audit them in-house. If your plan appears to be in order then the OFCCP will close out their review and you may continue on your way. If your plan has

problems then you would receive a letter indicating the OFCCP's intention to come to your facility and conduct a full compliance review.

According to Mr. James the OFCCP has closed the books on about 80% of their audits utilizing this method. In the world of federal contractors this would be considered a high rate of closure based on the belief that historically, many audits remained open for much longer durations. Mr. James also stated that there are plans underway to introduce new methods for reviewing small businesses, most likely utilizing the internet. The small business initiative release date is unknown.

In other sessions BCG picked up several important pieces of information (summarized below):

- Active Case Management (ACM) is a high priority
- Per George Bush it is a high priority to produce results and look at what the OFCCP does and how much it costs.
- The OFCCP would like to hear more from the local ILGs
- Harold Busch, Director, Division of Program Operations, is creating a specialized team in Washington, D.C. to audit Functional AAPs (FAAPs)
- Even with FAAPs, audit interviews may occur at the site level
- The implementation of FAAPs will better allow the OFCCP to conduct statistical analyses... beware
- The OFCCP intends to involve the Office of the Solicitor in more of their casework
- The OFCCP has an offer out to a statistician in Washington, D.C. and hopes to have someone in that position shortly
- Having a statistician will allow the OFCCP to utilize more regression analyses in the Equal Pay studies
- In the near future the OFCCP

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organization that is ultimately responsible for demonstrating that the selection device is valid, not the selection-device's developer. In other words, if you lose a civil-rights lawsuit because a selection device you used was not fair and valid, it is the employer that is responsible for the outcome (i.e., court penalties plus legal costs) and not the developer of the selection device.

It is recommended that employers work with a professional human-resource consulting company, like BCG, from the earliest stages of developing a plan for selecting and retaining the best people for the job. In the next issue we will present some actions you can take to help inoculate your organization from civil rights liability during the employee-selection process. ❄

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Introducing: AutoAAP 10

Client Server/Desktop AAP Development Software

You won't be able to resist purchasing AutoAAP 10 when you see the features and benefits this AAP development software has to offer. AutoAAP 10 has solutions to your current time consuming and frustrating development process. Or if you are first time AAP developers or just want to review your other options, you must take a look at AutoAAP 10.

AutoAAP not only produces the required reports and narrative, it can also develop compensation analyses, the EO Survey, EEO-1 & Vets-100 reports, and Adverse Impact analyses, all in one program. When you purchase AutoAAP, you automatically receive a comprehensive package that includes data preparation services, one half a day of web based training, and your first year of maintenance, all for one low price. This means you won't be left on your own to try to get your plans completed. We will guide you through the process of getting your data prepared, and we will train you on the software while taking you through the development of your first AAP.

A few of the most exciting features AutoAAP offers are as follows: multiple plan development, conversion from 1990 to 2000 Census, and a guaranteed user friendly software program. BCG has

created the functionality of applying choices made in one AAP to any or all other AAPs. For example, you can copy key components to other plans such as Factor Weights, Feeder Groups, and Labor Areas, allowing you to customize plans instead of starting at the beginning each time. This is very important because companies that have a centralized team creating AAPs will need to spend a significant amount of time making decisions for each step of an AAP.

One of the most complicated functions in AAP development is the calculation for comparing availability to current employee data. Companies must assign codes from the US Census to their job titles and the software pulls data from both sides, weights and compares them. Since new data comes out only once every 10 years, companies are nervous about converting all of the codes to the new codes that are expected to come out this year. BCG will have an automated converter from the 1990 codes to the 2000 codes, therefore reducing the workload, and probable user errors, by a tremendous margin. With your purchase of AutoAAP, you will receive the entire 1990 Census file, as well as the entire 2000 Census file (when it is released) for free.

It is always helpful to have a software product that is user friendly. When you are on your own using AutoAAP, after the data preparation and training has been completed, you can be sure the software will have simple data importation and navigation, as well as help screens if you have any questions.

Here at BCG, our focus is to help people through the difficult process of AAP development. We believe it is extremely important to find the perfect solution, whether it is software, outsourcing or implementation, to fit the needs of our clients. You can count on us to be there for you whenever you need guidance or advice. You will find AutoAAP 10 to be the answer for all your AAP development needs. ❄

See the Next Generation of Firefighter Exam

Firefighter Selection, Inc. (FSI) will soon be releasing the 8th edition of its popular entry-level firefighter exam, the Test Preparation Manual (TPM). The 8th edition is the next generation of written tests for agencies and HR departments to use for fair and legal entry-level firefighter recruitment. ❄

Spotlight: TVAP - Test Validation & Analysis Program

The Test Validation & Analysis Program (TVAP), which is the first software of its kind to help organizations validate their written tests developed in house, will be available to organizations in October 2003.

Biddle Consulting Group, Inc. distilled its 30 years of testing experience into this robust, yet easy-to-use program. TVAP automatically highlights potential problem areas in your testing process, using easy-to-follow highlights and interpretations.

TVAP provides the means for users to complete the validation process, start to finish, for most written

tests using technology that is designed for the experienced or novice professional.

This program will help organizations validate written test items, set cutoff scores, analyze SME rater reliability, evaluate item bias against women and minorities, conduct item and tests analyses, and analyze cutoff score options for adverse impact.

The entire program is based on Microsoft Excel and Visual Basic programming, authored by the President of Biddle Consulting Group, Inc., Dan Biddle, Ph.D. For more information on TVAP call (800) 999-0438.

Affirmative Action Plans:

Implementing An Applicant Management Program In Your Organization

Most federal contractors and subcontractors that are familiar with Affirmative Action Plans (AAP) know it's required to collect EEO data associated with applicants. Unfortunately, not all federal contractors and organizations that are familiar with AAPs are complying with this arduous task. This poses as a problem when the auditors have high expectations of the applicant data collection activities by federal contractors and subcontractors.

The majority of contractors currently aren't tracking their applicants and are in need of acquiring or developing a system. At first glance this appears to be a full-time job but the reality is that contractors have no choice.

At Biddle Consulting Group, Inc., we receive copies of audit letters and conciliation agreements on a regular basis and the collection of applicant data is typically an issue. While it may take a book to provide contractors with a step-by-step solution to transition from nonexistent electronic collection to an easily accessible data management process, organizations need to start thinking about a few key elements to help get the process in gear.

The first step is to define "applicant." The traditional definition, associated with the *Uniform Guidelines on Employee Selection Procedures* (UGESP), is that an applicant is anyone who expresses interest in a position and should be listed in an applicant log. The obvious problems with this definition are the record gathering and retention.

The Office of Federal Contractors Compliance Programs (OFCCP) Director, Charles James, has indicated that a change is necessary based on the difficult position federal contractors are in. Because there isn't a revised definition, contractors are faced with determining their own definition and trying to defend it. Harold Busch, OFCCP Director of Program Operations, offered some helpful suggestions on when to exclude someone

from the applicant log. If someone is applying to your organization but not to a specific job or someone who isn't willing to work in a different location, they can be excluded from the log. However, Mr. Busch did clarify that your applicant log should consist of more than those candidates interviewed.

Currently, the OFCCP is considering the following definition: "a person is an applicant if they are minimally qualified for the job, applied for the opening in question and the employer considered (or should have considered) the candidate." When any of these definitions will become official is anybody's guess. The task force appointed by the EEOC to create a definition that would fit general applicants and electronic applicants has

been delaying the completion for over a year now due to the difficulty in getting everyone to agree to one answer. Although we have been hopeful of a logical answer ever since Cari Dominguez, Chair of the EEOC, recently stated "A click does not an applicant make."

The following link is a useful resource, because it's an example of how to obtain applicant information.
<http://www.dol.gov/library/forms/forms/oasam/dolrno.html>

This is Part I of what will be an ongoing series on the management of applicants for Federal Contractors. If you have questions or wish to contribute material to share with your peers please e-mail us at QReview@biddle.com. ☒

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- hopes to hire statisticians into six regions to manage Pay Equity studies and implement statistical analysis using regression as its standardized method for reviewing contractors.
 - Analyzing transactions (Adverse Impact Analysis) continues to be a high priority for the OFCCP and there have been several conciliation agreements based specifically on collection of EEO data during the application process.
 - Harold Busch made it clear that a geographic rollup is not a FAAP. Rollups may get approved but not under the FAAP guidelines.
- OFCCP figures for fiscal year

September 2002 to August 2003:

- 4673 Evaluations (Not including compliance checks)
- \$18 million for 10,000 victims
- 65 FAAP approvals
- 500+ Compliance checks
- 80% of evaluations completed at desk audit level
- Conducting compliance meetings by the hundreds
- 54 Conciliation agreements
- 16 Compensation cases
- 28 Hiring
- 12 Hiring and Compensation

This is Part I of our NILG conference review. In the next issue we will discuss compensation analysis in more detail and the Equal Pay presentation at the NILG conference. ☒

News Flash!

The OFCCP has received approval from the Office of Management & Budget to release a new compensation questionnaire! The new questionnaire is designed to analyze the burden of gathering

compensation data for the OFCCP at the beginning of the audit process. This new letter has already begun to arrive at federal contractor sites. Go to www.biddle.com for a sample.

Calendar	
Conferences	BCG Training Workshops & Seminars
<p>: October 7-9 : (AAP) HR Southwest Conference & Expo Society for HR Management Fort Worth, Texas</p> <p>: October 27-30 : (OPAC) Staffing World Conference & Expo American Staffing Association Las Vegas, Nevada</p> <p>: November 7 : (OPAC) ALA Regions 1 & 2 Conference Association of Legal Administrators New York City, New York</p>	<p>: October 21-22 : <i>Affirmative Action Plan Methodology & Software Training</i> Rancho Cordova, California Cost: \$990</p> <p>: November 4 : <i>Diversity Training (Managerial-Level Workshop)</i> Rancho Cordova, California Cost: \$295</p> <p>: January 13-14, 2004 : <i>Affirmative Action Plan Methodology & Software Training</i> Rancho Cordova, California Cost: \$990</p> <p>: Coming to Chicago in 2004 : <i>Affirmative Action Plan Methodology & Software Training</i> Chicago, Illinois Cost: \$495/Day</p>
<p>For more information on any of the conferences, training workshops, or other Biddle Consulting Group, Inc. events listed, please call BCG toll-free at (800) 999-0438 or e-mail your questions to staff@biddle.com.</p>	

Check out these websites:

www.biddle.com | www.opac.com | www.critical911.com | www.fireselection.com | www.uniformguidelines.com

CareerExchange's SonicRecruit Joins Biddle Consulting Group to Provide Enhanced Human Resource Services to Organizations

CareerExchange Interactive Corp.'s SonicRecruit (www.sonicrecruit.com) product, the leading provider of Web-Based Applicant Tracking Software (ATS), and Biddle Consulting Group, Inc. (www.biddle.com), the leading provider of Equal Employment Opportunity (EEO), Affirmative Action Plan (AAP), and Personnel Selection consulting and software, form a partnership to integrate their products.


The partnership brings together SonicRecruit, CareerExchange's industry-leading ATS product, with

Biddle's Equal Employment Opportunity (EEO)/Affirmative Action Planning (AAP) software, AutoAAP®, and consulting services. SonicRecruit customers will be able to seamlessly pass stored EEO- and AA-related data to Biddle's AutoAAP® Software.

"The respected name of Biddle Consulting Group brings three decades of experience in Equal Employment Opportunity (EEO) and Affirmative Action Planning to our organization and to our customer's organizations," said Jason Moreau, President of

CareerExchange Interactive.

"One of the most common weaknesses in federal contractors is their inability to gather accurate and timely information on job applicants and the hiring process. This has a tremendous affect on their bottom line as well as their negotiations with the Department of Labor.

We are very excited about being able to direct our clients towards a cost effective and proven solution," said Patrick Nooren, Executive VP of Biddle Consulting Group. 



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