

An Equal Opportunity Paradox for Federal Contractors

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Introduction

Employers who become federal contractors assume a litany of obligations, only some of which apply to non-contractor employers. Both federal contractors and non-contractors may “not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin.”¹ But, unlike non-contractors, federal contractors must “take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their [protected characteristics].”² Federal contractors must be especially mindful of abiding by these obligations because the potential consequences for noncompliance go far beyond the usual damages other employers face in discrimination cases. Contractors run the risk of losing a customer and, in some cases, a very significant customer—the federal government. Abiding by these obligations, however, is not always easy. To demonstrate this, consider the following hypothetical.

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1. 41 C.F.R. § 60-1.4(a)(1) (2016).

2. *Id.*

Welookedatcloudsfrombothsidesnow.com (Cloud) builds and maintains data storage systems and holds multiple federal contracts with a variety of federal agencies. It has just received its first-ever scheduling letter from the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP or Agency) for a compliance evaluation of its establishment in Braintree, Massachusetts. The Braintree establishment is Cloud's research and development facility. Approximately 750 people are employed there, primarily in engineering, scientific, and other technical specialties. Positions range from entry-level jobs to senior scientists as well as a management structure that supervises technical professionals. Like many high-tech firms, despite extensive good faith efforts, Cloud struggles with the representation of female, African-American, and Hispanic scientists. It therefore routinely sets goals for these groups in its affirmative action plans. In contrast, Cloud's Asian professional scientific population is substantial. In some cases, it is statistically significantly above the calculated weighted availability, resulting in an underrepresentation for whites in several job titles. The representation of Asians in Cloud's scientific manager and director positions is also above availability, albeit not significantly so.

The company relies generally on targeted campus recruiting to fill its entry-level technical positions. Current employees are actively involved in the campus interviewing and recruiting process and in the selection of new employees. Cloud's applicant tracking system is deficient in a number of ways. Requisitions often remain open for extended time periods and the data is often insufficient to identify whether a particular candidate was "considered" as defined in OFCCP's Internet Applicant Rule. Similarly, the disposition codes used to explain why a candidate was "knocked out" at any step in the selection process are vague and recruiters do not use them consistently.

The applicant data reflects that the percentage of Asian candidates for the eight job titles in the entry-level technical job group was more than 70% in a combined applicant pool of more than 3,000 candidates. Although the overall selection rate was less than 3%, only 35% of the candidates who received offers were Asian. While that percentage of Asian hires is well above external availability measures, the difference between the actual and expected selection rate (based on Asian representation in the applicant pool) still yields a statistically significant adverse result to Asian candidates. Upon further review of applications received, Cloud knows that many of the candidates who self-identified as Asian applied from their home countries in Asia and many others applied from U.S. colleges and universities while in the United States on student visas. Cloud does not inquire about a candidate's eligibility to work in the United States with or without sponsorship.

The Cloud hypothetical is a realistic representation of the circumstances experienced by numerous federal contractors in high tech industries. They face a Catch-22. Contractors that depend on the highly competitive STEM (science, technology, engineering, and mathematics) labor market often receive extraordinary numbers of Asian candidates, numbers far above the availability measures from U.S. Census data or any other reliable and available benchmarks for the qualified labor pool. This can result in allegations by the OFCCP that, despite an otherwise high representation of Asians in the incumbent workforce, and no evidence of anti-Asian bias in decision-making, the contractors have violated Executive Order 11246 by discriminating against Asians in hiring because of race on a class-wide basis. This paradoxical scenario can be especially frustrating to contractors that regularly hire Asian applicants and maintain workforces well-represented with Asian employees at all employment levels, but under-represented in other protected groups.³

Indeed, the OFCCP filed two enforcement actions in late 2016 and early 2017 that illustrate the proverbial rock and hard place facing federal contractors. In *Office of Federal Contract Compliance Programs v. Palantir Technologies Inc.*,⁴ the OFCCP alleged discrimination against Asian applicants because 44% of hires (11 of 25) were Asian, compared to a candidate pool that was 85% Asian. Yet, in *Office of Federal Contract Compliance Programs v. Oracle America, Inc.*,⁵ the OFCCP alleged discrimination against non-Asian applicants because 82% of hires were Asian, compared to a candidate pool that was 75% Asian.⁶ In both cases, the contractor's hiring of Asian applicants exceeded availability according to national labor market statistics. Yet, the OFCCP alleges that *Oracle* discriminated against non-Asian applicants, but that *Palantir* discriminated against Asian applicants.

This Article reviews applicable legal principles that, together with the realistic Cloud scenario, frame the paradox that contractors frequently face and offers practical and strategic guidance to mitigate these risks. Part I summarizes the disparate treatment and disparate impact theories of proof. Part II describes the OFCCP's aggressive investigative and enforcement approach in recent years that has frus-

3. Among the absurd results in this paradox is that whites are often statistically significantly underrepresented in some technical jobs or job groups, but the Executive Order 11246 regulations, albeit with good historical reasons, do not contemplate establishing placement goals for whites. See 41 C.F.R. § 60-2.16(c) (2016) (“[T]he 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.”) (emphasis added).

4. No. 2016 OFC 00009 (docketed Sept. 26, 2016). Messrs. Geier and Gage and Ms. Daub are counsel of record in *Palantir*.

5. OFCCP No. R00192699 (filed Jan. 17, 2017, not yet docketed), <https://www.dol.gov/sites/default/files/newsroom/newsreleases/OFCCP20170071.pdf>.

6. *Id.*

trated federal contractors. Part III summarizes the OFCCP's Internet Applicant Rule (IAR) and explains how careful implementation can help manage the applicant flow "denominator." Finally, Part IV provides practical and strategic advice to guide contractors using the IAR and other techniques.

I. The Applicable Legal Framework

The OFCCP is responsible for monitoring federal contractors' compliance with Executive Order 11246.⁷ Through a well-established administrative process, it investigates contractors' compliance with the Executive Order, including requirements that they not discriminate in violation of Title VII of the Civil Rights Act of 1964⁸ and that they "take affirmative action."⁹ Based upon evidence gathered during compliance examinations, the OFCCP makes judgments about the contractor's compliance with the Executive Order. If it finds deficiencies, the OFCCP must make "reasonable efforts . . . to secure compliance through conciliation and persuasion" before commencing an enforcement proceeding.¹⁰ Among other relief, the OFCCP can seek debarment, the ultimate sanction for businesses relying on federal contracts.

Title VII's established principles of liability and relief are used to analyze claims of potential discrimination based on race, color, religion, sex, or national origin.¹¹ Contractors must be careful to avoid claims of disparate treatment, as well as claims of disparate impact. The OFCCP may pursue either or both in its enforcement action. Increasingly, the OFCCP has pursued discrimination claims on behalf of whites and males.

A. Disparate Treatment Theory

The disparate treatment theory of discrimination requires proof of intentional discrimination against an employee or group of employees on the basis of a protected trait.¹² An employer whose discrimination is analyzed within the disparate treatment theory may have discrimi-

7. Exec. Order No. 11246, 30 Fed. Reg. 12319 (Sept. 28, 1965). The OFCCP also monitors compliance with and enforces Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), Pub. L. No. 93-112, 87 Stat. 355 (1973), and the Vietnam Veterans Readjustment and Assistance Act of 1974, as amended (VEVRAA), Pub. L. No. 93-508, 88 Stat. 1578 (1974). The implementing regulations for the Executive Order, Section 503, and VEVRAA are found at 41 C.F.R. pt. 60, 41 C.F.R. pt. 741, and 41 C.F.R. pt. 300, respectively.

8. 42 U.S.C. § 2000(e) (2012), *et seq.*

9. 41 C.F.R. § 60-1.20(a) (2016).

10. 41 C.F.R. § 60-1.20(b).

11. See OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, FED. CONTRACT COMPLIANCE MANUAL, *1M Basis for Potential Discrimination Analyses* 43-44 (Oct. 2014), https://www.dol.gov/ofccp/regs/compliance/fccm/fccm_final_508c.pdf [hereinafter FED. CONTRACT COMPLIANCE MANUAL]. Sexual orientation and gender identity have recently been added to the list of protected characteristics under the Executive Order. 41 C.F.R. § 60-1.4(a)(1) (2016).

12. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.20 (1977).

nated through a pattern or practice or, instead, engaged in individual discrimination. To establish a pattern or practice of disparate treatment, the OFCCP must show by a preponderance of evidence that the discrimination was the company's standard operating procedure.¹³ The agency must provide "convincing proof of a company-wide discriminatory policy"¹⁴ and demonstrate that "discrimination was the company's standard operating procedure—the regular rather than the unusual practice."¹⁵ Pattern-or-practice disparate treatment claims ordinarily include "a combination of strong statistical evidence of disparate impact coupled with anecdotal evidence of the employer's intent to treat the protected class unequally."¹⁶ "Anecdotal evidence consists of statements from minorities or women who can show that they met all contractor requirements but still did not receive the benefit at issue, and any firsthand accounts of discriminatory acts by the contractor supporting the statistical inference."¹⁷ Notwithstanding the OFCCP's pursuit of hiring discrimination claims based entirely on statistical evidence and without any anecdotal evidence, numerous courts

13. See, e.g., *id.* at 336.

14. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 357–60 (2011).

15. *Teamsters*, 431 U.S. at 366; see also *EEOC v. Bloomberg*, 778 F. Supp. 2d 458, 468 (S.D.N.Y. 2011) ("To succeed on a pattern-or-practice claim, plaintiffs must prove more than sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's standard operating procedure.") (internal citation and quotation marks omitted).

16. *EEOC v. Mavis Discount Tire, Inc.*, 129 F. Supp. 3d 90, 103–04 (S.D.N.Y. 2015) (citing *Mozev v. Am. Commercial Marine Serv. Co.*, 940 F.2d 1036, 1051 (7th Cir. 1991)); see also *Bloomberg*, 778 F. Supp. 2d at 469; *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985). If the agency's prima facie case consists primarily of statistical evidence, the defendant cannot overcome the prima facie showing simply by articulating a legitimate, nondiscriminatory reason for individual employment decisions. Instead, the defendant must tailor its defense to the nature of the agency's proof to demonstrate that a pattern or practice of discrimination does not exist. *Teamsters*, 431 U.S. at 360 n.46. In order to do so, the defendant must demonstrate that the agency's statistical methodology lacks integrity or that the statistical disparities can be explained by non-discriminatory factors. *Segar v. Smith*, 738 F.2d 1249, 1267–68 (D.C. Cir. 1984); see also *Bazemore v. Friday*, 478 U.S. 358, 403–04 n.14 (1986) (to rebut a prima facie case of discrimination, a defendant must do more than raise theoretical objections to data or to the statistical approach taken to meet its obligations).

17. FED. CONTRACT COMPLIANCE MANUAL, *supra* note 11. The OFCCP's now-rescinded 2006 Standards stated that in systemic compensation cases it "will seldom make a finding of systemic discrimination based on statistical analysis alone, but will obtain anecdotal evidence to support the statistical evidence." Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35, 124, 139 (June 16, 2006). "Except in unusual cases, OFCCP will not issue [a Notice of Violation] alleging systemic compensation discrimination without providing anecdotal evidence to support OFCCP's statistical analysis." *Id.* at 35, 140; see *id.* at 35, 133. The 2006 Standards specifically referred to many of the above-cited Title VII cases that confirm the importance of anecdotal evidence to systemic disparate treatment claims. See *id.*

have confirmed that anecdotal evidence is a critical component of a systemic disparate treatment claim.¹⁸

Disparate treatment discrimination—intentional discrimination—is easier for contractors to prevent and identify. For the vast majority of responsible contractors, it is a rare and isolated occurrence. While unfortunate for the person affected, it rarely occurs on a class-wide basis. It is relatively easy for contractors to comply with the obligation not to discriminate intentionally. Compliance with the obligation not to unintentionally discriminate, however, is far more challenging.

B. *Disparate Impact Theory*

Both treatment and impact theories of discrimination require proof that the contractor discriminated “because of” a protected characteristic. In contrast to the disparate treatment theory, however, disparate impact claims shift the focus from discriminatory intent to discriminatory effect. Identifying discrimination before it happens, therefore, is far more challenging. Indeed, determining whether disparate impact discrimination has occurred is inherently a backward-looking exercise focused on a facially race- or gender-neutral process.

OFCCP disparate impact cases challenging facially neutral selection procedures are governed by the Uniform Guidelines on Employee Selection Procedures (Uniform Guidelines).¹⁹ To establish a disparate impact case, the OFCCP “must show that a facially neutral employment practice causes a significant discriminatory impact on a protected class,” and that, to the extent the employer is able to show the challenged practice is job-related and consistent with business necessity, “other . . . procedures exist that would serve the defendant’s legitimate business interest without causing an adverse impact.”²⁰

18. See *Morgan v. United Parcel Serv. of Am., Inc.*, 380 F.3d 459, 471 (8th Cir. 2004) (“[Plaintiffs] adduced no individual testimony regarding intentional discrimination Although such evidence is not required, the failure to adduce it ‘reinforces the doubt arising from the questions about validity of the statistical evidence.’”) (citations omitted); *Garcia v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 660 F.2d 1217, 1225 (7th Cir. 1981) (“Plaintiffs did not present in evidence even one specific instance of discrimination.”); *accord Coser v. Moore*, 739 F.2d 746, 752 (2d Cir. 1984) (“[statistical] evidence must be weighed in light of the failure to locate and identify a meaningful number of concrete examples of discrimination”); *Valentino v. United States Postal Serv.*, 674 F.2d 56, 69 (D.C. Cir. 1982) (“[W]hen the statistical evidence does not adequately account for the diverse and specialized qualifications necessary for (the positions in question), strong evidence of individual instances of discrimination becomes vital to the plaintiff’s case.”) (internal citation and quotation marks omitted); *United States v. Johnson*, 122 F. Supp. 3d 272, 366 (M.D.N.C. 2015) (lack of anecdotal evidence “burden[ed] [the] suggested inference” of statistical studies); *Bakewell v. Stephen F. Austin State Univ.*, 975 F. Supp. 858, 905–06 (E.D. Tex. 1996), *aff’d*, 124 F.3d 191 (5th Cir. 1997) (“The paucity of anecdotal evidence of discrimination severely diminishes plaintiffs’ contention that a pattern or practice of salary discrimination against female faculty members prevails”).

19. 41 C.F.R. § 60-3 (2016).

20. *OFCCP v. TNT Crust*, No. 2004-OFC-3, 2007 WL 5309232, at *16–18 (Sept. 10, 2007); see also *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 656–57 (1989), *codified in*

In *Smith v. City of Jackson*,²¹ the Supreme Court reaffirmed the plaintiffs' obligation to identify the *particular* practice responsible for an alleged disparity.²² The *Smith* plaintiffs' age discrimination claim attacked the employer's compensation plan.²³ The Court explained that the plaintiffs' statistical showing was deficient because they had "done little more than point out that the pay plan at issue [was] relatively less generous to older workers than to younger workers."²⁴ The plaintiffs did not, as required by *Wards Cove*, "identif[y] any specific test, requirement, or practice within the pay plan that [had] an adverse impact on older workers."²⁵ Moreover, disparate impact plaintiffs must use reliable statistical evidence to show that the identified practice *caused* the alleged disparities.²⁶

The Supreme Court reaffirmed these principles in 2015 in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*²⁷ It remains the law that "a disparate impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."²⁸ Otherwise, the Court said, "disparate-impact liability . . . 'would almost inexorably lead' governmental or private entities to use 'numerical quotas,' and serious constitutional questions then could arise."²⁹

*relevant part at 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012). Thus, to state a disparate impact claim, the OFCCP "must begin by identifying the specific employment practice that is challenged." Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 994 (1988); see also Wards Cove, 490 U.S. at 656 (The plaintiff must offer evidence "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities." (quoting *Watson*, 487 U.S. at 994)). An exception to this requirement exists where "the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis." 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2012).*

21. 544 U.S. 228 (2005).

22. *Id.* at 241.

23. *Id.* at 230.

24. *Id.* at 241.

25. *Id.* (citing *Wards Cove*, 490 U.S. at 652).

26. *See Watson*, 487 U.S. at 994 ("[P]laintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."). "[S]tatistical disparities must be sufficiently substantial that they raise such an inference of causation." *Id.* at 995.

27. 135 S. Ct. 2507 (2015) (housing discrimination case).

28. *Id.* at 2523.

29. *Id.* (quoting *Wards Cove*, 490 U.S. at 653); *see also Bennett v. Nucor Corp.*, 656 F.3d 802, 817 (8th Cir. 2011) ("[T]he plaintiffs' expert . . . failed to identify any specific employment practices responsible for the alleged disparate impact in promotion decisions."); *EEOC v. Freeman*, 961 F. Supp. 2d 783, 799–800 (D. Md. 2013) (agency failed to identify the particular aspects of the defendant's policies that allegedly caused the disparate impact).

II. The Paradox Facing Federal Contractors: OFCCP's Near Exclusive Reliance on Statistics

When assessing potential hiring discrimination in recent years, the OFCCP has issued Notices of Violation (NOVs) to contractors without any recitation of anecdotal evidence of discriminatory intent and without identifying any specific employment practice responsible for an alleged disparate impact. Instead, it relies almost exclusively on simple statistical analysis to determine whether candidates with relevant qualifications and experience were selected for hire at rates consistent with what would be expected in a neutral selection process. The Agency's analysis compares the selection rate for applicants in each demographic group (the number of those who received offers divided by the number of Internet Applicants) and calculates whether the selection rates are as expected. If not, it calculates whether the difference in the actual versus the expected selection rate is so great that it raises an inference of discrimination. The OFCCP has issued NOVs based on these calculations alone, while at the same time ignoring evidence that the contractor hired (and continues to hire) Asian applicants in substantial numbers at all levels of its organization and that interviews of dozens of employees produce no evidence of anti-Asian animus. This paradox is presented to Cloud and many contractors today.

The OFCCP's approach presents contractors with a threat of disparate treatment and impact exposure. These risks pressure contractors to engage in hiring by numbers, which itself is potentially illegal.³⁰ The Agency's aggressive investigation and enforcement strategies have not gone unnoticed. The OFCCP's approach was criticized by the U.S. Senate Committee reviewing the Agency's performance. In the Senate Appropriations Report, the Committee stated:

30. See 42 U.S.C. § 2000e-2(j) (2012) ("Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . in comparison with the total number or percentage of persons of such race . . ."); 41 C.F.R. § 60-2.16(e)(1-4) (2016); see also *Ricci v. DeStefano*, 557 U.S. 557, 581-82 (2009) ("[a]llowing employers to violate the disparate-treatment prohibition based on a mere good-faith fear of disparate impact liability would encourage race-based action at the slightest hint of disparate impact," amounting to a "*de facto* quota system"); *Torgerson v. City of Rochester*, 643 F.3d 1031, 1045 (8th Cir. 2011) ("Congress explicitly commands that Title VII shall not be interpreted to require preferential treatment . . . on account of an imbalance in the number or percent of those employed, compared to the relevant number or percent in the community."); *EEOC v. Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1276 (11th Cir. 2000) ("Indeed, if employers could be held liable for an unlawful disparate impact on account of statistical workforce imbalances per se, then they would be forced to use numerical quotas and other forms of preferential treatment in their hiring and promotion policies, in express contravention of Title VII . . ."); *EEOC v. Chi. Miniature Lamp Works*, 947 F.2d 292, 296, 305 (7th Cir. 1991) (Supreme Court has cautioned "employers not to engage in hiring quotas").

The Committee is concerned that OFCCP has lost its focus on identifying and addressing real employment discrimination and is imposing excessive compliance burdens on contractors. *More specifically, OFCCP appears to prioritize specific quota results rather than equal consideration and opportunity because of its reliance on statistical analysis in evaluating contractor hiring practices.* OFCCP should focus on actual discriminatory treatment instead of presumed discrimination based solely on benchmarks that may not be uniformly applicable. *Strict and exclusive use of statistical significance tests effectively requires contractors to use a quota hiring system in violation of the Civil Rights Act to avoid adverse impact claims by OFCCP.*³¹

If the OFCCP establishes a prima facie case of disparate impact, a contractor must be prepared to challenge that evidence in a number of ways that may be particularly appropriate in situations like the Cloud hypothetical. Once the OFCCP has established a prima facie showing that a specific employment practice has an adverse impact, or that the overall selection process has an adverse impact if the hiring practices cannot be separated, the burden of proof shifts to the employer to demonstrate the challenged practice is job-related and consistent with business necessity.³² In *Griggs v. Duke Power Co.*,³³ the Court did not distinguish business necessity and job-relatedness as two separate standards.³⁴ The Court stated: “The touchstone is business necessity. If an employment practice which operates to exclude [a protected group] cannot be shown to be related to job performance, the practice is prohibited.”³⁵

In cases brought pursuant to the Executive Order, an employer must demonstrate that the challenged practice is job-related and consistent with business necessity in accordance with the Uniform Guidelines.³⁶ The Uniform Guidelines delineate the minimum acceptable methods contractors must use to demonstrate the job-relatedness and business necessity of a selection criterion.³⁷ The Uniform Guidelines apply to all selection procedures used to make employment decisions.³⁸ In pertinent part, the regulations state:

The use of any selection procedure which has an adverse impact on the hiring, promotion, or other employment or membership opportunities of members of any race, sex, or ethnic group will be considered to be

31. S. REP. NO. 114-74, at 29 (2015) (emphasis added).

32. See 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971).

33. 401 U.S. 424 (1971).

34. *Id.* at 431.

35. *Id.*

36. See 41 C.F.R. pt. 60-3 (2016).

37. See *id.*

38. *Id.* § 60-3.2(C).

discriminatory and inconsistent with these guidelines, unless the procedure has been validated in accordance with these guidelines³⁹

The Uniform Guidelines also specifically contemplate that selection rate differences may not necessarily signify adverse impact:

Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group.⁴⁰

Defendants claiming an atypical pool, according to the Department of Labor's Administrative Review Board, bear the burden of showing that its recruitment efforts created a pool of unqualified applicants, thus explaining selection disparity.⁴¹

Courts too have cautioned against uncritical reliance on applicant flow for selection rate comparisons where it might not adequately reflect the pool of qualified persons.⁴² Historically, this occurs in situations in which the application process discouraged or "chilled" applications from certain protected groups (i.e., employers that discouraged African-American applicants) and the available labor market data suggested that the applicant flow for the position did not reflect the larger number of actually available qualified applicants in the protected group.⁴³ The large Asian applicant flow present in the Cloud hypothetical, and in the recent experience of many federal contractors, clearly demonstrates that Asian candidates have not been discouraged from expressing interest in employment—indeed, the opposite is true.

The atypical applicant pool phenomenon can also occur the other way—that is, where the applicant pool reflects a disproportionately *high* percentage of the protected group at issue.⁴⁴ In those circum-

39. *Id.* § 60-3.3(A).

40. *Id.* § 60-3.4(D).

41. *OFCCP v. TNT Crust*, No. 2004-OFC-3, 2007 WL 5309232, at *23 (Sept. 10, 2007).

42. *See* BARBARA T. LINDEMANN ET AL., *EMPLOYMENT DISCRIMINATION LAW* 35-21 (5th ed. 2012).

43. *Id.*

44. *See, e.g., Williams v. City of New Orleans*, 729 F.2d 1554, 1562 (5th Cir. 1984) (en banc) (general population statistics used where applicant flow was distorted); *Hammon v. Barry*, 826 F.2d 73, 78 n.7 (D.C. Cir. 1987) (general statistics used where applicant flow may have been skewed). There are a number of possible explanations for the extraordinarily high Asian applicant flow for technical positions. First, U.S. high-tech companies are among the largest and most sophisticated employers in the world and people want to work for them. Second, due to the highly competitive labor market for such talent, many employers are reluctant to limit the consideration of candidates to avoid missing the proverbial diamond in the rough, which results in enormous applicant pools with very low selection rates. Third, there is at least a perception that high-tech employers are willing to sponsor and obtain work visas for foreign nationals with these skills, and the possibility of working and living in the United States is very attractive to

stances, courts allow employers to use Census or labor market data as proper comparator evidence.⁴⁵

The OFCCP itself acknowledged the need to think critically about applicant flow in responding to comments concerning the Internet Applicant Rule in 2005.⁴⁶ It stated:

OFCCP . . . will compare the proportion of women and minorities in the contractor's relevant applicant pool with labor force statistics or other data on the percentage of women and minorities in the relevant labor force. *If there is a significant difference between these figures, OFCCP will investigate further as to whether the contractor's recruitment and hiring practices conform with E[xecutive] O[rder] 11246 standards.*⁴⁷

The Agency also responded by saying it “*does not agree that it should rely exclusively on availability data compiled by contractors, although the OFCCP will generally consider such data. The OFCCP must ensure that such data is accurate for compliance monitoring and enforcement purposes.*”⁴⁸ Unfortunately, the OFCCP has not fulfilled its promise to investigate further situations like that facing Cloud.

III. Managing the Applicant Denominator: the OFCCP's Internet Applicant Rule

New hiring technologies offer employers a wealth of possibilities to find the very best talent to drive a business strategy forward by relying on new technology to hire employees. However, evaluating the virtual tsunami of résumés submitted to the contractor's career page, LinkedIn, and other sources can be a tremendous challenge. If not done properly, the contractor may be liable for disparate impact or disparate treatment claims if the selection rate analysis denominator calculated by the OFCCP is not statistically representative of the applicant pool. It is therefore important for contractors to know how to manage the denominator.

For that, it is critical to understand the OFCCP's 2005 Internet Applicant Rule (IAR), which modified contractor recordkeeping requirements to address the increasing use of electronic technologies

many foreign nationals. Finally, in today's market, anyone from anywhere in the world can express interest in a position with the click of a mouse.

45. Social scientists agree that external labor market data can be used as a proxy measure of a demographic group's availability if there are problems with the use of actual applicant data. See WALTER B. CONNOLLY, JR. ET AL., *USE OF STATISTICS IN EQUAL EMPLOYMENT OPPORTUNITY LITIGATION* ch. 5 (2015); RAMONA L. PAETZOLD & STEVEN L. WILLBORN, *THE STATISTICS OF DISCRIMINATION* § 4.3 (2016).

46. See *Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes*, 70 Fed. Reg. 58,946, 58,960 (Oct. 7, 2005) (codified at 41 C.F.R. pt. 60-1 (2016)) (“[C]ourts frequently approve of [Census and other labor market data as benchmarks] in recruitment and hiring discrimination cases under Title VII.”).

47. *Id.* (emphasis added) (internal quotation marks omitted).

48. *Id.* (emphasis added).

and the Internet in hiring.⁴⁹ Under the revised regulations, contractors must solicit and maintain certain demographic information in connection with electronic hiring processes⁵⁰ for all “Internet Applicants.”⁵¹ The revised regulations define Internet Applicant as an individual who satisfies the following four criteria:

Expresses Interest in Employment. The individual submits an expression of interest in employment through the Internet or related electronic data technologies;

Possess Basic Qualifications. The individual’s expression of interest indicates the individual possesses the Basic Qualifications for the position;

Considered for a Particular Position. The contractor considers the individual for employment in a particular position; and

Does Not Withdraw from Consideration. The individual at no point in the contractor’s selection process prior to receiving an offer of employment from the contractor, removes himself or herself from further consideration or otherwise indicates that he or she is no longer interested in the position.⁵²

If an employer confines its “consideration” of candidates to those who meet the other parts of the Internet Applicant definition, it need only include those Internet Applicants in its adverse impact analyses. If the employer does not do so, or does not follow the rules consistently, all job seekers assessed or screened for the position, whether they possess the basic qualifications or not, must be included in adverse impact analyses reported to the OFCCP during a compliance evaluation.⁵³

49. See *Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes*, 70 Fed. Reg., 58,945, 58,961 (Oct. 7, 2005) (to be codified at 41 C.F.R. pt. 60-1).

50. By definition, the Internet Applicant Rule is implicated only if the hiring process involves at least some Internet or other electronic consideration of applicants. See *Obligations of Contractors and Subcontractors*, 41 C.F.R. § 60-1.3 (2016); 70 Fed. Reg. at 58,961.

51. The regulations require contractors to preserve for two years any personnel or employment record made or kept by the contractor, including “job advertisements and postings, applications, resumes, and any and all expressions of interest through the Internet or related electronic data technologies as to which the contractor considered the individual for a particular position,” as well as records that identify, “where possible, the gender, race, and ethnicity of each applicant or Internet Applicant.” See *Record Retention*, 41 C.F.R. § 60-1.12(a), (c)(ii) (2016). Under the 2014 revisions to the Vietnam Era Veterans’ Readjustment Assistance Act, as amended (VEVRAA) at 41 C.F.R. Part 60-30, and Section 503 of the Rehabilitation Act of 1973, as amended at 41 C.F.R. Part 60-741 (Section 503), the record retention for these same types of records was lengthened to three years. Although the Executive Order 11246 regulations were not revised, the three-year record retention period should be applied to satisfy VEVRAA and Section 503.

52. See 41 C.F.R. § 60-1.3 (2016) (emphasis added).

53. *Id.* § 60-1.12(d) (2016).

A. Contractors Should Consider Only Candidates Who Express Interest in a Particular Position

The first criterion of the Internet Applicant test requires that the person express interest in employment.⁵⁴ Contractors must maintain consistent and uniform procedures to limit what constitutes an expression of interest. An expression of interest generally includes submission of an application or résumé, posting a résumé on the employer's career website for a specific job, or posting a résumé on an external résumé database for a specific job with the employer.⁵⁵

The regulations provide that the expression of interest must be tied to a particular position. If a candidate, for example, sent a résumé to the recruiting department without specifying which job opening the application was for, the person could be excluded from consideration and thus from the Internet Applicant definition. However, the requirement of expressed interest in a particular position can be deemed waived if the employer disregards particularized expressions of interest to expand the available pool or considers applicants who have not expressed interest in a particular position.⁵⁶

In other words, expressions of interest should remain particularized and exclusive until the candidate affirmatively indicates otherwise. Candidates should be considered only for the positions to which they applied. If a contractor wants to consider someone who has not expressed interest in a particular position, the contractor should contact the person and request an affirmative expression of interest in the position. The contractor's processes for handling expressions of interest should be consistent and documented.

B. Contractors Should First Screen for "Basic Qualifications"

The Internet Applicant definition also requires that an expression of interest indicate that a candidate possesses the "Basic Qualifications" for the particular position.⁵⁷ There are four requirements for qualifications to be considered "basic." The qualification must be: (1) determined in advance of candidate consideration, (2) non-comparative, (3) objective, and (4) related to performance in the position at issue.⁵⁸

1. Basic Qualification Requirements

A. BASIC QUALIFICATIONS MUST BE DETERMINED IN ADVANCE OF ANY CONSIDERATION OF CANDIDATES

Basic Qualifications (BQs) must be determined in advance of the employer's consideration of any expressions of interest for the partic-

54. See 41 C.F.R. § 60-1.3 (2016).

55. *Id.*

56. See 70 Fed. Reg. 58,946, 58,950 (Oct. 7, 2005).

57. 41 C.F.R. § 60-1.3.

58. *Id.*

ular position.⁵⁹ The manner of complying with this requirement depends on whether jobs are advertised. If a position is advertised (e.g., the employer posts a job description), BQs *must* be included in the advertisement as “qualifications . . . that [applicants] must possess in order to be considered for the position.”⁶⁰ Qualifications not indicated as requirements for an advertised position may not be used to exclude persons from the definition of Internet Applicant. For positions not filled by using posted job descriptions or advertisements (for example, because of an urgent need that must be filled without following standard posting procedures), there must be a record that the BQs were established before considering candidates. If the employer cannot show the qualifications were established before candidates were considered, qualifications are not “Basic Qualifications” and may not limit the group of Internet Applicants.

B. BASIC QUALIFICATIONS MUST BE NON-COMPARATIVE AND OBJECTIVE

To ensure that contractors measure applicants without referencing other candidates and consider only the information within the applicants’ resumes and applications, the BQs must be non-comparative and objective. In support of this rule, the OFCCP explained: “One way to tell [whether] an advertised, basic qualification is objective is that a third-party [with sufficient technical knowledge], unfamiliar with the employer’s operation, would be able to evaluate whether the job seeker possesses the qualification without more information about the employer’s judgment.”⁶¹ Examples of non-comparative objective criteria include licenses, degrees, specific experience or years of experience, and language skills.

C. BASIC QUALIFICATIONS MUST BE RELEVANT TO PERFORMANCE OF THE PARTICULAR POSITION

BQs must be “relevant to performance of the particular position and enable the contractor to accomplish business-related goals.”⁶² In establishing this requirement, the OFCCP was careful to note that the requirement does not mean that BQs must be “consistent with business necessity.”⁶³ Instead, the requirement is intended to impose “a reasonable limit on the nature of the qualifications used only to define recordkeeping obligations.”⁶⁴

59. *See id.*

60. *Id.*

61. 70 Fed. Reg. at 58,957.

62. 41 C.F.R. § 60-1.3.

63. 70 Fed. Reg. at 58,957.

64. *Id.* In its summary of the revised regulations implementing the VEVRAA and Section 503, the OFCCP emphasized that it is unlawful for contractors to use qualification standards that screen out or tend to screen out a veteran or any person with a disability (IWD) unless the standard is shown to be job-related for the specific position in question and consistent with business necessity. *See* Affirmative Action and Nondiscrim-

D. STRATEGIC USE OF BASIC QUALIFICATIONS

Contractors should think of BQs as gatekeepers. BQs determine who *may* become an applicant for a particular position. However, it is important to keep in mind that BQs can be more stringent than minimum qualifications for a position. A minimum qualification is the lowest level qualifications a candidate must possess to perform successfully the position's duties. By contrast, a BQ is any qualification that is non-comparative, objective, and relevant to position performance. BQs should include minimum qualifications that satisfy these three criteria (so that individuals who do not possess the lowest level qualifications are not considered) and may also include other qualifications (something above the lowest level qualifications to perform the position's duties).⁶⁵

To use BQs as a gatekeeper, contractors should determine in advance and include in any job postings all qualifications that are objective, non-comparative, and relevant to performance that *may* be used to eliminate candidates from consideration. Contractors may not modify BQs during the hiring process for a particular position to limit those considered Internet Applicants. While contractors may use other criteria to select successful candidates during the process,⁶⁶ only qualifications established *prior* to the selection process can be called BQs and be used to determine whether a person satisfies the second criterion of the Internet Applicant Rule.

As a result, it is far more efficient for contractors to create a list of BQs and later remove unnecessary ones to get a reasonably sized and well-qualified applicant pool. Contractors can apply BQs seriatim to assess the size of the resulting pool and determine whether to apply additional BQs. Contractors do not have to identify specifically in the job posting which advertised qualifications are BQs rather than subjective, comparative qualifications.⁶⁷ Contractors can always con-

ination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities, 78 Fed. Reg. 58,682, 58,689 (Sept. 24, 2013); Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Veterans, 78 Fed. Reg. 58,614, 58,628 (Sept. 24, 2013).

65. Note that the basic qualifications (BQs) help define the applicant pool. Once that occurs, during further cuts (e.g., who to interview), contractors can use other criteria (such as preferred qualifications) to narrow the pool. The additional criteria will explain who was moved from phase to phase of the hiring process and why. They need not be uniform for all the openings nor need they be announced in advance. However, documentation of the criteria used will be useful if decisions are later challenged or reviewed.

66. Contractors may modify the BQs for different positions with the same job title as long as the BQs are determined in advance of the selection process for the particular position.

67. Moreover, contractors need not use the same screening qualifications for the group of Internet Applicants for every posting or every recruiter. They can choose the criteria they believe will yield the best applicants for the specific position. Keeping a record of those criteria or screens will facilitate defending decisions later.

sider such qualifications during the selection process to help determine the best candidates.

Many contractors use BQs such as grade point average, college major, years of relevant experience (for experienced hires), attendance at an accredited school, foreign language fluency (when relevant), and experience with certain technology or platforms. Using such BQs for entry-level jobs could avoid later claims of adverse impact in the hiring process.

The OFCCP has said that, in the absence of demonstrated disparate impact, BQs need not meet the job-related and consistent-with-business-necessity standard for defending against disparate impact claims. The OFCCP, however, reserves the right to assess whether BQs cause a disparate impact. As a result, when establishing BQs, contractors should periodically assess who is eliminated by each articulated BQ, and if any have an adverse impact based on gender, race, or ethnic groups, to assure themselves that BQs are job-related.

2. Contractors Should “Consider” Only Candidates Who Expressed Interest in the Particular Position and Satisfy the Basic Qualifications

A. “CONSIDERATION” REQUIREMENTS

A person is not an Internet Applicant unless “considered for” employment in a particular position.⁶⁸ A contractor “considers” someone for employment if “the contractor assesses the substantive information provided in the expression of interest with respect to any qualifications involved with a particular position.”⁶⁹ Contractors both comparatively and subjectively review a candidate’s qualifications (both as to the candidate and as compared to others in the pool).

B. EFFECTIVE DATA MANAGEMENT TOOLS FOR LIMITING THE GROUP OF INTERNET APPLICANTS

Contractors need not “consider” all candidates who apply for a position. In addition to the strategic use of BQs, contractors may use other non-substantive bases to eliminate candidates from consideration. If contractors eliminate a candidate for some reason other than substantive assessment of the candidate’s qualifications, the candidate was not “considered” and may be excluded from the definition of Internet Applicant.⁷⁰ This includes candidates who are eliminated because they do not follow required application process protocols (if protocols are consistently enforced) or are eliminated by facially neutral data management techniques (DMTs) that do not adversely impact a protected group.⁷¹

68. 41 C.F.R. § 60-1.3 (2016).

69. *Id.*

70. *See id.*

71. 41 C.F.R. § 60-1.3; 70 Fed. Reg. 58,946, 58,950 (Oct. 7, 2005).

In connection with the Internet Applicant Rule, the OFCCP provides guidance on how to manage the large volumes of job application data.⁷² Specifically, the Internet Applicant Rule permits a contractor to use DMTs to reduce the number of expressions of interest considered.⁷³ In today's competitive job market, however, recruiters and company talent acquisition leaders universally find DMTs an obstacle to achieving critical business imperatives. Many employers fight to attract top talent from the same Internet pool of prospective candidates. Recruiters want and need the ability to focus on finding the right talent, rather than a random sample of talent.

That said, after contractors initially screen out those who lack the BQs for the particular position (proceeding through as many BQs as needed to narrow the pool until all are exhausted), at least as to some positions, contractors may use one or more of the following DMTs to limit the pool of Internet Applicants:

- Eliminate candidates with incomplete applications;
- Consider only candidates who applied before (or after) a specified date;
- Impose absolute numerical limits on how many candidates who possess the BQs will be considered (e.g., the first fifty candidates); or
- Use random sampling to select candidates for consideration (e.g., by considering only every tenth applicant or using a random number table to generate through random selection those contractors want to screen).⁷⁴

Contractors may apply more than one DMT to the same job sequentially until the pool is sufficiently limited. Because DMTs are intended to manage data and are tied to the number of applicants and not the position at issue, DMTs may vary across requisitions, including requisitions for the same job title. Contractors should use appropriate disposition codes, maintain a record of all DMTs used, and indicate which candidates were eliminated because of DMTs (including candidates not considered because the position was filled before the contractor reviewed the candidate's résumé and qualifications).

3. Candidate Does Not Withdraw from Consideration

The final prong of the Internet Applicant definition criterion is that the applicant has not withdrawn from consideration prior to receiving an offer or otherwise indicated no further interest in the posi-

72. See 41 C.F.R. § 60-1.3; 70 Fed. Reg. at 58,961.

73. 70 Fed. Reg. at 58,962.

74. 41 C.F.R. § 60-1.3.

tion.⁷⁵ Contractors may conclude a person has withdrawn from consideration based on an express indication of lack of interest in the position; a passive demonstration of disinterest (failure to respond to request or requisition-related communications); or “information the individual provided in the expression of interest, such as salary requirements or preferences as to type of work or location of work, provided that the contractor has a uniformly and consistently applied policy or procedure of not considering similarly situated job seekers.”⁷⁶ Contractors should maintain records regarding candidates eliminated because of an indication of disinterest. An employer that uses expressions of interest to determine whether candidates are no longer interested must ensure such indications are consistently used to draw the same conclusion of disinterest for all candidates and such candidates are consistently excluded from consideration.⁷⁷

IV. Practical Advice to Contractors to Mitigate Risk

Until the OFCCP takes a more critical approach to its investigations and enforcement strategy, the paradox faced by Cloud and other similarly situated real federal contractors leaves them vulnerable to Notices of Violations, enforcement proceedings, and accompanying economic risks. The interim solution to reducing risks lies in acquiring and developing an effective applicant tracking system; regular training and monitoring of the staffing organization and hiring managers; a vigorous, disciplined, and strategic application of the Internet Applicant Rule; and periodic diagnostic analysis under attorney-client privilege. Each of these recommendations is addressed below.

A. *Acquisition of an Effective Applicant Tracking System*

Most applicant tracking systems (ATS) on the market offer an “OFCCP compliant” package. However, buyer beware—some ATS deliver far greater compliance than others. Before acquiring a new or improved ATS, someone with expertise with IAR requirements must review its candidate-facing and recruiter-facing functionality to ensure it is, in fact, fully OFCCP compliant. Among other things to evaluate in such a review is whether the ATS can customize “knock out” questions for a candidate seeking open positions. Examples include (depending on the position): Are you able to work overtime? Are you willing to work different shifts? Are you available to work weekends?

Similarly, an ATS should permit questions to help determine whether a candidate meets the position’s BQs—questions to assess a candidate’s educational background, as well as years of experience performing certain functions, skills, and licenses. Often, using such

75. *See id.*

76. *See id.*; 70 Fed. Reg. at 58,962.

77. *See* 70 Fed. Reg. at 58,962.

questions is more efficient than keyword searches of candidates' résumés. It is also important to determine if the ATS will permit customization of disposition codes. Finally, confirm the ATS can generate the records required to be maintained.

B. Training and Monitoring Recruiters and Hiring Managers

Contractors must develop comprehensive sourcing, selection and recordkeeping policies, and guidance documentation. They should provide periodic training on those policies and practices to recruiters, hiring managers, and other human resources generalists. The policies and guidance should cover such topics as:

- how to open and manage a requisition;
- the development of basic and preferred qualifications;
- the strategic use of data management techniques;
- consistent application of disposition codes, including, but not limited to, accurate disposition of candidates not considered; and
- effective use of external data bases to source candidates.

In addition to a commitment to training, which should be periodically refreshed due to turnover in staffing personnel, contractors should monitor recruiter compliance with policies and guidance on a bi-annual or quarterly basis to ensure proper recordkeeping and full compliance with the IAR. Delaying review until after a compliance evaluation has been scheduled is asking for trouble.⁷⁸

C. Disciplined and Strategic Implementation of the Internet Applicant Rule

Contractors must also develop a disciplined and strategic approach to implementing the IAR. One of the contractor-friendly aspects of the IAR is the ability to reduce applicant flow. Reducing appli-

78. If a contractor retains a staffing firm to use selection procedures to screen job seekers on the contractor's behalf, the contractor has the same recordkeeping requirements as if it screened job seekers itself. See Documentation of Impact and Validity Evidence, 41 C.F.R. § 60-3.15(D)(6) (2016); see also *OFCCP FAQs: Frequently Asked Questions for the Employer*, U.S. DEPT. OF LAB., <http://kb.dol.gov/DOLArticlePage?agency=OFCCP&parentCatValue=Employer&article=kali0000000WFFbAAO> (last visited Feb. 11, 2017). The OFCCP's other recordkeeping rules require federal contractors and subcontractors to keep and maintain records regarding their selection process, such as information about applicants and hires. See, e.g., 41 C.F.R. § 60-1.12. Use of a recruiting firm in the hiring process does not relieve a contractor of its recordkeeping obligations under 41 C.F.R. § 60-1.12; the contractor will be held accountable if the specified records are not maintained. Because the obligation to maintain records belongs to the contractor, not the staffing firm, contractors should consider entering into agreements with staffing firms that require providing contractors with OFCCP-mandated records.

cant volume avoids the statistical realities of the “law of large numbers”: as applicant volume increases, adverse impact becomes more likely. Here are some ways to reduce applicant flow:

- *Create well-defined BQs to eliminate candidates from applicant flow early in the hiring process.* Lateral hire positions likely will have more extensive BQs than entry-level or campus hire positions.
- *Use multiple, specific, and precise BQs.* This will permit explaining and defending a contractor’s selection decisions at each step of the hiring process. Highly precise BQs will also assist in defending the use of “atypical applicant flow” principles discussed above where, if like Cloud, the adverse impact resulted from an extraordinary number of applicants from a protected group. If a contractor can demonstrate that the applicant flow of the protected group was less qualified than the highest selected group, the contractor will be better able to defend using a different, and lower, availability benchmark (e.g., the Census code availability) against which to compare selections.
- *Strategically use “knock out” and “eligibility” questions.* These need not be applied to all requisitions, even for the same title. For example, there may be some requisitions for which a contractor will not sponsor a candidate who will require sponsorship now or in the future. Although not technically BQs, contractors should also strongly consider asking a two-part ICE question about eligibility to work in the United States and apply those answers strategically to further reduce applicant flow. In other words, contractors could consider candidates ineligible if they require immediate sponsorship to work in the United States. This will permit contractors to move forward with candidates who are currently eligible to work (i.e., because they are currently on a student visa), but who may require sponsorship in the future. Additionally, contractors could decide to try to fill some openings without anyone who will need future sponsorship.⁷⁹
- *Rely on “interest” questions.* Asking whether an applicant is able to work weekends, shifts, or overtime is critical with respect to

79. Employers may lawfully ask the following questions: (1) Are you currently authorized to work lawfully in the United States?, and (2) Will you now or in the future require sponsorship to work lawfully in the United States? See Letter from Katherine A. Baldwin, Deputy Special Counsel, U.S. Dept. of Justice, to Karen Moody, Assistant Att’y Gen., Md. Transp. Auth. (Sept. 27, 2010) (on file with U.S. Dept. of Justice) (a company “may ask candidates for the position whether they will require sponsorship for a visa”). If an employer does not wish to provide sponsorship, it may say so in its advertisements. *Id.* (An “employer may state in its job postings that it will not sponsor applicants for work visas.”).

some requisitions. Answering “no” to these types of interest questions for jobs that require weekends, shift work, or overtime is the equivalent of withdrawing interest in the position.

- *Carefully consider the use of a DMT.* DMTs need not be used for all requisitions and typically are most helpful with high volume applicant positions, such as for call centers, but are increasingly helpful as entry-level engineering or technical positions in high-tech and financial services industries. Employers in highly competitive industries often insist on reviewing every candidate to avoid missing the “diamond in the rough” or the “needle in the haystack.” However, if there are hundreds or thousands of candidates, using a DMT of 250 or 500 applicants at a time should generally identify sufficient highly qualified candidates from which to make selections.
- *Use carefully conceived and requisition-based talent acquisition.* Use of so-called “evergreen” requisitions (i.e., requisitions that remain open for extended periods of time) often create record-keeping issues and make it more difficult to defend selection decisions because the quality of the applicant pool can change over time. Thus, candidates with lesser qualifications may be selected at one time, while more qualified candidates were bypassed at prior or subsequent times when better qualified candidates are available. Even if multiple position requisitions are used, the requisitions should expire after a reasonable time (e.g., three months).
- *Avoid so-called “passive” recruiting*—in which recruiters import candidates into the ATS who appear to have both basic and preferred qualifications without requiring them to express interest in a specific position. Sourced candidates must affirmatively express interest in open positions.

D. Periodic Diagnostic Analysis Under the Attorney-Client Privilege

Each year of an affirmative action plan should start by issuing a privilege protocol memorandum from internal or external legal counsel to the team responsible for preparing plans. Preparation includes gathering data and conducting analysis of hiring, promotions, terminations, and compensation. In addition to analyzing hiring transactions for the prior twelve months, careful contractors should conduct periodic diagnostic statistical analysis of hiring during the current plan year. Here are some suggestions for that analysis:

- An offers-and-hires analysis should be conducted by both AAP job group and job title.

- If there is any bottom-line impact, a steps analysis must be conducted to determine whether any particular step in the selection process is driving the impact. A job-title analysis will also provide insights as to whether only certain titles have flags.
- If a structured interview or other test is identified as driving the impact, a contractor should consider conducting a job analysis and preparing validation evidence in accord with the Uniform Guidelines.
- In job titles with flags, a further drill-down to the requisition level analysis should be considered (perhaps depending upon the number of selections). For example, a “multiple pools” analysis by requisition may eliminate statistical indicators.

Conclusion

Compliance with the Executive Order, as well as the myriad of other requirements imposed on federal contractors, is challenging. The vast majority of responsible contractors take their nondiscrimination and affirmative action obligations very seriously. Indeed, many leading contractors have been (and remain) leaders in implementing policies and practices that have transformed the U.S. workplace over the last half century. For example, the 2016 LGBT Executive Order raised few eyebrows in the executive suites or hallways of most federal contractors because they already included sexual orientation and gender identity as protected characteristics in internal equal employment opportunity policies. Contractors have been among the leaders in making commitments to hire veterans. Many contractors commit the human and financial capital to support the spirit and intent of the Executive Order, VEVRAA, and Section 503.

However, the issues raised in this Article are real. OFCCP investigators should consider all of the facts and circumstances proffered by a contractor to assess whether discrimination “because of” protected characteristics has occurred, regardless of whether the Agency can state a prima facie case of disparate treatment or disparate impact discrimination. Applicant pools that suggest availability of certain protected groups materially inconsistent with availability data that the OFCCP has otherwise said can be relied upon should be scrutinized carefully. The Agency should reasonably evaluate what may be contributing to the difference and consider the plausibility of explanations other than discrimination for the difference in selection rates. Finally, if the Agency reasonably believes there is a facially neutral selection practice that is adversely impacting a protected group, it should identify that practice *during* the compliance evaluation and in conciliation discussions so contractors can fairly respond.