

# **Employment Best Practices (That You Probably Forgot About)**

February 16, 2023

**Cassie Alfheim and Evan Szarenski**

*DCI Consulting*

# Presenters



**Cassie Alfheim**  
*Consultant*



**Evan Szarenski**  
*Senior Consultant*

# About DCI

# Data Driven, Client-Focused

## Our Mission

Advancing workforce equity and organizational effectiveness through our dynamic client partnerships.

## Our Vision

We believe every person deserves equal opportunity and fair treatment in the workplace and beyond.

# Our Services

DCI is your one-stop shop for your HR analytics needs



**OFCCP  
Compliance**



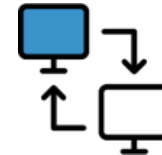
**Diversity, Equity  
& Inclusion**



**Pay Equity**



**Personnel  
Selection**



**EEO Litigation  
Support**



**Testing &  
Validation**

# Agenda

- 1 Hiring: Recruitment**
- 2 Hiring: Dispositioning**
- 3 Hiring: Applicant Accommodations**
- 4 Compensation: Proactive Analyses**
- 5 Compensation: Pay Adjustments**



# Hiring: Recruitment

# Making Outreach Efforts

Must make specific outreach efforts to:

- Minorities
- Females
- Protected Veterans
- Individuals with Disabilities

**Generalized outreach is not sufficient**

Specific outreach to representatives of targeted referral sources could include:

- Direct e-mails
- Phone calls
- In-person meetings
- Facility tours
- Job fairs

# Tracking and Evaluating Outreach Efforts

**Document** specific outreach efforts made for individual positions

Date of activity, organization engaged, activity description, protected groups engaged, costs to participate (if applicable), etc.

**Track results** of outreach efforts

Evaluate how candidates were referred

- Leverage ATS data

Evaluate efforts and certain sources

- Are they worth repeating?
- Document criteria used in evaluation

Look for different recruitment sources if current sources fail to provide members of the protected classes

**NOTE:** Even if not effective, continue utilizing state veterans and disability organizations. OFCCP will specifically ask about efforts to these organizations.



# Recruitment



Direct outreach is time and resource intensive.



OFCCP is very interested in how contractors are evaluating and documenting their outreach efforts.



Whatever you do,  
document – document – document.



# Hiring: Dispositioning

# Refresher: OFCCP's Internet Applicant Rule

An “Applicant” satisfies all four of the following criteria:

1. Individual submitted an **expression of interest** in employment
2. The contractor **considered** the individual for employment in a particular position
3. The individual's expression of interest indicated that the individual possesses the **basic qualifications** for the position
4. The individual, at no point in the contractor's selection process prior to receiving an offer of employment, removed himself or herself from further consideration or otherwise indicated that he/she was **no longer interested in the position**

# What Does Consideration Mean?

The contractor assesses the **substantive information** provided in the expression of interest with respect to any basic qualifications involved with a particular position

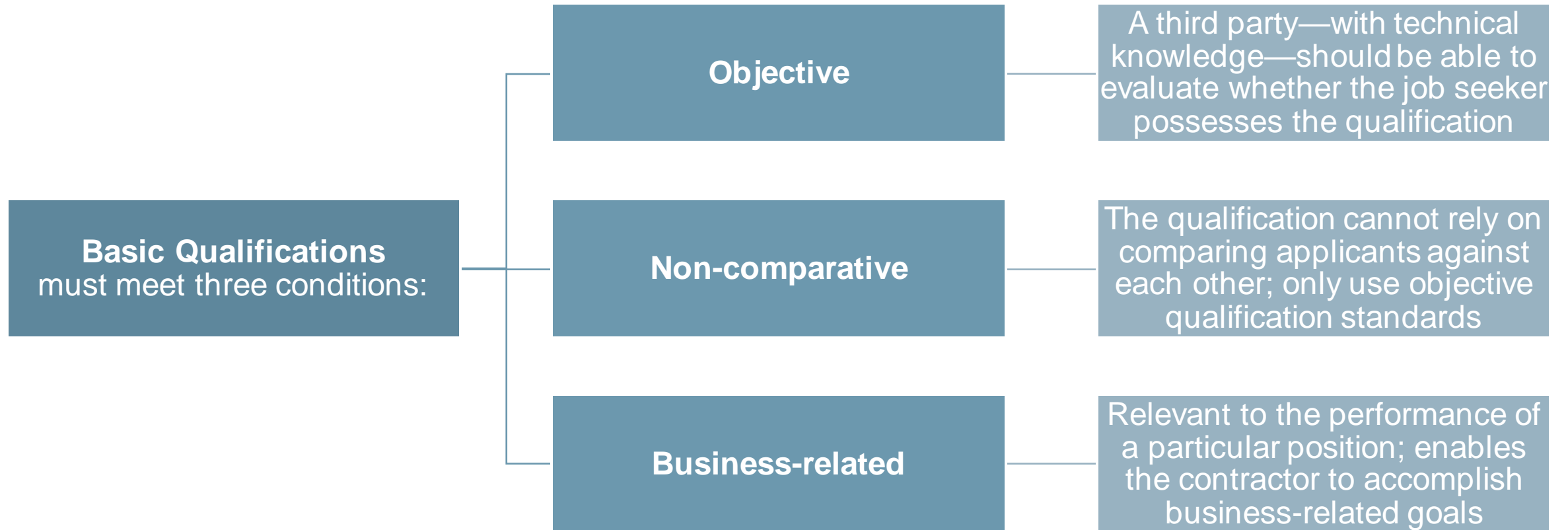
A contractor may **establish a protocol** under which it refrains from considering expressions of interest that are not submitted in accordance with standard procedures the contractor establishes:

- Unsolicited resumes
- Apply via company website
- Must be consistently applied!

Contractors may use **data management techniques (DMT)** that do not depend on assessment of qualifications:

- Provided the sample is appropriate in terms of the pool of those submitting expressions of interest
- Random sampling or numerical limits

# Basic Qualifications



# Withdrawals of Interest

- The individual at no point in the contractor's selection process, **prior to receiving an offer of employment from the contractor**, removes him/herself from further consideration or otherwise indicates that he or she is no longer interested in the position
- Passive withdrawals: Contractors can assume disinterest from applicant after **2 or more non-responses** to inquiries

## Example ways individuals “withdraw” themselves from consideration:

- Failure to complete all of the application requirements
- Falsification of information on the application
- Found another job
- Salary requirements are too high
- No longer interested in the job
- Did not show for the interview
- Could not be contacted for the interview
- Declined the interview

# Analyzing Applicant Data

Applicants who cannot be hired are properly removed from any analysis of applicants provided to OFCCP

Proper dispositioning of candidates is critical because dispositions determine the applicant data that is analyzed by OFCCP

- “Did not meet basic qualifications” – not analyzed
- “Withdrew” – not analyzed
- “Not Selected” – included in analyses

OFCCP may review steps in the consideration process

- Examples: phone screen, interview, background check, drug screen, etc.
- ATS fields “status” and/or “stage” can be helpful, in addition to dispositions, when available

# Recruiters: Make or Break Point

Avoid **mass dispositioning**  
(Position Filled,  
Not Selected,  
etc.)

Avoid **unspecific disposition codes** (Not Most Qualified, Consider for Future Openings)

Do the work **NOW** to avoid having to do the research years down the road

**Specific and Consistent**  
Applicant  
Dispositioning

Fewer  
Applicant  
Records  
Included in  
Analyses

**Lower Risk  
for Statistical  
Disparities**





# Hiring: Accommodating Applicants

# Accommodations: Regs and Requests

“The contractor is required to provide necessary reasonable accommodation to ensure **applicants** and employees with disabilities receive equal opportunity in the operation of personnel processes. The contractor is also encouraged to make its information and communication technologies accessible, **even absent a specific request for reasonable accommodation.**” ([41 CFR 60 741.44\(b\)](#))

Item 20: “Copies of reasonable accommodation policies, and **documentation of any accommodation requests received and their resolution, if any.**”

- Proposed letter adds clarification regarding reporting period (Item 23)

# Accommodations for Applicants

Types of accommodations applicants might seek:

- Assistance navigating careers page and online application
- Sign language interpreting services for interview stage(s)
- Scheduling flexibility due to ongoing treatments
- Accessible conference room for interview

Careers page and/or job postings should offer accommodation assistance via phone and/or e-mail

Ensure accommodation assistance lines are routinely monitored and messages are followed-up on in a timely manner

# Religious Accommodations too?

- “An employer must accommodate to the religious observances and practices of an employee or **prospective employee** unless the employer demonstrates [doing so would put] undue hardship on the conduct of the employer's business.” ([41 CFR 60-50.3](#))
- Types of religious accommodations applicants might seek:
  - Flexible scheduling around prayer or observances
  - Exceptions to dress code provisions that conflict with religious garb
- Companies should be wary when declining any religious accommodation requests, as EEOC also investigates claims of religious discrimination.
- ***Groff v. DeJoy*** – U.S. Supreme Court

# Centralized Accommodation Tracking

- Designate an individual or team responsible for **tracking** all accommodation requests and events that follow
- **Document** items such as:
  - Dates of request, response, implementation, and duration (if applicable)
  - Descriptions of request, accommodation offered, and reason for denial (if applicable)
  - Work location or functional unit
- Avoid pairing sensitive employee medical information with the accommodation log – **keep it general**
  - e.g., “Needs a stool for sit breaks” vs. “Has COPD and will hyperventilate if standing at work for more than 60 minutes at a time”
  - e.g., “Do not schedule on Tuesday afternoons for weekly appointment” vs. “Major depressive bipolar and has to meet with psychiatrist every week”
- **Train** all managers on protocol regarding applicants or employees requesting accommodations (and document the training!)



# Compensation: Proactive Pay Analyses

# Equal Pay Act of 1963

- Prohibits paying women less than men for performing the same job
  - Same job = requires the same skill, effort, and responsibility, and is performed under the same working conditions
  - Courts have been very narrow in their definitions of “equal work”
- Differences in pay are allowed if they can be explained by factors other than sex:
  - Seniority system
  - Merit system
  - Quantity or quality of production
  - A differential based on any other factor other than sex
- Enforced by EEOC, not OFCCP

# Title VII of the Civil Rights Act of 1964

## 42 U.S.C. § 2000e-2 – Unlawful employment practices

**(a) Employer practices** – It shall be an unlawful employment practice for an employer –

- 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his **compensation**, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
- 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

\*Note: Title VII is also enforced by EEOC



# Executive Order 11246

## 41 CFR § 60-2.17

**(b) Identification of problem areas.** The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:

- 3) Compensation system(s) to determine whether there are sex-, race-, or ethnicity-based disparities

Enforced by OFCCP

# State Pay Laws

Since 2016, big uptick in number of states that have created for the first time or amended their equal pay laws

The “big” ones:

- California – amended (and expanded) 3 times already
- Massachusetts
- Oregon
- New York
- Maryland
- Puerto Rico

These new laws with differing standards and requirements pose unique challenges for multi-state employers

# Conducting a Pay Equity Analysis

From an analysis standpoint, what are you going to do with your analysis and/or results?

- Report out to the state
- Demonstrating compliance with OFCCP's regulations
- ESG demonstration and public disclosure
- Identifying systemic pay equity issues and implementing a remedy

# Appropriate Groupings

- **Equal Pay Act** – Equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions
- **California Fair Pay Act** – Substantially similar work, when viewed as a composite of skill, effort and responsibility, and performed under similar working conditions
- **Title VII** – Employees are similarly situated if they are similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions

# Potential Salary Predictors

## Career Path

- New hire
- Promotion
- Demotion

## Experience

- Time in company
- Time in grade
- Time in current job
- Previous relevant experience (age?)

## Performance Ratings

## Training

- Education
- Certifications
- Security Clearance

## Market Information

- Salary Survey Median
- Geographic Adjustments
- Line of Business
- Merger/Acquisition
- H1-B Visa
- Economy During Time of Hire

## Job (if groups non-similarly situated)



# Compensation: Best Practices for Pay Adjustments

# Making a Race/Ethnicity or Sex-Based Remedy

- *Ricci v. DeStefano*, 557 U.S. 557 (2009).
- The Supreme Court held 5–4 that New Haven’s decision to ignore the test results violated Title VII because the city did not have a “strong basis in evidence” that it would have subjected itself to disparate impact liability if it had promoted the White and Hispanic firefighters instead of the Black firefighters.
- Conclusion: Employers need to closely follow Title VII standards (e.g., robust statistical modelling) prior to making salary adjustments based on race/ethnicity and sex.

# Mitigation Objectives and Strategies

Pre-adjustment research is a must!

Traditional cohort/outlier strategy

- Outliers can be defined as appropriate
- Protocols on amount any one outlier receives

More aggressive “move the curve” strategy in order to improve pay gap analysis before you conduct it

- But avoid “peanut buttering” mitigation

How far do you want to move the curve/narrow the gaps?

- Below significance, -1.5, -1.0, ...0?
- \$0.998/\$1.00

But then there is the budget!



# Conducting a Root Cause Analysis



If meaningful differences exist, make the necessary salary adjustments.



However, additional analyses and review should be conducted to determine where and why those differences are occurring.

- Starting Salary
- Job Assignment
- Unconscious Bias
- Performance Ratings
- Merit Increase
- Policies and Procedures



This analysis should be both quantitative and qualitative.

- Data Analytics
- Focused Groups
- Review of Policies and Procedures
- Etc.



Questions?