

CHAIRS, AFFIRMATIVE ACTION  
PRACTICE GROUP

Cara Crotty, *Columbia, SC*  
Angelique Lyons, *Port St. Lucie, FL*

EDITOR IN CHIEF

Robin Shea  
*Winston-Salem, NC*

CHIEF MARKETING  
OFFICER

Victoria Whitaker  
*Atlanta, GA*

## OFCCP May Request Data That Post-Dates Scheduling Letter, Appeal Board Rules

May 15, 2012

By Anne Bell, AAP Specialist  
Winston-Salem, NC Office

The Office of Federal Contract Compliance Programs has regulatory authority to request data beyond the date of a scheduling letter where the request is motivated by a “deficiency,” such as discriminatory adverse impact, discovered during a compliance review.

The ruling, in *OFCCP v Frito-Lay, Inc.*, was made last week by the federal Administrative Review Board, which hears appeals in administrative cases involving the U.S. Department of Labor. ARB decisions can be appealed to the federal courts.

In the Frito-Lay matter, the company provided data for 2005 through 2007 in response to a July 2007 OFCCP scheduling letter. During its investigation, the agency determined there was a statistically significant hiring disparity (3.26 standard deviations) against women for the period between June 13, 2006 and December 31, 2007 (which indicates Frito-Lay had apparently already provided 6 months of data beyond the date of the scheduling letter). In November 2009, the OFCCP asked Frito-Lay to submit data for 2008 and 2009 as well, so that the agency could analyze whether the statistical disparity continued past 2007. The company refused, arguing the request was beyond the scope of the scheduling letter.

The OFCCP filed a complaint, and an Administrative Law Judge ruled in favor of Frito-Lay. The OFCCP appealed to the ARB, which ruled that federal contractors have an ongoing duty to comply with Executive Order 11246 and that the regulations authorize the OFCCP to pursue “a concern about statistically significant disparity in hiring women. . . .” Although noting that Frito-Lay had “objectively good faith reasons for” refusing to comply with the OFCCP’s request, the ARB determined that the request for 2008 and 2009 data was “narrow and motivated by the objective deficiency discovered during the 2007 desk audit.” The ARB also found that the “request for two subsequent years [of data] is consistent with a proper disparate impact analysis.”

The only good news for contractors in this decision is found in a footnote, where the ARB notes that its “focus is narrow in this case. We do not address whether OFCCP has the ability to ask for post-Scheduling Letter data in all desk audits or where OFCCP has not objectively identified a concern about compliance.” In other

Atlanta  
•  
Asheville  
•  
Austin  
•  
Birmingham  
•  
Boston  
•  
Chicago  
•  
Columbia  
•  
Dallas  
•  
Fairfax  
•  
Greenville  
•  
Jacksonville  
•  
Kansas City  
•  
Lakeland  
•  
Los Angeles County  
•  
Macon  
•  
Madison  
•  
Nashville  
•  
Port St. Lucie  
•  
Princeton  
•  
St. Louis  
•  
Tampa  
•  
Ventura County  
•  
Winston-Salem

May 15, 2012

words, the OFCCP *may* be required to identify a specific “deficiency” before requiring a contractor to submit data past the date of the scheduling letter. On the other hand, the lack of a definitive, bright-line rule will leave many contractors uncertain about when and whether the OFCCP may legitimately request such additional information.

We will keep our readers informed if Frito-Lay appeals, and if the outcome affects the way data requests from the OFCCP should be handled.

As always, if you have any questions, please contact any member of Constangy’s **Strategic Affirmative Action Practice Group** or the Constangy attorney of your choice.

*Constangy, Brooks & Smith, LLP has counseled employers on labor and employment law matters, exclusively, since 1946. A “Go To” Law Firm in Corporate Counsel and Fortune Magazine, it represents Fortune 500 corporations and small companies across the country. Its attorneys are consistently rated as top lawyers in their practice areas by sources such as Chambers USA, Martindale-Hubbell, and Top One Hundred Labor Attorneys in the United States, and the firm is top-ranked by the U.S. News & World Report/Best Lawyers Best Law Firms survey. More than 130 lawyers partner with clients to provide cost-effective legal services and sound preventive advice to enhance the employer-employee relationship. Offices are located in Alabama, California, Florida, Georgia, Illinois, Massachusetts, Missouri, New Jersey, North Carolina, South Carolina, Tennessee, Texas, Virginia and Wisconsin. For more information, visit [www.constangy.com](http://www.constangy.com).*