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**UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES**

OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

RECEIVED

JUN 02 2017

Office of Administrative Law Judges
San Francisco, CA

OFCCP'S MEMORANDUM REGARDING BINDING AUTHORITIES

On May 26, 2017, the Court ordered the parties to submit briefs outlining which courts provide binding precedent for the purposes of this Court's rulings in this matter. It is OFCCP's position that decisions of the Administrative Review Board ("ARB"), the Ninth Circuit Court of Appeals and the D.C. Circuit Court of Appeals provide controlling precedent for this case.¹

I. Administrative Review Board decisions are binding on this Court.

ARB decisions represent binding precedent for this case. The Secretary's Order, delegating his adjudicatory responsibilities to the ARB, empowers the ARB to review ALJ decisions regarding OFCCP matters. 77 FR 69378-01 (Secretary's Order 2-2012). In accomplishing that review, the ARB sets controlling precedent: it is instructed to "adhere to the rules of decision and precedent... until and unless the Board or other authority explicitly reverses such rules of decision or precedent." *Id.* The binding nature of ARB rulings is routinely recognized by ALJs. *See, e.g., OFCCP v. O'Melveny Myers*, 2011-OFC-00007, slip op. at 8 &

¹ Of course, decisions of the Supreme Court of the United States are also controlling precedent for this Court.

n. 6 (ALJ Chapman, October 31, 2011) (in a denial of access case, the ALJ recognized that the ARB's interpretation of a disputed term was "binding precedent").

II. Administrative Review Board decisions are subject to challenge in federal courts.

In this case, the ARB decision will be reviewable. Under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* final agency actions, not wholly committed to the discretion of the agency, are subject to challenge in federal courts. 5 U.S.C. §§ 701-704. The process for challenging those actions is provided by the APA unless there is a competing statute depriving the courts of jurisdiction or providing another mechanism for appeal. *See Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1467 (D.C. Cir. 1995) (statutory mechanism for appealing "standards" controls those appeals, but where there is no statutory mechanism for challenging "regulations," the APA applies); *see also California Dep't of Soc. Servs. v. Shalala*, 166 F.3d 1019, 1020 (9th Cir. 1999) (where the statute does not provide a mechanism to challenge a denial of funding, a challenge may be brought under the APA).

As discussed above, the Secretary has delegated his authority to take final agency actions with respect to OFCCP enforcement matters to the ARB. 77 FR 69378-01. However, Executive Order 11246, the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act ("VEVRAA") do not identify a specific method for appealing final agency actions issued by ARB decisions. Thus, OFCCP enforcement actions may only be appealed under the APA. As the Fifth Circuit recognized in a proceeding under Section 503 of the Rehabilitation Act "[w]hen, as here, the relevant administrative agency [(OFCCP)] statutory provisions do not directly provide for judicial review, the APA authorizes judicial review" of final agency actions. *Am.*

Airlines, Inc. v. Herman, 176 F.3d 283, 287 (5th Cir. 1999); *see also Bank of Am. v. Solis*, 2014

WL 4661287, at *3 (D.D.C. 2014) (analyzing a challenge to the Secretary's enforcement under the Executive Order 11246 *via* the APA); *Greer v. Chao*, 492 F.3d 962, 963 (8th Cir. 2007) (analyzing a challenge to the Secretary's enforcement under VEVRAA *via* the APA).

III. The ARB's final decision in this matter may be appealed to either the District Court for the Northern District of California or the District of Columbia so Ninth Circuit and D.C. Circuit Courts of Appeal decisions are binding.

The APA provides that final agency orders may be challenged "in a court of competent jurisdiction...." 5 U.S.C. § 703. Federal district courts are empowered to hear APA challenges to agency actions by the federal question statute, 28 U.S.C. § 1331. *Int'l Bhd. of Teamsters v. Peña*, 17 F.3d 1478, 1481 (D.C. Cir. 1994). In an APA challenge against a federal agency, venue is appropriate where "(A) a defendant in the action resides, (B) a substantial part of the events or omissions giving rise to the claim occurred... or (C) the plaintiff resides if no real property is involved in the action." 28 U.S.C. § 1391(e)(1); *see Nat'l Wildlife Fed'n v. Harvey*, 437 F. Supp. 2d 42, 46 (D.D.C. 2006) (finding that venue would be appropriate in either D.C. or Florida applying 28 U.S.C. § 1391(e) to an APA challenge). While district courts are empowered to overrule ARB decisions by the APA, they are bound to follow the decisions of the relevant Circuit Courts of Appeal and the Supreme Court.

Here, the Agency is headquartered in Washington, D.C. and the subject of this compliance review is Google's employment practices at its headquarters in Mountain View, CA. Accordingly, venue for a challenge to an ARB decision in this matter would be appropriate in either the District Court for the Northern District of California (Google's location, or where a substantial part of the events giving rise to the suit took place) or the District Court for the District of Columbia (the Agency's location). *See Stafford v. Briggs*, 444 U.S. 527, 542 (1980)

(recognizing that the purpose of the venue provisions in 28 U.S.C. § 1391(e) was to provide venue in courts outside of the District Court for the District of D.C.). Challenges in the Northern District of California District Court would be controlled by Ninth Circuit Court of Appeals decisions; Challenges in the District of D.C. District Court would be controlled by D.C. Circuit Court of Appeals decisions.

The choice of location for an appeal is well-recognized by the courts. For example, in the OFCCP litigation involving *United Space*, the Administrative Law Judge regarded Eleventh Circuit precedent as binding on the court, apparently because the matter involved a contractor located in Florida. *OFCCP v. United Space All., LLC*, 11-OFC-00002, 2011 WL 926895 at *10 (ALJ Sarno, Feb. 28, 2011). However, the case was ultimately appealed by United Space to the D.C. District Court, which applied binding D.C. Circuit precedent. *United Space All.*, 824 F. Supp. 2d 68 at 77-78.

It is therefore OFCCP's position that this Court should rely on decisions from the ARB, the Ninth Circuit Court of Appeals and the District of Columbia Court of Appeals as the source of law for its decision. Since venue in either D.C. or California would be appropriate for an appeal, this Court's decisions should comport with those bodies of law.

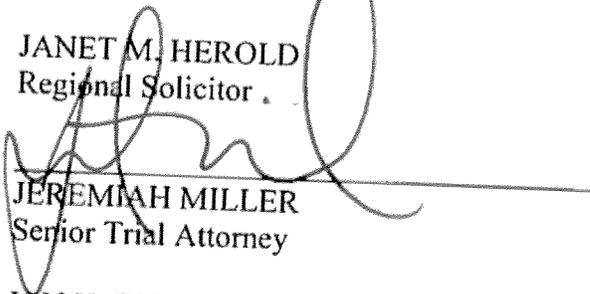
Date: June 2, 2017

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CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On June 2, 2017, I served the attached **MEMORANDUM REGARDING BINDING AUTHORITIES** on Defendant Google Inc. through serving its attorneys below via electronic mail, pursuant to the parties' agreement:

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I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in San Francisco, California on June 2, 2017.

/s/Llewlyn D. Robinson
LLEWLYN D. ROBINSON