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AUG 25 2017

Office of Administrative Law Judges
San Francisco, Ca

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

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

Plaintiff,

v.

ORACLE AMERICA, INC.,

Defendant.

OALJ Case No. 2017-OFC-00006

OFCCP No. R00192699

**DECLARATION OF GARY R.
SINISCALCO IN SUPPORT OF
DEFENDANT ORACLE
AMERICA, INC.'S OPPOSITION
TO OFCCP'S MOTION TO
COMPEL**

I, GARY R. SINISCALCO, hereby declare as follows:

1. I am Senior Counsel at Orrick, Herrington & Sutcliffe LLP. If called as a witness, I could and would testify competently to the matters set forth herein.

2. I respond to Ms. Suhr's affidavit regarding "extensive correspondence" and "pay equity analyses" in paragraphs 4 and 5, respectively, in her affidavit. Set forth below I offer a more complete description of the underlying facts and context of the discussion in the October 6 conciliation meeting regarding pay. I also address issues related to personnel records and documents referenced in paragraph 7 of Mr. Garcia's declaration.

3. First, I provide some background on my experience with OFCCP, its policies and practices, and matters generally involving pay discrimination and pay analyses.

a. In addition to my practice at Orrick, I have extensively written, lectured and taught courses on discrimination law. I am considered a leading authority and speaker on equal pay law. I have co-authored a law review article on the topic. *"The Pay Gap, the Glass Ceiling, and Pay Bias: Moving Forward Fifty Years After the Equal Pay Act,"* ABA Journal of

Labor & Employment Law, Gary Siniscalco, Lauri Damrell and Clara Moran Nabity, Vol. 29, No. 3, Spring 2014, as well as numerous seminar papers. Just in 2017 to date, I have spoken on the topic of pay at OFCCP industry liaison meetings where OFCCP management were present; in Dublin, IR, at the ABA International Labor & Employment Law Committee mid-winter meeting; chaired a PLI program in New York on OFCCP practice and procedure, including a panel on pay; and am scheduled to speak on a comparative law pay panel, hosted by the English Lawyers Association, in London on October 3, 2017.

b. I am also a frequent speaker on panels with government EEO officials. Over the past several years, and while this compliance review has progressed, I have been on panels with National office officials from OFCCP and the Office of the Solicitor regarding substantive law and OFCCP practice and procedure. These panels include past PLI programs, ABA EEO Committee and ABA EEO Committee Government Liaison Program (annual day and a half conference comprised of senior staff from OFCCP, Solicitor's Office, EEOC, and U.S Dept. of Justice) where we jointly and mutually discuss policy and practice issues of concern to the government officials as well as leading members of employers and plaintiffs EEO bar. In February 2016, for example, I chaired an OFCCP program for PLI which included former OFCCP Director Pat Shiu and current Northeast Regional Director, Diana Sen.

c. I have also been selected by NYU to serve on its faculty for its annual employment law training program for federal judges and magistrates.

4. During my time at Orrick I have led or co-led its EEO & Affirmative Action compliance practice group. Among other things I have been involved in numerous pay discrimination cases and administrative compliance reviews conducted by OFCCP all over the country. For Oracle alone, just since 2013, I have been involved in over 40 OFCCP compliance reviews around the country.

5. Prior to joining Orrick nearly forty years ago (1978), I spent 10 years at the U. S. Equal Employment Opportunity Commission. As a law student in 1967-68, I discussed with EEOC commissioners and wrote early substantive Decisions for the Commission itself, many of

which were deemed precedential at the time and published in CCH FEP cases. Upon graduation from law school, I continued as an EEOC Attorney and supervising attorney before being selected in 1973 as EEOC Regional Counsel for the western region where I served in that capacity and then for a short period as a senior trial attorney until I left the Commission and joined Orrick in 1978.

6. I believe it is fair to say that I am extremely well-versed in Title VII law, the law of pay discrimination, including OFCCP's pay directive 307 issued in 2013, its prior pay discrimination standards and voluntary guidelines for self-evaluations issued in 2006, OFCCP's regulations, OFCCP's Federal Contract Compliance Manual (FCCM), and in OFCCP audit practices and policies throughout the country.

7. Based on my experience with OFCCP compliance reviews throughout the country, and through conversations and in formal panels with numerous officials in its national office, and from several regions, when I describe OFCCP's practices in the Pacific region to other OFCCP officials, they typically react negatively or otherwise disavow this region's actions as not representative of, or consistent with, national policies and practices. This includes for example, the following:

a. Employee interviews. I am not aware of any other region in the country that requests all employee contact information during compliance reviews. In almost all other reviews for Oracle, and for other contractors, OFCCP staff typically provide company compliance personnel with the names of employees they would like to interview on-site; Oracle staff arranges and schedules those interviews in private conference rooms; and the employees then meet privately with OFCCP staff. Per OFCCP's FCCM, section 2M00, that section details the procedures and respective rights of employees and managers regarding representation at interviews. In fact, after objecting to OFCCP's employee contact requests here, that is exactly what OFCCP agreed to during its nine days on-site at Oracle headquarters facility.

b. Access to records. During compliance reviews, OFCCP regularly requests data from a contractor that is available and retrievable in an electronic database. This typically

involves pay data during a desk audit and in supplemental data requests. Contractors regularly provide such data to OFCCP. However, in some instances OFCCP seeks to review information that is not retrievable in such a format and may require reference to, or review of, actual files or records. In such cases a contractor may be able to undertake the retrieval and compilation of such information. But in many cases the effort is not easy, may be extremely burdensome and time-consuming, and may involve voluminous amounts of information that may be in multiple personnel records or files. OFCCP's regulations contemplate this issue and provide expressly that a contractor must provide OFCCP staff "**access to records**" during an onsite visit as provided for in its regulations. *See* 41 CFR 60-1.20(f) and 41 CFR 60-1.43.

In the course of the underlying compliance review, Oracle produced to OFCCP extensive amounts of information, including over 400,000 total data points regarding employee compensation and hiring from Oracle's database and over 30,000 pages of documents such as applications and job requisition information, resumes, complaints, personnel files, labor condition applications, and policies. In OFCCP's motion to compel, OFCCP appears finally to identify information it has claimed Oracle allegedly refused to provide during the compliance review. *See* Norman Garcia declaration, para. 7 where he details precisely the type of information in records that OFCCP could have accessed ("education background, recruiter's notes, compensation history, performance ratings and a myriad of other data points"). Instead, OFCCP complains of a "refusal" to provide requested information despite Ms. Holman- Harries having explained in writing the burdensome nature of OFCCP's requests for information such as employees' education, expertise, prior experience, and performance, etc. None of this data is in an easily retrievable database. In this litigation, Oracle has agreed to undertake the massive effort to compile such information, despite the substantial time, effort and burden of doing so. Nonetheless, these types of base personnel records and documents are precisely what are intended by OFCCP's regulations to allow its compliance staff to access for review during the on-site phase of a compliance review. In fact, OFCCP staff in another region did just that during their recent on-site review.

c. Pay equity. Nowhere in its regulations does OFCCP describe, detail or “require” a contractor to conduct something called a pay equity analysis. In fact, such an analysis is not referenced in any federal pay law or regulation. The regulation OFCCP cites, 41 CFR 2.17 (b)(3) is plain in its words and terms. It refers to evaluation of a “compensation system.” It mentions neither pay equity, nor a pay equity analysis.

d. What is pay equity? There is much written on the concept so I will not attempt to describe it here. Suffice to say it is used in Human Resources’ compensation practices, underlies pay discrimination statutes, and is used in social economics. A manager or HR person, when comparing the roles and positions of persons on a work team, may look at internal “pay equity.”

e. Assessing EEO compliance and nondiscrimination. For many reasons, in addition to Oracle’s own well described non-discrimination policies, assessing compliance and legal risks is good corporate governance and human resource policy. In addition, Oracle like other companies, regularly seeks advice and assistance from legal counsel to analyze employment decisions, policies and practices. Therefore, some of this analysis may be done internally as part of HR/compliance oversight. Other efforts can involve privileged audits that OFCCP has long recognized and encouraged. See, for example, 2006 Voluntary Guidelines for Self-Evaluation of Compensation Practices, 71 Fed. Reg., No. 116, June 16, 2006. Of course, while the 2006 standards and voluntary process were rescinded in 2013, the widely accepted legal right of employers to conduct a privileged audit was never discarded by OFCCP.

8. It is in this context that we look at the declaration of Deputy Regional Director Jane Suhr. First, it is worth noting that Ms. Suhr played no active role in OFCCP’s compliance review, did not conduct the audit, and never attended any of the nine days OFCCP was onsite. Regional Director Wipper was present for the first day of the on-site, otherwise the compliance review was left to OFCCP staff and Oracle’s Diversity & Compliance team. I personally was on-site throughout the nine days but mostly interacted with and advised the Oracle team. After a short entrance conference and facility tour, the onsite consisted mostly of manager-level and

non-manager employee interviews. This included OFCCP interviews of 36 manager level staff and several dozen non-manager employees. OFCCP also had access to records but, OFCCP never asked to review any personnel records. Rather they wanted Oracle to do their work, no matter the burden. When Oracle objected, due to the burden and breadth of information requested, OFCCP did nothing, offered no response, and made no request for further access, nothing!

9. After the NOV was issued, without any prior notice to Oracle of OFCCP's concerns or intended findings, there was "extensive correspondence" as briefly noted in Ms. Suhr's declaration. Most of the extensive correspondence after the NOV involved detailed discussion and description of the inadequacies in OFCCP's compliance review processes; effort by Oracle to learn from OFCCP the facts underlying the NOV, and discussion of OFCCP's failure to apply applicable legal standards and its disregard of Title VII law and its own directives for properly analyzing possible pay discrimination. During the period from the NOV on March 11, 2016 and the October 6, 2016 meeting, I did undertake to analyze the pay issues identified by OFCCP in the NOV.

10. Conciliation meeting. Much of the discussion in the October 6 conciliation meeting centered around the factual and legal concerns raised by Oracle in the prior "extensive correspondence." We discussed Title VII law and standards of proof as embodied in Directive 307 and how OFCCP had failed to follow its own Directive in analyzing pay. See Directive 307 8B (Procedures Applying Case-Specific Investigation Protocols (Dir. 2013-03), issued Feb. 28, 2013. The Directive mandates as follows:

In every case there are three key questions to answer:

- a. Is there a measurable difference in compensation on the basis of sex, race or ethnicity?
- b. Is there difference in compensation between employees who are comparable under the contract's wage or salary system?
- c. Is there a legitimate (*i.e.* non-discriminatory) explanation for the difference?

We discussed the fact that OFCCP had failed completely to follow this protocol. We discussed the need to look at and assess facts and details regarding employees' skill, duties and responsibilities as required by Title VII, Directive 307 and OFCCP's own regulations (see 41 CFR 60-20.4). I explained that in many instances at Oracle there are, at most two, or three employees doing the same work, or with the same skills, or responsibilities. Erin Connell and I explained that for most jobs, employees are not fungible or interchangeable—simply stated—not similarly-situated. The upshot of this discussion caused Janet Wipper, the Regional Director, to remark essentially as follows: “well, if we accept what you say, we could never do any statistical analysis.” I, and Erin Connell, said that's correct, and at minimum, any analysis must be more refined. We talked further about employees' numerous job differences that really required a different type of analysis, called a “cohort analysis.” While some types of statistical analyses may be feasible, I explained how we had undertaken comparison of employees working under a particular supervisor where the work would likely be more similar. In fact, in our prior extensive correspondence we provided detailed examples of cohort comparators. Therefore, I did describe how I would review various employee cohorts to assess whether the employees were or were not similarly situated and if so, whether there were legitimate non-discriminatory explanations for pay differences. This is standard privileged audit practice 101. It is also consistent with what OFCCP should have done pursuant to the three part process noted above in paragraph 8. I never said, nor would I even say, that I conduct any pay equity analyses pursuant to 41 CFR 60-2.17(b)(3), since that regulation does not reference, nor does it require, a pay equity analysis.

11. By letter dated August 16, 2017, a true and correct copy of which is attached hereto as Exhibit A, Oracle provided OFCCP amended and supplemental responses to OFCCP's Document Request Nos. 71, 72, 78, 79, 80, 87, and 88.

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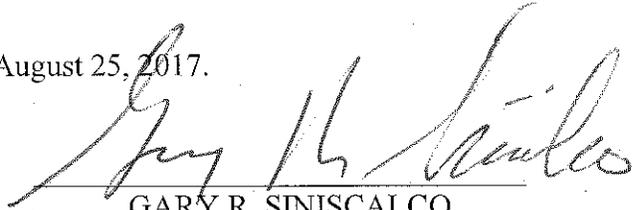
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12. Exhibit B is a true and correct copy of a BNA Bloomberg report "DOL Shuts Down Inquiry Reporting System Amid Possible Breach."

I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct.

Executed in San Francisco, California on August 25, 2017.



GARY R. SINISCALCO

①,

①,

EXHIBIT A



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August 16, 2017

Via E-Mail

Marc Pilotin
Laura Bremer
Office of Solicitor
90 7th Street, Suite 3-700
San Francisco, CA 94103

Re: OFCCP v. Oracle America, Inc. Redwood Shores, California (OALJ
Case No. 2017-OFC-00006)

Dear Marc and Laura:

As discussed during our meet and confer call yesterday (August 15, 2017), in light of the ALJ's comments during our telephonic conference on August 14, 2017, and in the interest of limiting the issues to be presented to the ALJ for resolution, Oracle hereby amends and supplements its responses and objections to OFCCP's Requests for Production Nos. 71, 72, 78, 79, 80, 87, and 88 as set forth below. As we discussed yesterday, these amended and supplemental responses confirm that notwithstanding Oracle's objections, no responsive documents exist with respect to Request Nos. 71, 72, 78, 79, 87, and 88. They further confirm that notwithstanding Oracle's objections, Oracle will produce responsive documents to Request No. 80 that relate to OFCCP's allegation of recruiting and hiring discrimination in the PT 1 job group, and that relate to OFCCP's allegation of compensation discrimination in the Product Development, Support, and IT lines of business. We believe these amended and supplemental responses negate the need for motion practice as to these particular requests for production. Please confirm if your position is otherwise.

REQUEST FOR PRODUCTION NO. 71:

YOUR internal pay equity analyses conducted pursuant to 41 C.F.R. § 60-2.17 for the RELEVANT TIME PERIOD, including the date of analysis and dataset(s) used for the analysis.

RESPONSE TO REQUEST FOR PRODUCTION NO. 71:

Oracle incorporates by reference its Objections to Specific Definitions set forth above. Following its meet and confer conversations with OFCCP, Oracle maintains its objections to this request as overbroad in scope, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case. Oracle further objects to this request to the



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extent it seeks information protected by the attorney-client privilege or the attorney work product doctrine. Oracle further objects to this request on the ground that it calls for a legal conclusion; specifically, as Oracle noted in its meet and confer letter dated June 9, 2017, this request, by referring to a regulation, requires Oracle to read, research, and apply the regulation to the request, which inherently requires a legal analysis of the regulation and its applicability. Oracle further objects to this request on the ground that it requires Oracle to refer to materials outside the request itself.

Oracle further objects to the false premise suggested by this request that Oracle was obligated under 41 C.F.R. § 60-2.17 to perform an "internal pay equity analysis," a term not found in the regulation itself, or in any authority interpreting the regulation. Subject to and without waiving these objections, Oracle responds that, after undertaking a reasonably diligent search, Oracle has determined that it does not have responsive documents to this request in its possession, custody or control.

REQUEST FOR PRODUCTION NO. 72:

All DOCUMENTS RELATING TO actions taken during the RELEVANT TIME PERIOD in response to YOUR internal pay equity analyses conducted pursuant to 41 C.F.R. § 60-2.17.

RESPONSE TO REQUEST FOR PRODUCTION NO. 72:

Oracle incorporates by reference its Objections to Specific Definitions set forth above. Following its meet and confer conversations with OFCCP, Oracle maintains its objections to this request as overbroad in scope, unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case. Oracle further objects to this request to the extent it seeks information protected by the attorney-client privilege or the attorney work product doctrine. Oracle further objects to this request on the ground that it calls for a legal conclusion; specifically, as Oracle noted in its meet and confer letter dated June 9, 2017, this request, by referring to a regulation, requires Oracle to read, research, and apply the regulation to the request, which inherently requires a legal analysis of the regulation and its applicability. Oracle further objects to this request on the ground that it requires Oracle to refer to materials outside the request itself.

Oracle further objects to the false premise suggested by this request that Oracle was obligated under 41 C.F.R. § 60-2.17 to perform an "internal pay equity analysis," a term not found in the regulation itself, or in any authority interpreting the regulation. Subject to and without waiving these objections, Oracle responds that, after undertaking a reasonably diligent search, Oracle has



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determined that it does not have responsive documents to this request in its possession, custody or control.

REQUEST FOR PRODUCTION NO. 78:

ADVERSE IMPACT ANALYSES, as required by 41 C.F.R. § 60-3.15A, performed by YOU or any other PERSONS acting or purporting to act on YOUR behalf or at YOUR direction for the RELEVANT TIME PERIOD.

RESPONSE TO REQUEST FOR PRODUCTION NO. 78:

Oracle incorporates by reference its Objections to Specific Definitions set forth above. Following its meet and confer conversations with OFCCP, Oracle maintains its objections to this request as overbroad in scope, unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case. Oracle further objects to this request to the extent it seeks information protected by the attorney-client privilege or the attorney work product doctrine. Oracle further objects to this request on the ground that it calls for a legal conclusion; specifically, as Oracle noted in its meet and confer letter dated June 9, 2017, this request, by referring to a regulation, requires Oracle to read, research, and apply the regulation to the request, which inherently requires a legal analysis of the regulation and its applicability. Oracle further objects to this request on the ground that it requires Oracle to refer to materials outside the request itself.

Oracle further objects to the false premise embedded in this request that Oracle was required under 41 C.F.R. § 60-3.15A to perform an "adverse impact analysis." Section 60-3.15A sets forth guidelines for "[u]sers of selection procedures," and, as Oracle noted in its letter to ALJ Larsen dated August 8, 2017, OFCCP has not alleged that Oracle used an employee selection device that has an adverse impact, let alone identified any employee selection procedure at issue in this litigation. Subject to and without waiving these objections, Oracle responds that, after undertaking a reasonably diligent search, Oracle has determined that it does not have responsive documents to this request in its possession, custody or control.

REQUEST FOR PRODUCTION NO. 79:

Evaluations of each step or component of the selection (i.e., HIRING) process, as described in 41 C.F.R. § 60-3.4(C), for positions in the PT1 job group and/or Product Development line of business for the RELEVANT TIME PERIOD.



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RESPONSE TO REQUEST FOR PRODUCTION NO. 79:

Oracle incorporates by reference its Objections to Specific Definitions set forth above. Following its meet and confer conversations with OFCCP, Oracle maintains its objections to this request as overbroad in scope, unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case. Oracle further objects to this request to the extent it seeks information protected by the attorney-client privilege or the attorney work product doctrine. Oracle further objects to this request on the ground that it calls for a legal conclusion; specifically, as Oracle noted in its meet and confer letter dated June 9, 2017, this request, by referring to a regulation, requires Oracle to read, research, and apply the regulation to the request, which inherently requires a legal analysis of the regulation and its applicability. Oracle further objects to this request on the ground that it requires Oracle to refer to materials outside the request itself.

Oracle further objects to the false premise suggested by this request that Oracle was obligated under 41 C.F.R. § 60-3.4(C) to perform evaluations of each step or component of its hiring process. Section 60-3.4(C) set forth guidelines for "users" of employee selection procedures, and suggests an evaluation of individual components of the hiring process only where "the total selection process for a job has an adverse impact." But as Oracle noted in its letter to ALJ Larsen dated August 8, 2017, OFCCP has not alleged that Oracle used an employee selection device that has an adverse impact, let alone identified any employee selection procedure at issue in this litigation. Subject to and without waiving these objections, Oracle responds that, after undertaking a reasonably diligent search, Oracle has determined that it does not have responsive documents to this request in its possession, custody or control.

REQUEST FOR PRODUCTION NO. 80:

In-depth analyses of the total employment process, as required in 41 C.F.R. § 60-2.17(b), for positions in the PT1 job group or Product Development, Information Technology, and/or Support lines of business for the RELEVANT TIME PERIOD.

RESPONSE TO REQUEST FOR PRODUCTION NO. 80:

Oracle incorporates by reference its Objections to Specific Definitions set forth above. Following its meet and confer conversations with OFCCP, Oracle maintains its objections to this request as overbroad in scope, unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case. Oracle further objects to this request to the extent it seeks information protected by the attorney-client privilege or the attorney



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work product doctrine. Oracle further objects to this request on the ground that it calls for a legal conclusion; specifically, as Oracle noted in its meet and confer letter dated June 9, 2017, this request, by referring to a regulation, requires Oracle to read, research, and apply the regulation to the request, which inherently requires a legal analysis of the regulation and its applicability. Oracle further objects to this request on the ground that it requires Oracle to refer to materials outside the request itself.

Oracle further objects to the extent that this request seeks non-relevant information (for example, related to promotions and terminations) as referenced in 41 C.F.R. § 60-2.17(b)(2).

During its meet and confer with OFCCP on June 5, 2017, Oracle explained its objections and requested that OFCCP clarify and explain this request. Following OFCCP's explanation, Oracle requested that OFCCP provide a clarified or modified request in writing. Despite OFCCP's failure to provide a clarified or modified request, and subject to and without waiving its objections, Oracle responds that it will, after conducting a reasonably diligent search, produce responsive, non-privileged documents in its possession, custody or control relating to hiring and recruiting for positions in the PT1 job group, and relating to compensation for Product Development, IT, and Support jobs for the ALJ Relevant Period.

REQUEST FOR PRODUCTION NO. 87:

ALL DOCUMENTS RELATING TO validity studies or evaluations that YOU or someone on YOUR behalf conducted RELATING TO any step or component of the HIRING process for employees in the PT1 job group and Product Development line of business during the RELEVANT TIME PERIOD.

RESPONSE TO REQUEST FOR PRODUCTION NO. 87:

Oracle incorporates by reference its Objections to Specific Definitions set forth above. During the meet and confer process, Oracle requested that OFCCP clarify the specific tests or selection procedures relevant to OFCCP's hiring claims on which Oracle would have conducted validity studies. OFCCP declined to specify and instead reiterated that this request is for any validity study that was conducted in relation to the hiring process. Due to OFCCP's lack of limitation or clarification, Oracle maintains its objections to this request on the grounds that it is vague and ambiguous, including but not limited to the phrases "validity studies or evaluations" and "any step or component." Oracle further objects to this request as overbroad in scope, unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor



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proportional to the needs of the case. Oracle further objects to this request to the extent it seeks information protected by the attorney-client privilege or the attorney work product doctrine.

Oracle further objects to the false premise suggested by this request that Oracle was obligated to conduct "validity studies or evaluations" relating to each "step or component" of its hiring process. As with Request Nos. 78 and 79, these requests appear to refer to concepts contained in the Uniform Guidelines on Employee Selection Procedures. But as Oracle noted in its letter to ALJ Larsen dated August 8, 2017, OFCCP has not alleged that Oracle used an employee selection device that has an adverse impact, let alone identified any employee selection procedure at issue in this litigation. Subject to and without waiving these objections, Oracle responds that, after undertaking a reasonably diligent search, Oracle has determined that it does not have responsive documents to this request in its possession, custody or control.

REQUEST FOR PRODUCTION NO. 88:

ALL DOCUMENTS RELATING TO validity studies or evaluations that YOU or someone on YOUR behalf conducted RELATING TO any step or component of the COMPENSATION determination process for employees in the Product Development, Information Technology, and Support lines of business during the RELEVANT TIME PERIOD.

RESPONSE TO REQUEST FOR PRODUCTION NO. 88:

Oracle incorporates by reference its Objections to Specific Definitions set forth above. During the meet and confer process, Oracle requested that OFCCP clarify the specific tests or selection procedures relevant to OFCCP's compensation claims on which Oracle would have conducted validity studies. OFCCP declined to specify and instead reiterated that this request is for any validity study that was conducted in relation to the compensation process. Due to OFCCP's lack of limitation or clarification, Oracle maintains its objections to this request on the grounds that it is vague and ambiguous, including but not limited to the phrases "validity studies or evaluations" and "any step or component." Oracle further objects to this request as overbroad in scope, unduly burdensome, oppressive, and encompassing documents not relevant to any party's claim or defense nor proportional to the needs of the case. Oracle further objects to this request to the extent it seeks information protected by the attorney-client privilege or the attorney work product doctrine.

Oracle further objects to the false premise suggested by this request that Oracle was obligated to conduct "validity studies or evaluations" relating to each "step or component" of its compensation determination process. As with Request Nos. 78 and 79, these requests appear to refer to concepts contained in the Uniform Guidelines on Employee Selection Procedures. But as Oracle noted in its



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letter to ALJ Larsen dated August 8, 2017, OFCCP has not alleged that Oracle used an employee selection device that has an adverse impact, let alone identified any employee selection procedure at issue in this litigation. Subject to and without waiving these objections, Oracle responds that, after undertaking a reasonably diligent search, Oracle has determined that it does not have responsive documents to this request as currently drafted in its possession, custody or control.

Very truly yours,

A handwritten signature in cursive script that reads "Erin M. Connell".

Erin M. Connell

cc: Gary Siniscalco
Warrington Parker

EXHIBIT B

EEOC's investigatory powers aren't simply derivative of a charging party's, he said.

Despite the existence of a circuit split, which is often a predictor of the Supreme Court's eventually being called upon to resolve a legal question, the chances of Union Pacific winning reversal of the Seventh Circuit's ruling aren't real high, management-side attorney Aaron R. Gelb told Bloomberg BNA Aug. 16. Given the high court's "unbending arch" in finding the agency has broad enforcement powers, "it's unlikely the Supreme Court would hold that the EEOC can't continue investigating when it finds evidence of broader discrimination" than that alleged in an individual worker's bias charge. Union Pacific faces "an uphill battle" if it seeks further review of the issue, he said. Gelb, who didn't participate in the case, is a shareholder with Vedder Price in Chicago.

Judges Ilana Diamond Rovner and Ann C. Williams joined the opinion.

EEOC attorneys James M. Tucker and Susan L. Starr in Washington represented the commission. Edward K. Poor and Tracy L. Farley of Quarles & Brady LLP in Chicago represented Union Pacific.

By PATRICK DORRIAN

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Text of the opinion is available at http://www.bloomberglaw.com/public/document/EQUAL_EMPLOYMENT_OPPORTUNITY_COMMISSION_Petitioner_Appellee_v_UNI?doc_id=XHUOAUGG000N.

Safety & Health

DOL Shuts Down Injury Reporting System Amid Possible Breach

The Labor Department temporarily shut down a portal for employers to report injuries and illnesses while the agency investigates a "potential compromise" of a company's electronic data, a DOL official told Bloomberg BNA Aug. 16.

The possible breach comes as the Trump administration earlier this year suspended, and is now considering reversing, a 2016 regulation that would have required for the first time hundreds of thousands of businesses to electronically report employee injuries. Trade groups and employers that oppose the rule have cited concerns that data could be publicized and accessed by unions to critique safety performance and reveal other employee information.

The Homeland Security Department informed the Occupational Safety and Health Administration on Aug. 14 that "there is a potential compromise of user information for OSHA's Injury Tracking Application," according to the DOL official. "At this time, one company appears to have been affected and that company has been notified of the issue. Access to the ITA has been temporarily suspended as OSHA works with the system developer to examine the issue to determine the extent of the problem."

The official didn't identify the company involved in the possible breach.

OSHA's tracking website currently loads with an alert stating that "due to technical difficulties with the website, some pages are temporarily unavailable." The portal went live Aug. 1, although the initial compliance phase of the regulation isn't scheduled to take effect until Dec. 1.

No Confidential Info The first stage of the rule's staggered rollout involved reporting of generic information, such as number of on-the-job deaths and injuries. David Michaels, the OSHA administrator for most of the Obama administration, told Bloomberg BNA that if a breach occurred, it wouldn't have uncovered sensitive employee information.

"The injury data system that we designed last year but was delayed by the Trump Administration did not collect any confidential information," Michaels, now a professor at George Washington University, told Bloomberg BNA via email. "Any data breach would be acquiring data that are designated to be made public."

However, eventually the rule mandates the sharing of more detailed employee records, which include names and sensitive health information, Eric J. Conn, chair of the OSHA practice at Conn Maciel Carey in Washington, told Bloomberg BNA.

"OSHA has stated repeatedly that their intent is to scrub personal identifying information from what they intended to publicize, but stakeholders have expressed concerns about what has now happened," Conn said, referring to the potentially compromised data. His practice represents industry clients subject to OSHA enforcement actions.

Deborah Berkowitz, a former OSHA chief of staff under Obama, told Bloomberg BNA that the agency has "decades" of experience collecting other forms of employer data online.

"This agency has a lot of experience with doing this—and doing it right," said Berkowitz, a senior fellow at the National Employment Law Project. "This is a brand new application, and because of the new administration, it was never tested. OSHA should use this time to get it right and protect the data base."

Debate Continues on Obama Rule It's unclear if the agency's ongoing review of the rule will lead to a decision to cancel portions of the reporting requirement or to void the entire regulation. Some management attorneys have been advising clients not to report during this period of uncertainty in which data disclosure to DOL is voluntary.

Portal security issues shouldn't affect the agency's decision on rolling back the rule, Jamie LaPlante, who represents employers at Porter Wright in Columbus, Ohio, told Bloomberg BNA.

"I do think it underscores the risks of the portal and may be cited as one reason for rescinding the rule if that's what OSHA eventually does," LaPlante said in an email.

The rule applies to employers with 250 or more employees and to locations with 20 to 249 employees in industries designated by OSHA as having historically high rates of occupational injuries and illnesses.

—With assistance from Bruce Rolfson

By BEN PENN

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