

Article

Responding to OFCCP Document Requests Post-*United Space*



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U.S. District Judge Royce Lamberth's 46-page decision in *United Space Alliance LLC v. Solis*, No. 11-746 (D.D.C. Nov. 14, 2011), introduces new uncertainties for contractors facing investigations by the U.S. Department of Labor's Office of Federal Contract Compliance Programs. The case arose from a 2009 OFCCP desk audit of United Space Alliance's facility in Cape Canaveral, Fla.

Applying the DOL's established practices to the initial compensation data provided by United Space Alliance revealed no discriminatory pattern. But the DOL sought additional information because "it appeared that women were earning less more frequently than men." United Space Alliance refused, calling the request "unjustified."

United Space Alliance challenged the DOL's order to produce the additional information in court, asserting violations of the Fourth Amendment, the Administrative Procedure Act, the Fifth Amendment and the Paperwork Reduction Act. The basic theory behind the lawsuit was that OFCCP was limited to using its published methodologies in identifying discrimination. Since the initial analysis revealed no discriminatory pattern in the compensation data, United Space Alliance argued that OFCCP was not permitted to request additional data or to conduct additional data analysis.

The court rejected all of United Space Alliance's legal theories. The court directly rejected United Space Alliance's theory that OFCCP was limited to using its published data analysis techniques. In the court's view, DOL guidance on the issue gives OFCCP substantial discretion in the selection of data analysis techniques.

Despite mandatory language requiring the use of the "threshold test," DOL guidance does not forbid the use of "pattern analysis" or other data analysis techniques. Unless the D.C. Circuit enters a stay pending appeal, the documents requested by the DOL will have to be produced.

In one sense, the United Space Alliance decision addresses only the production of documents. Indeed, the last paragraph of the opinion seeks

to minimize the result on this basis:

Despite the vigor with which United Space has litigated it, there is surprisingly little at stake in this case. The Department of Labor has not accused United Space of employment discrimination. It has not ordered United Space to permit agency investigators onto company premises. The Department has merely required United Space to submit data about its employee compensation. The Court understands that United Space and the entire community of federal contractors are keenly interested in how OFCCP decides whether to request additional data on a contractor's compensation practices, but that interest does not allow those companies or this Court to interfere with the agency's investigatory practices. Submission to such lawful investigations is the price of working as a federal contractor.

To us, the case is about the scope of DOL's authority to parse contractor data in new and unspecified ways and to identify purported discrimination based on unstated rules. We look forward to the D.C. Circuit's analysis of the issue. ■

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