

OFCCP's New Compensation Directive: The Agency's Continued Search for Systemic—or Any—Discrimination in Compensation

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After a relatively quiet 2012, the Office of Federal Contract Compliance Programs (OFCCP) hit the ground running in 2013. In a second major announcement in the new year, OFCCP issued new investigation standards and procedures on February 28 as well as a new policy directive for reviewing the compensation systems and practices of federal contractors and subcontractors.

Directive 307 provides for broad investigation of “any observed difference in compensation” and allows OFCCP compliance officers to utilize a wide range of statistical and non-statistical analytical tools in investigating and remedying compensation discrimination. The Directive, entitled *Procedures for Reviewing Contractor Compensation Systems and Practices*, will apply to all OFCCP compliance reviews scheduled on or after February 28, 2013.

On the same day, OFCCP issued a Notice rescinding the agency's allegedly ineffective 2006 pay discrimination enforcement guidance documents: *Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination (“Interpretive Standards”)* and *Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination (“Voluntary Guidelines”)*. 78 Fed. Reg. 13508 (Feb. 28, 2013). When releasing these new procedures, OFCCP Director Patricia A Shiu announced that “Today, we are lifting arbitrary barriers that have prevented our investigators from finding and combating illegal pay discrimination.”

The Notice of Rescission and the Directive replace all existing written internal OFCCP guidance on compensation enforcement and are intended to officially broaden the agency's compensation enforcement tools.

Additional information regarding the rescission of the 2006 guidance documents as well as Directive 307 may be found at <http://www.dol.gov/ofccp/compguidance/>.

Background—More of the Same

Under Executive Order 11246 and its implementing regulations, contractors may not discriminate in “rates of pay or other forms of compensation.” Contractors must review and monitor their compensation systems to “determine whether there are gender-, race-, or ethnicity-based disparities.” During a compliance evaluation, OFCCP requests compensation data and analyzes contractors’ compensation systems and practices to determine if discrimination exists and, if so, how it should be remedied. 41 C.F.R. § 60-2.17(b)(3), (d).

OFCCP’s announcement of new compensation standards is a continuation of the agency’s strategy in recent years to address compensation discrimination by issuing internal directives, broadening investigation procedures, and imposing new compensation data collection tools. The federal contractor community is well aware that OFCCP had already effectively abandoned the rigorous standards embodied in the 2006 Interpretive Standards. In June 2010, OFCCP quietly issued an internal directive that established a new “trigger” for identifying possible indicators of possible pay bias; shortly thereafter, the agency officially proposed to rescind its Interpretive Standards. In May 2011, OFCCP proposed to amend the Itemized Listing attached to a revised compliance review Scheduling Letter to include a demand that contractors produce detailed individual employee compensation-related data in compliance reviews. Although the Scheduling Letter and Itemized Listing have not yet been approved by the Office of Management and Budget (OMB), OFCCP is already requesting this individualized data in almost every compliance review.

2006 Compensation Guidance Rescinded to Provide More Flexibility to OFCCP Investigators

OFCCP’s 2006 Interpretive Standards established analytical procedures to be followed by the agency in assessing and alleging systemic compensation discrimination; the Voluntary Guidelines provided a methodology and “safe harbor” for contractors’ self-evaluation of pay practices. OFCCP now complains, however, that these guidelines “addressed only a single type of pay practice [systemic discrimination] using limited evidence and a highly specified analytic framework.” 78 Fed. Reg. at 13509. The Interpretive Standards and Voluntary Guidelines “impede the agency’s ability to detect and investigate compensation discrimination” and “significantly undermine the ability of the agency and contractors to vigorously investigate and identify compensation discrimination consistent with Title VII principles.” *Id.*

With the “impediments” of the Interpretive Standards and Voluntary Guidelines in mind and “to provide transparency,” OFCCP will no longer be limited in its investigation or analysis of potential pay discrimination. The agency will use both statistical and non-statistical analyses, as well as anecdotal evidence, to ferret out and remedy compensation discrimination, even if no pay disparities are reported by employees.

OFCCP will now assume a case-by-case approach to analyzing compensation issues and will consider five principles when reviewing contractor pay practices:

- Determining the most appropriate and effective approach from a range of investigative and analytical tools. OFCCP will utilize “preliminary analysis techniques” early in a compliance review to prioritize resources and determine if further analysis is warranted, such as a review of data and payroll practices, employee interviews, statistical and non-statistical analyses, and consultation with labor economists and other experts.
- Considering all employment practices that may lead to compensation discrimination. OFCCP’s inquiry into “compensation” can include salary, wages, overtime pay, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options, profit sharing, and contributions to retirement, as well as access to earnings opportunities (such as higher-paid positions, work assignments, training, desired sales territories, etc.)
- Developing appropriate pay analysis groups. OFCCP may combine employees into “appropriate pay analysis groups,” which are comparable for purposes of the contractor’s pay practices but which may not reflect distinct job titles, units, categories, or job groups. The size and definition of the group used will depend on the particular industry, the types of jobs and compensation at issue, the contractor’s pay practices, and available data.
- Investigating large systemic, smaller unit and individual discrimination. When data are inappropriate or insufficient to support a claim of systemic pay discrimination, OFCCP may examine the data to address compensation differences based on specific job titles, units, or other small groupings.
- Reviewing and testing factors before including them in analysis. OFCCP will evaluate any factor offered by the contractor to explain differences in employee pay to determine whether it should be included in the agency’s analyses.

What Title VII Discrimination Standards Will Apply?

OFCCP insists that it will be using its legal authority to hold contractors to the same legal standard that courts use to evaluate pay discrimination claims under Title VII of the Civil Rights Act. Nonetheless, it remains unclear what Title VII standards will apply.

OFCCP compensation reviews have focused on current pay disparities and the contractor’s ability to explain the non-discriminatory reasons for such disparities. Significantly, the agency’s inquiries do not focus on identifying specific discriminatory decisions that may have caused the disparities. OFCCP’s continued focus on current pay disparities seems at odds with more recent controlling Title VII law. According to the majority opinion in the 2007 U.S. Supreme Court case Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007), Title VII claimants cannot focus on current pay because Title VII itself focuses only on discrete pay decisions. A majority of the Court dismissed Ledbetter’s lawsuit because she did not identify or challenge any discrete pay decision occurring within the Equal Employment Opportunity Commission’s (EEOC) 180/300 day charge-filing period.

The Lilly Ledbetter Fair Pay Act of 2009 reversed the timeliness portion of the Ledbetter decision, but did not change the crucial portion of the majority decision, namely that Title VII focuses solely on discrete decisions, not current pay. According to the current statute, “an unlawful employment practice . . . with respect to compensation discrimination” is

something that results from a discriminatory decision or other practice. 42 U.S.C. Section 2000e-5(e)(3)(A).

Despite the fact that OFCCP observers have commented on the apparent disconnect between OFCCP practice and current Title VII law for several years, the new Guidance does not address this issue or indicate any change in direction. Time will tell if OFCCP's approach to evaluation of compensation discrimination in current pay will withstand judicial scrutiny.

Directive 307's New Investigative Procedures—Emphasis on Case-by-Case Analysis Provides Little Guidance to Contractors

In the comments to OFCCP's Notice of Rescission, contractors requested that OFCCP provide clarity and consistency about how the agency will investigate pay practices. Directive 307 establishes procedures to be used by OFCCP in reviewing compensation systems and practices in line with the factors addressed in the Notice of Rescission. The Directive addresses how OFCCP will review compensation data received at the beginning of a desk audit as well as at subsequent stages of a compliance evaluation. These procedures, which apply to any compliance review scheduled on or after February 28, 2013, will also apply to the investigation of employee complaints alleging compensation discrimination.

Despite OFCCP public statements to the contrary, the new Directive offers little "clear guidance" at all for federal contractors in preparing affirmative action programs that will pass the scrutiny of an OFCCP compliance review. Rather, the Directive provides investigators continued broad discretion to examine a wide array of contractor practices and to make case-by-case judgments on how to proceed in any given compliance review. The Directive states the following:

Investigation of potential compensation discrimination presents complex and nuanced issues. The choice of the best approach for a case depends upon the underlying facts, the available data, and the contractor's compensation system and practices. As such, OFCCP takes a case-by-case approach to analyzing compensation issues.

1. Preliminary Analysis and Assessment of Quantitative and Qualitative Factors

Generally, OFCCP will conduct a "preliminary analysis" of summary compensation data submitted pursuant to the scheduling letter. OFCCP will use the preliminary analysis to determine whether to continue the compliance evaluation, including requesting and reviewing individual employee-level data. OFCCP will not limit or define the scope of further review based solely on the results of the preliminary analysis.

The preliminary analysis usually will assess both quantitative and qualitative factors.

Quantitative factors may include:

- The size of the overall average pay difference based on race and gender;
- The size of the largest average pay difference within job groups or the contractor's

- existing salary band or pay grade system;
- The number of job groups or grades where average pay differences based on race or gender exceed a certain threshold; or
- The number of employees affected by race- or gender-based average pay differences within job groups or grades.

Qualitative factors may include:

- Compliance history and OFCCP or EEOC complaints (a “bad actor” factor);
- Anecdotal evidence (such as employees who can testify about discrimination);
- Potential violations involving other employment practices (another “bad actor” factor); or
- Data integrity issues.

2. Analysis of Individual Employee-Level Data

In any case where individual data is provided or requested, OFCCP will assess whether or not the information is complete and may seek clarification or supplementation of the materials submitted. Data that the contractor maintains in an electronic form must be submitted in a useable and readable electronic format upon request.

3. Use of a Wide Range of Investigative and Analytical Tools

As noted above, a variety of tools are available to OFCCP for investigating and analyzing compensation issues and there is no single tool that must be used in every case. The particular analytical tool, or combination of tools, that will be used depends on the facts of the case. These tools may include statistical analysis, non-statistical analysis, including cohort analyses, and anecdotal evidence collected as part of the investigation.

In every case OFCCP will seek to answer three questions:

- Is there a “measurable difference” in compensation on the basis of sex, race, or ethnicity?
- Is the difference in compensation between employees who are comparable under the contractor’s wage or salary system?
- Is there a legitimate non-discriminatory explanation for the difference?

OFCCP does not say how it will make these determinations or how “measurable difference” is defined, but asserts that “[s]tatistical evidence is not required in all compensation cases; other evidence may be used to evaluate potential discrimination in pay.” Neither is anecdotal evidence or individual complaints of pay discrimination required for OFCCP to proceed with its investigation. *Frequently Asked Questions: OFCCP Procedures for Reviewing Contractor Compensation Systems and Practices (“FAQs”),* Nos. 28 and 29.

Note also that the Directive instructs OFCCP compliance officers to examine “[h]igh level professional and managerial positions . . . to determine if ‘glass ceiling’ issues exist.”

4. Consideration of All Employment Practices—Investigation of Any Observed Difference

The Directive allows OFCCP compliance officers to conduct broad investigations into a host of other areas that theoretically affect compensation or have the potential to lead to compensation disparities. The compliance officer “may investigate any observed differences in pay, other earnings or benefits, job assignment/placement, training/advancement opportunities, differences in opportunities to increase compensation, or other unexplained differences.”

5. Develop Pay Analysis Groups That Are Larger Than Job Titles and AAP Job Groups

After examination of all the data and information submitted by the contractor, OFCCP will develop pay analysis groups. A pay analysis group is a group of employees who OFCCP considers comparable for purposes of the contractor’s pay practices and may include multiple job titles, units, categories, and job groups. Pay analysis groups are developed to examine possible systemic issues. The analysis may be based on groups that are larger than job titles and AAP job groups. OFCCP may use various pay analysis groups and conduct different types of statistical analysis or testing to determine whether discrimination exists. The analytical model used will initially test large pay analysis groups but OFCCP may conduct subsequent tests of smaller groups or individuals. OFCCP may conduct this analysis at the desk audit stage or may proceed to an onsite investigation even before conducting this analysis.

6. Investigate Systemic, Small Group, and Individual Discrimination

OFCCP may examine the compensation data for systemic, small group, or individual discrimination based on its initial analysis. When the data are insufficient or inappropriate for regression analysis, OFCCP will look for possible small group or individual discrimination involving specific job titles, particular units, or locations. Individual or small group pay disparities will typically be analyzed under the disparate treatment theory of discrimination. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualification, and other unspecified “objective factors.”

7. Review and Test Contractor Factors Before Accepting the Factors for Analysis

Typically, OFCCP asks the contractor what factors the contractor considered in making compensation decisions. Rather than accepting the contractor’s criteria at face value, the Directive requires that OFCCP evaluate whether the factors offered by the contractor are relevant and consistently applied, and whether using the factor presents adverse impact issues. This evaluation can include interviews with contractor employees to verify the application of the factors to compensation decisions. Clearly, the Directive anticipates that OFCCP will have complete discretion to accept or reject factors provided by the contractor and to determine whatever analysis it deems appropriate, once again, on a case-by-case basis.

8. Conduct Onsite Investigation, Offsite Analysis, and Refinement of the Model

After completing the previous steps in its compensation investigation, OFCCP will decide on a preliminary model to analyze the contractor's compensation data and will give the contractor an opportunity to provide any additional relevant information to be considered.

At that point, OFCCP may conclude the compensation investigation; decide to conduct an onsite audit, and/or and decide if refinements to the analytical model are needed.

If OFCCP alleges pay discrimination, remedies include make whole relief to victims, cessation of the discriminatory practice(s), and prevention of the violation's recurrence. Back pay and benefits, salary adjustments, modification of policies and procedures, providing training opportunities and job placements are all possible remedies, as well as legal action—including debarment—for contractors “who refuse to comply and for the worst offenders.” *FAQs*, No. 32.

What Do You Do Now?

Contractors, beware! Despite OFCCP's considerable focus on perceived widespread compensation discrimination, it is well-known that the agency has had very limited success in actually finding such discrimination by federal contractors. Directive 307 puts contractors on notice that OFCCP intends to aggressively continue its search for systemic, small group, and/or individual discrimination with a broad arsenal of “flexible” and “case-by-case” investigative approaches.

In light of the above, we recommend the following actions:

- First of all, much of the investigative process outlined in Directive 307 is not new. If you have been through an OFCCP compliance review in the last three years, you will recognize some of the methodology that OFCCP has finally formalized in this Directive. OFCCP has had very little success with systemic pay discrimination cases but the “onesy twosy” cases using a cohort analysis have reaped monetary rewards for the agency and the alleged victims of discrimination.
- At least annually, conduct an analysis of your compensation system(s) to determine whether there are gender, race, or ethnicity-based disparities. This analysis, which is required by the affirmative action regulations at 41 C.F.R. § 60-2.17(b)(3), should be conducted under privilege.
- Do not rely on any single “trigger” or “indicator” test to analyze compensation. OFCCP has made it clear in its Notice of Rescission and Directive 307 that its investigative tools and methodologies are many and varied; it will not rely on the “2% or \$2000” threshold or any other threshold to limit its investigations into pay discrimination. Recognize also that OFCCP is not known for its consistency of investigative methodologies among regions, offices, or compliance officers; this fact has led to great frustration among the contractor community even beyond compensation investigations. Consider which “pay groupings” may be at issue in a compliance review: job groups, salary grades, functions, levels, etc. Note also that “pay analysis groups” may include groups of employees in different job titles, functions, levels, and categories who OFCCP believes are comparable for purposes

of pay analysis, but such groups could also consist of a single job title or employee category.

- Review your compensation policies and procedures, including those relating to initial pay, promotions, merit increases, performance increases, incentive compensation, work and shift assignments, overtime, commissions, and any other practice that may have an effect on an employee's compensation. Are such policies current? Are they consistently implemented? Are pay decisions well-documented?
- Ensure that managers and hiring officials understand the importance of consistent, well-documented pay decisions, as well as other aspects of equal employment opportunity.
- If your establishment is selected for an OFCCP compliance review, determine how to "put your best foot forward" in submitting aggregated compensation data in response to Item 11 of the current Scheduling Letter's Itemized Listing. Do you submit the information by job title, job group, and pay grade? Regardless of how you submit the information, OFCCP will likely ask for additional, more detailed information. Know where your risk is.
- Be prepared for OFCCP inquiries into executive, managerial, and professional pay practices and information, including "perks" such as parking, gym memberships, etc. Historically, this type of investigation has been limited to OFCCP's "corporate management" or "glass ceiling" reviews, but Directive 307 requires it to be part of even routine establishment reviews.
- OFCCP appears to be schizophrenic about how Title VII principles apply; indeed, it does not concede that Title VII's proscription against discriminatory pay decisions is the law, rather than the agency's focus on current pay. Know the difference and insist on a proper analysis. If OFCCP alleges pay discrimination after evaluating only current pay (which is what you provide to OFCCP in Item 11, based on your workforce when the AAP period begins), investigate whether any pay decision was actually made during the relevant time period and ensure that OFCCP compares "apples to apples" by providing information on the entire affected group of employees (actives and terminated), not just the active employees who are included in your AAP.
- If OFCCP's compliance officers investigate pay discrimination in the granular fashion anticipated by Directive 307, compliance reviews will be long, drawn-out, and very expensive endeavors. Be prepared for the long haul with OFCCP but ensure that you know and assert appropriate defenses to irrelevant and/or overbroad analyses and requests for information.

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