

## Federal Contractors Beware - New Guidelines for Assessing Discrimination in Pay and Benefits

In an ongoing effort to assist federal contractors and subcontractors with an understanding of their obligations concerning non-discrimination and affirmative action, last week, the Office of Federal Contract Compliance Programs (OFCCP) issued final standards regarding *systemic* compensation discrimination. The OFCCP issued these standards pursuant to Executive Order 11246, which prohibits federal contractors and subcontractors with contracts in excess of \$10,000 from, among other things, discriminating against employees with respect to "rates of pay or other forms of compensation."

These are the first standards issued by the OFCCP on the subject of systemic compensation discrimination. The standards will be used only during OFCCP audits and compliance reviews to analyze the presence of systemic (also known as pattern and practice) compensation discrimination. They are not designed to deal with situations of individualized compensation discrimination. Moreover, the standards only come into play when a preliminary analysis by the OFCCP suggests the possible presence of discrimination. In other words, the OFCCP will continue to utilize its so-called "tiered-review" approach, wherein it will review all data received by employers in response to Item 11 of the OFCCP's compliance review scheduling letter, plus certain employee-specific compensation and personnel information provided by employers. If this data indicates potential compensation discrimination, the OFCCP will then conduct a formal evaluation that is governed by these standards.

Significantly, the OFCCP's standards took effect immediately on June 16, 2006. Therefore, contractors must take steps now to ensure that their employee pay and compensation practices are not suggestive of systemic discrimination. Key components of the standards are as follows:

- *Adoption of the similarly situated analysis.* Borrowing from Title VII and other non-discrimination statutes, the standards formally adopt the "similarly situated" benchmark for comparing employee pay. According to the standards, "Systemic compensation discrimination exists when there are statistically significant compensation disparities between similarly situated employees." Thus, the OFCCP's first step in assessing whether compensation discrimination exists will be to divide the workforce into separate groups of similarly situated employees. In order to determine whether employees are similarly situated, the OFCCP will focus on job duties, responsibility levels, skills and qualifications, and other relevant factors, as determined by reviewing job descriptions and interviewing managers, Human Resources personnel, and other employees.

By adopting the similarly situated benchmark, the OFCCP has rejected its historical reliance on the controversial "pay grade" theory. Under this theory, the OFCCP divided the workforce according to pay grade or pay range. The theory was premised on the idea that an employer's own pay grades identified which jobs were deemed to be similar in nature. Going forward, the OFCCP will focus on the employees' actual duties, not necessarily on how employees are grouped or classified by the employer.

- *Use of multiple regression analysis.* As quoted above, the guidepost for assessing compensation discrimination is whether there are "statistically significant compensation disparities" between similarly situated employees. Under the standards, a statistically significant disparity occurs at a level of two or more standard deviations, based on generally-accepted measures of statistical significance. For purposes of making this statistical comparison, the OFCCP standards adopt a statistical device known as "multiple regression analysis." This device enables the OFCCP to compare the compensation of similarly situated employees while at the same time controlling for legitimate non-discriminatory factors that influence an employer's pay decisions, such as education, experience, performance, and productivity.

In certain circumstances, the OFCCP announced it may also use “pooled” multiple regression. Under this analysis, the OFCCP combines different groups of similarly situated employees, while still controlling for their membership in these separate groups.

- *Reliance on anecdotal evidence.* In conducting its audits and compliance reviews, the OFCCP will not rely on statistical evidence alone. According to the standards, except in unusual circumstances, the OFCCP will only cite an employer for a violation if it has anecdotal evidence of discrimination. In essence, anecdotal evidence refers to actual reports of, or first hand accounts of, compensation discrimination, as opposed to conclusions borne out by the statistics.

The above standards illustrate how the OFCCP will audit employer compensation practices for purposes of determining systemic discrimination. However, contractors should not await an OFCCP audit to determine whether they are at risk for non-compliance. In fact, the OFCCP’s affirmative action regulations already require covered contractors to evaluate their compensation practices on their own. To help contractors make this evaluation, the OFCCP released Voluntary Self-Evaluation Guidelines on the same day that it implemented the systemic compensation discrimination standards summarized above. Highlights of these voluntary guidelines include:

- *Potential incentive for use of OFCCP methodology.* Under the guidelines, a contractor has two options for conducting its self-evaluation. The contractor can conduct a compensation self-evaluation that “reasonably” implements OFCCP’s prescribed methodology. If the contractor does, as an incentive, the contractor will be deemed to be in compliance with Executive Order 11246. Alternatively, the contractor can select its own form of compensation monitoring, in which case the OFCCP will evaluate the contractor’s compensation practices itself.
- *Requirements of the OFCCP-prescribed methodology.* According to the guidelines, a self-evaluation that comports with the OFCCP’s methodology will include the following components: (1) the self-evaluation must be performed on employees in similarly situated groups; (2) multiple regression analysis must be used for any workplace with 500 or more employees; (3) the statistical analysis must include a significant majority, at least 70% of the employees in the workplace; (4) the self-evaluation and statistical analysis must be conducted annually; and (5) any statistically significant compensation disparities must be investigated and resolved.

Because both the OFCCP’s standards and guidelines take effect immediately, it is extremely important that contractors and subcontractors act now, before the OFCCP reviews your compensation practices and issues you an OFCCP notice of violation. If you have any questions concerning these standards and guidelines, or any other matters pertaining to federal contractor obligations under Executive Order 11246, please contact the Womble Carlyle Labor & Employment attorney with whom you usually work.

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