



Hospitals Are Still In The OFCCP's Crosshairs

Insights

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On February 12, 2015, U.S. Labor Department's Office of Federal Contract Compliance Programs (OFCCP) underscored its intent to continue to scrutinize hospitals, including nonprofit hospitals. The OFCCP found that Lahey Clinic Hospital in Burlington, Massachusetts had discriminated against 38 female housekeepers by paying them \$.70 per hour less than male housekeepers. As a result, and while denying liability, Lahey agreed to enter into a settlement agreement with the OFCCP that will pay the affected women a total of \$190,000 in lost wages, interest and salary adjustments.

The settlement followed an OFCCP investigation that found that from 2010-2012, the Lahey Clinic had failed to pay female housekeepers, who were predominantly Haitian, Créole-speaking African Americans, at the same rate as their male counterparts. OFCCP wisely did not include "Haitian, Creole-speaking African Americans" in the official description, having been recently chastised by a federal court for alleging discrimination against "non-Asians," a category the court found is not a protected category.

OFCCP Director Pat Shiu, a member of President Obama's National Equal Pay Task Force, had this to say about the settlement: "While 70 cents might not seem like much, over the course of a year it adds up to a \$1,500 disparity....Workers don't often know how their pay compares with that of their colleagues, and discrimination like this is often hidden. That's why OFCCP's ability to audit and review contractors' pay practices is critical to closing the pay gap once and for all."

The standards employed by OFCCP in the Lahey Clinic matter have subsequently been modified and the OFCCP has now imposed even more stringent compensation evaluation methods. On February 28, 2015, the OFCCP issued Directive 307, which allows a case-by-case analysis to review compensation, but does not provide any numeric triggers or thresholds to provide guidance for employers. Significantly, the requirement that compared employees must be "similarly situated" remains so employers are well-advised to take seriously their federal contractor obligation to continue compensation self-audits and to make equitable adjustments if disparities are identified that can't be explained by consistently applied legitimate business factors.

The OFCCP has been working hard to extend its jurisdiction over hospitals. Currently, hospitals whose only alleged federal contract connection is their acceptance of TRICARE or similar healthcare insurance for federal employees, are preparing to enter into the second year of a five-year moratorium imposed by the Secretary of Labor. Secretary Perez notified the healthcare providers that the OFCCP would graciously forego its audits of these entities for five years. Oddly, the

providers that the OFCCP would graciously forego its audits of these entities for five years. Sadly, the 2011 National Defense Authorization Act had expressly precluded OFCCP coverage on this basis. OFCCP appears unwilling to relinquish its position and vows to continue to pursue this industry.

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