



# OFCCP Announces New Tactics To Review Compensation

BE READY TO DEFEND YOUR COMPENSATION DECISIONS

Insights

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The Office of Federal Contract Compliance Programs (OFCCP), the U.S. Department of Labor agency that enforces federal contractor affirmative action requirements, has significantly expanded its investigative tactics for compensation discrimination. This will have a significant effect on federal contractors whose compensation decisions are challenged.

On February 28, the OFCCP formally rescinded its 2006 Voluntary Guidelines and Compensation Standards. At the same time, it issued a new policy directive, which establishes the new standards that will be used when evaluating compensation disparities.

To help explain the rescission and Directive 307, the agency has issued on its website a Fact Sheet, FAQs, a press release, and a notice of an upcoming webinar. The new regulations rely on Title VII principles, an approach which comports with its recent adoption of the EEOC's criminal-background guidance, as well as its "sister agency" status with the EEOC.

Employers in general, and federal contractors in particular, should be ready to defend their compensation decisions even more vigorously under these new standards. If your compensation practices are found discriminatory, you could face substantial financial liability in backpay and interest, often in a class-wide context.

## Prior Guidance Is Now Rescinded

Stating that it found the prior guidance and standards limiting and too narrow, the OFCCP has now endorsed a "rigorous fact-based assessment of a broad array of pay practices" based on Title VII analysis. The Title VII discrimination guidance includes addressing all forms of compensation differences, such as "channeling" a favored group into a better-paying entry-level job that will have better long-term opportunities; unfair promotion practices; and access to overtime or higher-paying shifts.

OFCCP found that the prior rules using multiple regression analysis (a sophisticated statistical model that assigns relative importance to various factors, including race and sex) and identifying anecdotal evidence of discrimination (such as statements from employee interviews) were too inflexible. The agency also implied that the prior Standards and Guidelines resulted in finding a

contractor in compliance even where other equally “reasonable” analytic approaches would have revealed systemic discrimination.

Consequently, the agency, through its new Directive, is formalizing its internal approach, which it says contractors should have been on notice of through their own Title VII obligations. Significantly, OFCCP “is not currently contemplating additional formal rulemaking associated with [the Notice of Rescission].” Several of OFCCP’s advanced notice of proposed rulemakings have recently received significant criticisms from a broad base of OFCCP’s stakeholders. Instead, by issuing an internal directive rather than a formal rule for compensation analysis, OFCCP avoids the cumbersome and sometimes uncomfortable public comment process and retains agency flexibility.

Significantly, OFCCP does not want to be limited in its test for pay differences by being required to consider compensation in terms of job similarity. Instead, OFCCP will consider systemic pay discrimination issues involving “workers holding a variety of different positions.” OFCCP’s admittedly “more proactive and rigorous approach” raises the stakes considerably for employers.

The agency has stated that “no anecdotal evidence should be required for any type of case, much less for a compensation case where it may be extremely difficult or impossible to obtain.” In other words, OFCCP has not been able to satisfy the prior regulatory standards and, therefore, has established these new methods to allow its compliance officers to have *carte blanche* to conduct compensation analyses.

In a nod to federal contractors’ request for more transparency from the agency, OFCCP has stated clearly that it will not defer to contractor decisions about how to test pay differences, instead stating that it will provide “as much transparency and public disclosure as possible about its procedures for investigating compensation discrimination.”

These “transparency tools” include: FAQs, webinars, conference calls, online chats, and presentations providing opportunity for stakeholder dialogue and feedback. It has stated that it will “provide clear and consistent guidance to staff, contractors, and the public regarding its case-by-case assessment of compensation discrimination investigation procedures.” New, or resurrected, tools include:

- statistical analyses;
- non-statistical analyses, such as comparator or cohort analyses;
- factual issues; and
- seeking, but not requiring, anecdotal evidence.

Under its new principles for reviewing pay practices, the OFCCP will: 1) Determine the most appropriate and effective approach from a range of investigative and analytical tools; 2) Consider all employment practices that may lead to compensation discrimination; 3) Develop appropriate pay

analysis groups; 4) Investigate large systemic, smaller unit, and individual discrimination; and 5) Review and test factors before including them in analyses.

Here is a brief review of each of the new principles.

### **1. Determine the most effective and appropriate approach**

OFCCP will ask the same basic questions it has always asked in compensation analyses, including whether there is a measurable difference on the basis of race, sex, or ethnicity; whether the difference between employees is comparable under the contractors' wage or salary system; and whether there is a non-discriminatory explanation for the difference.

To help answer these questions the OFCCP will review policies and practices; conduct employee interviews; examine payroll and personnel data; conduct both statistical analyses (regression analyses) and non-statistical analyses (comparator or cohort analysis); consult with labor economists; and examine "other relevant information."

### **2. Consider all employment practices**

OFCCP has dramatically expanded its compensation analysis to include not just salary and wages, but overtime pay, bonuses, commissions, vacation and holiday pay, allowances, insurance, benefits, stock options, profit sharing and retirement contributions. In addition, it will examine employee opportunities, such as job classifications, work assignments, training, preferred or higher-paid shift work, and "other such opportunities."

The agency is looking for policies and procedures that unfairly limit compensation such as glass ceiling-issues, access to overtime, pay increases, incentive compensation, higher commissions, or more desirable sales territories.

### **3. Develop appropriate pay analysis groups**

Having discontinued the use of Similarly Situated Employee Groupings (SSEG), OFCCP will now begin investigations by testing for statistical significance on large groups of employees by combining them into "appropriate pay analysis groups," a new term. Statistical controls will be used as necessary for title or level in an effort to more easily identify potential systemic discrimination.

To identify these pay-analysis groups, OFCCP will consider: 1) the particular industry; 2) the types of jobs and compensation at issue; and 3) a contractor's actual compensation practices, such as whether the compensation differs by role, level, function, unit, or job classification.

OFCCP believes it will find this information through reviewing a contractor's policies or training documents, descriptions of its compensation system or practices, compensation data, records and coding, job descriptions, including the ability of workers to rotate or transfer among different positions within a business unit, common hiring or selection processes, common performance-

review practices, or other common identifiable employment practices. From these pay analysis groups, the OFCCP will then further “refine” the compensation analysis.

#### **4. Investigate large systemic, smaller unit, and individual discrimination**

After conducting analysis of larger pay analysis groups, OFCCP will then examine data to consider specific job titles, particular units or locations, or other smaller job groupings. Determination of similarly-situated employees will be case-specific, but you should expect the OFCCP to review the tasks performed; employee skills, effort and level of responsibility; working conditions; job difficulty; minimum qualifications, and other objective factors.

Determining “similarly situated” status in an individual analysis may be different than determining “similarly situated” status for a systemic discrimination analysis. Clearly, OFCCP wants to be able to shift analytical styles and methods when it believes it would be most advantageous for it to identify a disparity.

#### **5. Review and test factors before including in an analysis**

OFCCP will review and test both internal and external factors to determine whether they actually explain compensation, are implemented fairly and consistently applied, and whether the data regarding the factor is accurate. “Where a factor that explains pay differences is based on an identified employment practice, such as a specific qualification, performance review instrument, job assignment policy, or a similar policy or practice, OFCCP will evaluate it for potential disparate impact or disparate treatment before determining whether to include it in the analysis.”

#### **The New Directive**

Directive 307 itself provides definitions for both new and old terms of art employed by OFCCP and summarizes the general investigative protocols the agency will apply, including how it will analyze individual employee-level data. At several points, OFCCP notes that its next step will be based on whether the data allows that step to occur, such as in developing pay analysis groups.

Significantly, “a pay analysis group may be limited to a single job or title, or may include multiple distinct units or categories of workers. A pay analysis group may combine employees in different jobs or groups, with statistical controls to ensure that workers are similarly situated.”

#### **The FAQs**

Contractors already engaged in compliance reviews are not subject to the new Directive, according to the FAQs, but all contractors, as well as non-federal contractor employers whose compensation practices have been challenged by the EEOC, will find it, as well as the Notice of Rescission, and the FAQs themselves to be instructive. Presumably, the EEOC will borrow from OFCCP’s guidance, when convenient, just as OFCCP has relied upon the EEOC guidance.

Since the OFCCP’s lack of success in identifying compensation discrimination has been highlighted at recent national conferences, and its proposed compensation regulations had received scathing

reviews, it apparently felt the need to take an entirely different approach – which is not good news for contractors.

### **What Should Employers Do?**

Review your data and compensation information prior to submitting it to the OFCCP under the same standards the OFCCP will use to evaluate it. Using the new Directive and the guidance found in the Notice of Rescission, anticipate that OFCCP will examine any compensation disparities using all methods employed with every individual or employee grouping.

For help in understanding how this important change could affect your operation, contact your regular Fisher Phillips attorney.

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*This Legal Alert provides an overview of a specific new federal directive. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*