



Government Revises Pay Bias Standards For Federal Contractors

Insights

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The agency overseeing federal contractors issued a revised pay bias directive on Friday that somewhat loosens the standards by which it will evaluate employer compensation practices during compliance investigations. The Office of Federal Contractor Compliance (OFCCP) released DIR 2018-05, also known as “Analysis of Contractor Compensation Practices During a Compliance Evaluation,” to replace a 2013 directive which had ratcheted up the heat on contractors and scrutinized their compensation practices to identify and root out pay bias.

The August 24 directive has two main functions:

- Whereas the previous directive *only* required statistical data when investigating potential pay discrimination, the new standard announces that the value of statistics in such situations may be tied to their ability to be corroborated by other evidence—meaning that raw numerical data will not necessarily be the be-all and end-all when it comes to a final conclusion. This significant revision stops short of the requiring anecdotal evidence, which had been the standard before the now-rescinded Directive 307, but it is a significant improvement.
- Contractors will now be able to submit explanations to the agency to provide context about any identified pay gaps between men and women in order to demonstrate the lack of gender bias.

New Direction For Statistical Data Examinations

By law, federal contractors are prohibited from committing pay bias violations; in other words, they cannot pay men greater compensation than women, or members of a certain race or ethnic category more than another, for performing the same or similar tasks. To ensure each contractor is held to this standard, federal contractors and subcontractors have long been required to provide detailed compensation information to the agency broken down by gender and race/ethnic categories, which is then examined for evidence of pay gaps. Long-time federal regulations also require the contractors to conduct periodic self-audits of their compensation.

OFCCP is tasked with launching investigations into possible pay disparities to determine whether the gap can be explained by justifiable reasons or whether there is evidence of discrimination. However, arriving at that conclusion has, at times, caused headaches for employers because they have often believed that the agency has found pay bias simply because statistical variances in compensation might exist.

OFCCP announced that it needed to revise the way that it used statistical evidence when analyzing pay analysis groupings (PAGs) and statistical modeling for purposes of determining whether such discrimination exists. The agency announced this was part of its ongoing “commitment to greater transparency, consistency, and efficiency in compliance evaluations.”

Although OFCCP’s stated objective is to now use PAGs that “mirror” a contractor’s compensation system, it also cautions that the contractor’s system must be “reasonable” and “of a sufficient size to conduct a meaningful systemic statistical analysis.” This means that although the agency may begin its analysis using EEO-1 or AAP job groups, if those groups are smaller than 30 total employees in each group and with fewer than 5 comparators in each comparator category, the agency will combine the groups until it has created groups of sufficient size. In a footnote, however, OFCCP states that its initial regression analysis may proceed regardless of group size, providing a confusing framework for the contractor attempting to replicate the agency’s findings.

OFCCP has also stated that it may review whether employees within each job group are under a similar compensation system and have a similar job function. However, this may be a challenging task for an OFCCP compliance officer unfamiliar with the contractor’s workplace. Thus, although the directive appears helpful at first glance, it does not fix the problem of OFCCP’s comparing the compensation of employees who are not similarly situated, as the contractor would define the term, in order to reach the size necessary for a statistical regression analysis.

Contractor Submissions Can Now Include Explanations

The new directive also allows contractors to present the information in a manner that explains differences in pay, although this may not be acceptable to the agency. For example, many contractors rely on market studies in setting their compensation. OFCCP says it will “evaluate market salary surveys, if provided, on a case-by-case basis depending on whether or not job and pay differential between employees are already sufficiently accounted for in the analysis.” Unfortunately, OFCCP is silent on the standards it will use to determine whether disparities have been “sufficiently accounted for in the analysis.”

OFCCP’s directive also encourages contractors to provide the factors it considers in setting compensation, although it warns that it will test all variables for neutrality and “omit any variables that it determines from its evaluation are tainted by discrimination.” In other words, the contractor may provide the factors, but if the agency decides the factors are tainted by discrimination, it will discount them.

On the other hand, OFCCP has promised to provide, with any Pre-Determination Notice, which will precede a Notice of Violation, the individual-level data necessary for the contractor to replicate the agency’s analysis. This permits the contractor to provide an explanation to demonstrate a legitimate and non-discriminatory justification. Of course, this opportunity would be more valuable to the contractor earlier in the process, but it is still a welcome change.

What You Need To Know

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The directive took effect on August 24 for any compliance reviews (aka audits) scheduled on or after that date. However, contractors with audits currently pending should be able to take advantage of the directive to the extent they can assert the agency must be consistent with its newly-adopted outlook.

Conclusion

“Equal pay is a critical issue for workers and their families,” the agency said in its August 24 announcement, “and a priority of OFCCP’s equal employment compliance assistance and compliance evaluation activities.” However, the agency has concluded that the method of obtaining and analyzing the information necessary for it to make substantive conclusions was flawed and needed to be fixed. The change is a step in the right direction for federal contractors across the country.

If you have any questions about how to comply with the new directive, contact any member of our [Affirmative Action and Federal Contract Compliance Practice Group](#) or your Fisher Phillips attorney.

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

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