



AFFIRMATIVE ACTION UPDATE: JULY 2006

This bulletin provides an update on employment issues for Affirmative Action e-Bulletin subscribers. Please contact us if you have any questions about these OFCCP Final Rules or about their effects on your business.

Last month, the OFCCP published the final ***Standards for Systemic Compensation Discrimination*** and ***Voluntary Guidelines for Self-Evaluation of Compensation Practices***, which we first told you about back in November 2004. Although the final rules do not require any immediate action by contractors, they express current OFCCP policy and are binding on the OFCCP. Contractors would therefore be wise to familiarize themselves with these latest issuances from the agency. Because the Standards create no particular contractor obligation to gather data, build databases, or perform multiple regression analysis, the OFCCP declined to include a grace period in the final rule, and this interpretive guidance is effective immediately. We'll look at the two companion rules separately.

Standards for Systemic Compensation Discrimination

According to the OFCCP, it has issued these Interpretive Standards in order to institutionalize and codify its methods of investigating systemic compensation discrimination. The Standards apply to all contractor establishments or, if multiple establishments have been consolidated into a single affirmative action plan, then all employees covered by the plan are subject to a single systemic pay discrimination investigation.

As you may recall, in the past, the OFCCP has used a "salary grade" theory to analyze pay claims. The salary grade theory assumed that employees were similarly situated with regard to evaluating and comparing their compensation if the contractor had grouped their jobs in the same pay grade. Under Title VII, of course, similarity in job content, skills and qualifications involved in the job, and responsibility level are the crucial determinants of whether employees are similarly situated with regard to compensation comparisons. The pay grade theory, in contrast, resulted in groupings of employees who performed dissimilar work.

In the final Standards, the OFCCP stated clearly that the salary grade theory has no basis in Title VII case law. However, the agency also stated that it may continue to use the salary grade method for the purpose of preliminary examination during a desk audit, in order to determine whether a contractor's compensation system merits review under the Standards.

In the final Standards, there are essentially three steps in the OFCCP's methodology for investigating systemic pay discrimination. First, the OFCCP will attempt to place 80% of the employees at an establishment (or within a plan) into Similarly-Situated Employee Groups ("SSEG's"). Second, the OFCCP will conduct multiple regression analysis on the SSEG's to determine whether there are any statistically-significant pay disparities. Third, the OFCCP will review anecdotal evidence in order to support any statistically-significant finding of potential discrimination within the SSEG's.

For the purposes of these Standards, employees are defined as similarly situated with respect to pay decisions – and therefore can be placed in SSEG's – where the employees perform similar work, have similar responsibility level, and occupy positions involving similar qualifications and skills. The OFCCP agrees with some of the comments it received, however, that other factors – such as departmental assignments and types of pay plans – may need to be considered in developing SSEG's.

With regard to conducting multiple regression analysis, many commenters noted that contractors do not maintain much of the data related to factors that may influence pay decisions. For instance, a person's technical degree may play a large role in setting that person's salary, but that information is likely not maintained in the contractor's HR database. With regard to this issue, OFCCP stated in these Standards that:

[It does] not expect contractors to maintain all of the data necessary to conduct a multiple regression analysis in its HRIS system. Nor does OFCCP require that contractors collect such data and build a database to turn over to OFCCP during a compliance review. Instead OFCCP will gather the pertinent information through interviews and through review of personnel files and other pertinent documents. Once OFCCP gathers the necessary information, OFCCP staff will build a database. OFCCP does

not presume that every factor that may influence compensation is necessarily quantifiable.

Clearly, once the OFCCP undertakes this kind of investigation, the process is going to be long and involved.

Importantly, the OFCCP has reserved the right to allege systemic discrimination without anecdotal evidence if the statistical evidence is sufficiently compelling. On the other hand, the OFCCP could allege systemic discrimination based on very strong anecdotal evidence, even in the absence of statistical evidence.

Voluntary Guidelines for Self-Evaluation of Compensation Practices

Issued at the same time as the Interpretive Standards, the separate Voluntary Guidelines are intended to offer contractors a standard of self-evaluation that is consistent with the OFCCP's Interpretive Standards. In 2000, OFCCP adopted a requirement that contractors evaluate their compensation systems to determine whether there are gender, race, or ethnicity-based disparities. Prior to November 2004, OFCCP had not provided any guidance to contractors regarding techniques for compliance with this compensation self-evaluation requirement.

As indicated in their title, these Guidelines are voluntary; contractors may continue to utilize whatever form of self-evaluation they determine is appropriate in order to comply with the 2000 regulation requiring contractors to analyze and evaluate their compensation practices. If, however, contractors choose to conform their self-evaluation to the Interpretive Standards, OFCCP will give deference to the contractor's methodology and will review only the documentation and results. Keep in mind, however, that in order for contractors to benefit from adopting this method, they must also take appropriate remedial action to correct statistically-significant compensation disparities between employees in an SSEG, if those disparities are not explained by legitimate, non-discriminatory factors. There are also record-keeping requirements in order for contractors to benefit from utilizing the OFCCP Standards. Furthermore, contractors will have to maintain and reveal sensitive pay analysis that could be highly valuable to plaintiffs' attorneys in litigation.

Recognizing that some contractors may take the position, based on the advice of legal counsel, that "their compensation self-evaluation is subject to certain protections

from disclosure, such as the attorney client privilege or attorney work product doctrines, and that these protections would be waived if the contractors disclosed the self-evaluations,” the OFCCP permits a contractor to certify its compliance with the 2000 regulation in lieu of producing the actual methodology and/or results of the self-evaluation. The certification would have to be in writing, signed by a duly authorized officer of the contractor under penalty of perjury, and state that the contractor has performed a compensation self-evaluation with respect to the affirmative action program and that counsel has advised the contractor that the compensation analysis is subject to the attorney-client privilege and/or attorney work product doctrine. In cases where a contractor submits a compliance certification, the OFCCP will assume it has met its obligation under the 2000 regulation, but will proceed with evaluating the contractor’s compensation practices without regard to the contractor’s analysis.

Importantly, under the Preamble to the Voluntary Guidelines, OFCCP makes clear that if a contractor declines to adopt the self-evaluation methods outlined in the Standards, that decision will not be used as a basis for any negative or adverse inference about the contractor’s compliance status. However, if the contractor fails to adopt *any* method for self-evaluation, that failure will serve as a basis for a finding of noncompliance with the 2000 regulation.

In response to several comments that performing regression analysis might pose a substantial burden on contractors, the OFCCP reduced its requirements for the thoroughness of the statistical analysis under the Voluntary Guidelines and only requires that the contractor’s self-evaluation under the Standards cover at least 70% of all employees (the proposed rule had called for 80%) reported in the affirmative action program or workplace. If the contractor has 500 or more (the proposed rule had specified 250 employees or more) employees in the plan or at the workplace, the statistical analysis used must be multiple regression analysis.

What are the Implications of These Rules?

These final rules are consistent with the OFCCP’s trend of moving away from enforcing the technical nuts and bolts of affirmative action compliance, and moving towards rooting out systemic discrimination. Obviously, the kind of statistical analysis

used to detect and analyze systemic pay discrimination issues is complex and time consuming. Most contractors will not be in a position to undertake such a time-intensive self-evaluation for the majority of all of their employees at each location on an annual basis.

Contractors must, however, undertake some form of self-evaluation of their compensation system, and take remedial action as needed. OFCCP has made clear that it intends to enforce the regulatory requirement to conduct some kind of self-evaluation, and will inquire concerning the documentation a contractor has as evidence of having done so. Remember, nothing in the OFCCP regulations requires statistically-based self-evaluations.

Since the proposed rules were issued in November 2004, our advice to contractors has been to begin understanding what factors influence pay decisions in your company. It's important to realize that pay may be determined on completely different bases in different departments of the same workplace – indeed, under different supervisors in the same department. Do not assume that the “usual factors” – such as years of experience and performance appraisal scores – determine your employees' pay rates. Developing an understanding of what factors influence your pay decisions will place you in a better position should the OFCCP come calling to analyze your company's compensation.

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