

# PUBLICATION

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## Pot o' Gold: OFCCP Releases Contractor Compensation Procedures

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*OFCCP has released a new directive that outlines the procedures the office will use for reviewing contractor compensation systems and practices during a compliance evaluation. One thing is not new: Under Executive Order 11246 and its implementing regulations, contractors must review and monitor their compensation systems to determine whether there are any gender-, race- or ethnicity-based disparities.*

Effective February 28, 2013, the Office of Federal Contract Compliance Programs (OFCCP) issued Directive No. 307, which outlines the procedures OFCCP will use for reviewing contractor compensation systems and practices during a compliance evaluation. The Directive also rescinds OFCCP's 2006 Compensation Standards and the Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination. One thing is not new: Under Executive Order 11246 and its implementing regulations, contractors must review and monitor their compensation systems to determine whether there are any gender-, race- or ethnicity-based disparities.

### The Rescission

The 2006 standards were "interpretive standards" that did not have the binding force of law, although they did bind OFCCP's actions; i.e., their purpose was to inform contractors of the rules the OFCCP would follow with respect to investigating compensation practices during a compliance evaluation. The standards focused on "systemic discrimination." Nonetheless, that did not mean that the OFCCP would overlook smaller groups of alleged compensation discrimination if it found them, but that the primary focus of its investigatory prowess was meant to target larger systemic compensation issues. The standards sought to segment the workforce into what OFCCP termed "Similarly Situated Employee Groups," otherwise known as SSEGs, and to primarily use multiple regression analysis as its tool for determining whether there were any statistically significant wage-based disparities in the SSEGs it created.

The "Voluntary Guidelines," on the other hand, were meant to enable contractors to obtain voluntary compliance coordination with the OFCCP during a compliance review instead of supplying compensation data pursuant to Item 11 of the Scheduling Letter. Contractors could also seek Alternative Compliance Certification under the Guidelines, but only under penalty of perjury. The number of contractors that actually sought voluntary compliance coordination is questionable as the requirements to achieve compliance were quite onerous and expensive.

### The Directive

OFCCP claims that the 2006 standards contained "arbitrary restrictions" that hampered the agency from effectively combating illegal pay discrimination. It states that the new Directive will provide a flexible, case-by-case approach to compensation discrimination that includes the use of various statistical and non-statistical means of analyses consistent with Title VII.

However, any contractor that has been subjected to an OFCCP compliance review in the past few years has most likely noticed the increased focus on compensation and has been, almost without fail, directed to submit

individualized compensation data after OFCCP's initial review of the contractor's Item 11 data. Upon review of the Directive, it does not appear that this practice will change. Unfortunately, the Directive does not provide any specifics about the "average pay difference," "thresholds," or the number of "affected employees" that will trigger an individualized compensation data request. Consequently, contractors should be prepared for such a request and also be prepared to explain its pay practices and policies, especially in those areas in which the data reveals any significant compensation disparities.

Once it receives the individualized compensation data, OFCCP will then determine which tool(s) it may use to analyze for compensation issues. The Directive does not restrict OFCCP to multiple regression analysis. Although the Directive mentions a number of tools OFCCP may use to analyze the contractor's compensation data, it will remain unknown to the contractor as to which tool or tools OFCCP actually utilizes.

Probably the most disturbing aspect of the Directive is the creation of "Pay Analysis Groups," which OFCCP will use for its analyses. OFCCP loosely defines "Pay Analysis Groups" as "a group of employees who are comparable for purposes of the contractor's pay practices." However, it goes on to say that these groups "may be limited to a single job or title, or may include multiple distinct units or categories of workers" and "may combine employees in different jobs or groups, with statistical controls to ensure that workers are similarly situated." It is doubtful that contractors will have much confidence in OFCCP's assurance. At least the 2006 definition for SSEGs stated that employees are similarly situated "if they are similar with respect to the work they perform, their responsibility level, and the skills and qualifications involved in their positions." In any event, OFCCP will analyze these Pay Analysis Groups for systemic discrimination, smaller groups of discrimination and/or individual discrimination.

Finally, if OFCCP's analysis warrants, it may decide that an on-site investigation is necessary and determine the need for interviews with the contractor's staff and employees. Of note, the Directive emphasizes OFCCP's enforcement of Title VII's principles that prohibit discrimination based on disparate treatment (intentional discrimination) or disparate impact (neutral policy that negatively impacts the protected class) theories. Thus, contractors should guard against any attempt by the OFCCP to base a violation upon Equal Pay Act principles that do not require a finding of discrimination.

Even though, going forward, contractors subject to a compliance review may not experience much difference outwardly in the manner in which OFCCP seeks additional compensation data and otherwise conducts its investigation, the Directive provides a lot of useful insight that a proactive contractor would do well to heed.

As always, Baker Donelson's Labor and Employment attorneys stand ready to assist contractors in understanding this compensation Directive as well as any issues that may arise in the federal contracting arena.

If you have questions about how the OFCCP directive will affect your business, please contact any of our more than 70 Labor & Employment attorneys.