

PUBLICATION

FEDERAL CONTRACTORS: OFCCP wants to know "What's in Your Wallet"?

August 11, 2011

Federal contractors, subject to Executive Order 11246, have been required by the Office of Federal Contract Compliance Programs (OFCCP) since 2000 to proactively conduct in-depth analyses of their compensation systems to ensure that those systems were not discriminatory. And since that same year the OFCCP has struggled to gain greater access to contractors' employee compensation data to enforce that aspect of contractors' obligations under the Executive Order regulations.

Contractors that have long been subject to EO 11246 or that have been involved in an OFCCP compliance review know that a well-prepared, correct and thoughtful "Item 11" response is critical because it can mean the difference between ending a compliance review (provided all else is in order) or the OFCCP seeking individualized compensation data on all of the contractor's employees in a particular establishment. But it has become next to impossible for contractors to survive the Item 11 review without further information requests by the OFCCP. For the past year or so, OFCCP has been using a 2 percent or \$2,000 "tipping point" method (2 percent or \$2,000 difference in pay between protected and non-protected class whether data provided by job title, job group, etc.) to determine whether it will seek individualized compensation data from contractors as part of the desk audit phase of a compliance review. Few, if any, contractors pass this analysis, and as a result, OFCCP has been using this process to obtain contractor compensation data to send to its statisticians in Washington, D.C.

Fast forward to August 10, 2011 – the OFCCP has now issued an Advance Notice of Proposed Rulemaking (ANPRM) inviting the public to provide input on the development and implementation of a compensation data collection tool. See <http://www.gpo.gov/fdsys/pkg/FR-2011-08-10/pdf/2011-20299.pdf>; 76 Fed. Reg. 49398 (advance notice proposed Aug. 10, 2011). OFCCP notes that the tool may be "used to identify contractors for compensation focused reviews as well as full compliance reviews." Thus, it appears that the proposed compensation data collection tool would be a separate reporting requirement apart from the Itemized Listing (noted above) that is included with the notification letter announcing a compliance review.

Consequently, contractors should be deeply concerned both about the implementation of such a data tool as well as the "scope, content and format" of the tool. As such, OFCCP has suggested fifteen specific areas for comment regarding the proposed tool. The questions OFCCP would like to have contractors address range from how various elements of compensation should be reported to how employees should be grouped for the compensation data reporting. In addition, OFCCP asks for comments on the format contractors should be expected to produce the compensation information. Further, OFCCP seeks comments on what type of compensation data would be useful for identifying specific industries for industry focused reviews and even multi-establishment national compensation reviews of a contractor's business. For a complete list of all fifteen questions, please go to the ANPRM (above).

What Can You Do Now?

OFCCP is seeking comments from contractors on this ANPRM for 60 days from August 10, 2011, meaning all comments must be received on or before October 11, 2011. All comments must be identified by RIN number 1250-AA03 and submitted by any of the following methods:

- Federal eRulemaking Portal: www.regulations.gov (follow instructions).
- Mail: Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

As always, Baker Donelson's Labor and Employment attorneys stand ready to assist contractors in understanding this Advance Notice of Proposed Rulemaking as well as any issues that may arise in the federal contracting arena. Please feel free to reach out to your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.