



Morgan Lewis

C O U N S E L O R S A T L A W



LABOR AND EMPLOYMENT LAW SEMINAR

OFCCP Compliance Update

William E. Doyle, Jr.

Alissa A. Horvitz

October 27, 2005


The New Internet Applicant Regulations

- Uncertain Definition for 25 Years:
 - Paper Expressions of Interest:
 - Unsolicited Resumes
 - Internet Exacerbated Problems:
 - 1995 letter to Society for Human Resource Management former OFCCP Director Shirley Wilcher suggests that everyone on Monster.com may be an applicant.
- Good news is we now have a definition that provides guidance on these issues.
- Bad news is the regulations are complicated and contractors must come into compliance by February 6, 2005.

Overview of the New Regulations

- The New Regulations Have Four Major Provisions:
 - Solicitation Obligations: 41 CFR 60-1.12(c)(1)(ii)
 - Definition of Internet Applicant: 41 CFR 60-1.3
 - Recordkeeping Obligations: 41 CFR 60-1.12(a)
 - Adverse Impact Analyses: 41 CFR 60-1.12(d)

Solicitation Provisions of the New Regulations



- Contractors have to solicit race and gender information from either “applicants” or “Internet applicants,” but not both.
- The particular solicitation obligation depends on the recruiting process for each position.
- If the contractor considers expressions of interest submitted through the Internet or related electronic data technologies, then the Internet Applicant Definition applies.
 - The Internet Applicant Definition will apply to paper expressions of interest for that position as well.
- If the contractor considers only paper expressions of interest, then the existing Applicant Definition applies.
 - Unclear what the “Applicant” Definition is.

Definition of Internet Applicant

- Four-Part Standard:
 - The individual submits an expression of interest in employment;
 - The contractor considers the individual for employment in a particular position;
 - The expression of interest indicates that the individual possesses the basic qualifications of the position; and,
 - At no point in the selection process prior to receiving an offer of employment has the individual removed himself or herself from consideration or otherwise indicated that he or she is no longer interested in the position.

Consideration for a Particular Position



- The contractor considers an individual by reviewing the individual's expression of interest to assess the individual's qualifications.
 - The contractor considers the individual when it determines whether the individual meets the basic qualifications of the position.
- The contractor can have a policy or procedure not to consider certain types of expressions of interest, such as unsolicited resumes.
 - It must be uniformly and consistently applied.
 - Cannot be selective and consider only certain expressions of interest that were submitted in a particular manner.

Basic Qualifications

- The term “basic” is not a substantive limit on the type or range of qualifications that can be “basic qualifications.”
- Three Criteria:
 - Objective: Third party with the contractor’s technical knowledge.
 - Noncomparative: No relative assessment of better or best qualified.
 - Relevant to the performance of the particular position and enabling the contractor to accomplish business-related goals.
- Employment tests cannot be basic qualifications.

Data Management Techniques



- Uses:
 - Limit the number of individuals to consider.
 - Limit the number of individuals to contact to determine if they are interested in the position.
- Techniques:
 - Absolute numerical limits:
 - Document prior to using
 - Neutral criteria
 - No adverse impact
 - Random sampling:
 - Document relevant pool
 - No adverse impact
 - Sample must be appropriate in terms of the pool submitting expressions of interest or meeting the basic qualifications.

Determining Whether the Individual Is Interested in the Particular Position



- Contractors can rely on information in the expression of interest to determine if the individual would be interested in the particular position:
 - Salary requirements
 - Preferences as to type or location of work
- Must have consistently applied procedure to ensure that the contractor does not apply this selectively:
 - E.g., the contractor can't contact only some of the individuals whose salary requirements were higher than the salary for the position.

Recordkeeping Provisions of the New Regulations



- Contractors must keep:
 - All expressions of interest that were considered for a particular position, regardless of whether the individual qualifies as an Internet applicant.
 - Records of those individuals whom the contractor contacted to determine his or her interest in a particular position.

Recordkeeping Provisions of the New Regulations



- External Resume Databases:
 - Position
 - Date of search
 - Search terms
 - Resumes of individuals who met the basic qualifications of the position and were considered by the contractor.
- Internal Resume Databases:
 - Resumes
 - Date resumes entered into database
 - Position
 - Search terms
 - Date of search

Adverse Impact Analyses



- Required for Internet applicants versus hires.
- Not required for basic qualifications.
- But OFCCP will use census and labor force statistics to assess the impact of basic qualifications:
 - OFCCP likely to rely on contractor's Availability Data.
- OFCCP will directly assess basic qualifications:
 - High school degree
 - Weight and height requirements
 - Arrest records

What Should Contractors Do?

- Identify the positions where you do not consider submissions through the Internet or related electronic data technologies.
- Map out a recruiting process that meets your operational needs.
 - If this varies by position, list the processes that are suitable for each position.
- Identify the points in your current recruiting processes where you would have recordkeeping or data analysis obligations under the new regulations.
- Consider your options for meeting your operational objectives while minimizing compliance burdens under the new regulations.
 - Keep in mind that OFCCP will use this data to determine if there is hiring discrimination and to determine whether to conduct additional investigation of your hiring practices.
- Review the accuracy of availability calculations contained in your AAPs.

OFCCP Compensation Analysis



- On November 16, 2004, OFCCP published proposed standards and guidelines on systemic compensation discrimination:
 - Standards address the way OFCCP will determine whether a contractor has engaged in systemic compensation discrimination in violation of E.O. 11246.
 - Guidelines provide contractors an incentive to conduct a compensation self-audit in accordance with suggested techniques.
- OFCCP provided notice and comment opportunity for 60 days
 - OFCCP received approximately 35 total comments on one or both of the notices.
 - OFCCP has reviewed the comments and developed draft final standards and guidelines.

Current Status of OFCCP's Proposed Compensation Standards and Guidelines

- DOL leadership committed to publishing a final set of standards for systemic compensation discrimination.
- The standards for making an ultimate determination of liability for systemic compensation discrimination under E.O. 11246 are unlikely to change:
 - None of the commenters argued that the proposed compensation standards misstated the current caselaw regarding pattern or practice disparate treatment compensation discrimination claims under Title VII.
 - DOL has historically followed Title VII standards, and there are no indications of a desire to change that policy.

Current Status of OFCCP's Proposed Compensation Standards and Guidelines

- There may be more developments in the analyses and “trigger points” OFCCP uses to determine which workplaces receive detailed investigation:
 - Many employer organizations are pushing the agency to publish its methods of preliminary analysis and the trigger points it will use to determine whether further investigation is warranted.
 - These groups also want OFCCP to defer to the employer’s own analysis when making these determinations.
- A crucial issue will be whether the final standards will allow OFCCP investigators to issue PDNs or NOV’s without analyzing compensation under the prevailing legal standards outlined in the proposals.
 - Some employer groups would prefer this approach, because they want to avoid the burden and cost of a detailed OFCCP investigation.
 - But employers probably won’t like the consequences if OFCCP alleges a large liability and refuses to consider employer rebuttals that analyze compensation as outlined in the standards.
 - Could result in a return to a dynamic similar to that under the Dubray method where the agency issued many NOV’s and pushed hard for settlements, but was unable to pursue the matter through enforcement litigation.

Analyses and Trigger Points that Some OFCCP Offices Are Using in the First Stages of a Compensation Review

- Scheduling Letter, itemized Listing Paragraph 11, permits OFCCP to seek total compensation and total number of employees by grade, wage rate, or range.
- OFCCP can calculate average compensation for the “pay division.”
- Challenge for OFCCP is to determine how to allocate investigative resources using only average compensation.

Analyses and Trigger Points that Some OFCCP Offices Are Using in the First Stages of a Compensation Review

- Some regions/district offices are using a three part threshold analysis to determine whether to investigate further.
- Part 1: For each “pay division,” calculate the average compensation of females, males, minorities and nonminorities.
- If the average difference is greater than 2%, OFCCP adds the affected group population to a running tally.

Analyses and Trigger Points that Some OFCCP Offices Are Using in the First Stages of a Compensation Review

- At the conclusion of the tally, OFCCP calculates the percent females and minorities affected.
- Part 2: If the percentage of females or minorities affected is greater than 30%, OFCCP compares the percentage of affected females and minorities with the percentage of affected males and nonminorities.
- Part 3: Where the percentage of females or minorities affected is more than three times the percentage of males or nonminorities, the OFCCP concludes that there is sufficient cause to request 12 points of data in order to conduct a Cluster Regression Analysis.

Analyses and Trigger Points that Some OFCCP Offices Are Using in the First Stages of a Compensation Review

Pay Div.	Females		Males		Percent Pay Difference	Affected Employees	
	Count	Average Salary	Count	Average Salary		Group	Count
1	14	\$22,245.00	26	\$26,295.00	-18.21%	Females	14
2	9	\$25,006.00	20	\$27,030.00	-8.09%	Females	9
3	23	\$27,180.00	27	\$28,902.00	-6.34%	Females	23
4	7	\$35,000.00	18	\$35,000.00	0.00%	Neither	0
5	22	\$42,446.00	3	\$40,702.00	4.11%	Males	3
6	5	\$46,011.00	12	\$48,020.00	-4.37%	Females	5
7	16	\$47,501.00	60	\$49,480.00	-4.17%	Females	16
Total	96		166				

Percentage of Females Affected: 69.79%

Percentage of Males Affected: 1.81%

Affected female population is well above 30% threshold, and 69.79% is more than three times 1.81%, thus OFCCP would assert that it has grounds to seek additional information related to compensation.

Analyses and Trigger Points that Some OFCCP Offices Are Using in the First Stages of a Compensation Review

- What are the 12 items requested?
 - Unique identifier
 - Race
 - Sex
 - Job title
 - Location (if different from facility under review)
 - Annual(ized) salary
 - Grade/Band/SSEG
 - Time at the company
 - Time in the job
 - Exempt/Nonexempt status
 - Part-time/full-time status
 - Previous experience (age as a proxy)

Analyses and Trigger Points that Some OFCCP Offices Are Using in the First Stages of a Compensation Review

- OFCCP uses the 12 data items to conduct a Cluster Regression Analysis.
- In the Cluster Regression, the computer forms comparator groups based on three criteria:
 - Create groups that have at least 30 total employees and five employees from each comparator group (e.g., males/females).
 - To the extent possible, avoid grouping employees in different job titles. If grouping of different job titles is required to reach 30/5 size requirement, group titles that are closest in average pay.
 - To the extent possible, avoid grouping job titles in different pay grades.
- The Cluster Model is used as a diagnostic screen; it is not sufficient to establish a violation under the prevailing caselaw.

OFCCP's Current Approach in Pending Compliance Reviews



- Use of reported analytical processes varies by region.
- Regional, managers prefer flexibility to make judgment calls.
- OFCCP managers may not trust the accuracy of the pay division analysis or cluster model.
- Some regions may be tentative about compensation investigations, even if there are indicators:
 - Uncertainty regarding the final standards and guidelines.
 - Concerns about agency resources needed to determine SSEGs.
 - Only trained on grade method, which seemed easier to apply.
- Some OFCCP staff would prefer less complicated, automated approach that compliance officers can easily use:
 - OFCCP has considered software, but will take significant time for development, training, etc.

OFCCP's Current Approach in Pending Compliance Reviews



- OFCCP is attempting to develop SSEGs through targeted employee interviews in several open reviews.
- OFCCP staff hopes to find a way to create SSEGs without significant investigation activity such as employee interviews.
- OFCCP staff likely to be attracted by internal functional groupings such as job families and AAP job groups.
- OFCCP staff may use pay grade or range in addition to functional grouping.

Contractor Responses to OFCCP Compensation Investigations



- Opportunity for contractors to influence OFCCP determinations about SSEGs and analyses.
- Objective is to provide an analysis that resonates with OFCCP decision-makers and leads the agency to close the investigation at the desk audit stage.
- Vitally important to assess this objective in a larger context:
 - Cost
 - Accuracy and legitimacy of analysis

Contractor Responses to OFCCP Compensation Investigations

- Cost and accuracy/legitimacy are competing factors:
 - Age as a proxy for actual experience:
 - Age is cheaper than coding actual experience.
 - Age is a poor proxy for actual experience.
 - Actual experience has a significant influence on compensation.
 - Internal administrative groups as SSEGs
 - Using an existing administrative grouping is cheaper than reviewing actual job duties, responsibility levels, and skills/qualifications and comparing against Title VII caselaw.
 - Internal administrative groups were not developed through consultation with counsel on Title VII standards.
 - SSEGs have a significant influence on compensation.

Contractor Responses to OFCCP Compensation Investigations

- Why should you care about accuracy/legitimacy?
 - It is your model. If you run the model or submit it to OFCCP, you OWN it.
 - Class Action Litigation:
 - Plaintiffs will say you conceded the appropriateness of the model.
 - You have not considered the implications of the model for other facilities or other business units.
 - You are stuck with false positives as statistical evidence of discrimination.
 - Plaintiffs will say you ignored statistical evidence because you did not want to pay a lot of money to fix the problem.


Contractor Responses to OFCCP Compensation Investigations

- Why Should You Care About Accuracy/Legitimacy?
 - *Beck v. Boeing* is a cautionary tale.
 - \$72.5 million settlement
 - See *Business Week* article: “Coverup at Boeing?”
 - The Plaintiffs’ lawyer argued:
 - Boeing’s motion is unprecedented. Among other things, Boeing claims Dr. Siskin [the plaintiffs’ expert] should be excluded from testifying about the disparities identified from Boeing’s own self-monitoring model and internal studies. Whether its internal studies were flawed is irrelevant. The jury is entitled to hear what Boeing knew from its studies and, to understand them requires the assistance of a statistician. No Court has ever struck a witness from testifying about the disparities identified by the employer’s own model or studies. . . . In short, this motion appears to be at least in part an effort to keep from the jury evidence about what Boeing knew.

Recommended Approach to OFCCP Compensation Investigations


- Difficult judgment call on how to develop these models to navigate the three competing objectives: (1) convincing OFCCP to close the audit; (2) cost; and (3) accuracy.
- Our general recommendation is a two-tiered approach.
- First tier is very basic model as diagnostic screen:
 - E.g., large functional groups, pay grade, and time in company.
 - No plausible argument that this model is sufficient for analyzing compensation discrimination.
 - Reduce costs by focusing efforts on certain areas.
- Second tier is refined model in areas where first-tier diagnostic screen indicated a potential problem.
 - Refined model involves SSEG creation, coding actual experience, and controlling for as many factors that influence compensation as possible.

Preparing for the Final Standards and Guidelines



- Understand Your Unique Situation:
 - Assess current data collection:
 - Do you capture data on factors that influence compensation?
 - Is the data accurate?
 - Assess current administrative groupings:
 - How closely do they approximate the definition of similarly situated employees?
 - Assess budget considerations:
 - How much can you afford to budget to prepare for OFCCP compensation audits?

Preparing for the Final Standards and Guidelines




- Understand Your Unique Situation:
 - Assess vulnerability to class employment discrimination litigation:
 - Are you in an industry targeted by plaintiffs' lawyers, such as retail, consumer products, financial services, or transportation?
 - Do you have any EEOC or state FEP charges that allege classwide discrimination?
 - Are any of the high-powered plaintiffs' firms representing the plaintiff in any particular charges or cases?
 - Use assessments to explore options.

Preparing for the Final Standards and Guidelines

- Explore Your Options Based on Your Particular Situation:
 - Develop a diagnostic model and see how many areas for followup investigation would be required.
 - Develop the more sophisticated model in a particular area to assess cost and implications of the model.
 - Develop SSEGs if your administrative groupings do not contain similarly situated employees.
 - Develop a pilot program for collecting additional data, such as prior relevant experience or relevant education.

Preparing for the Final Standards and Guidelines



- When exploring options, ensure that analyses are protected by the attorney-client privilege or Attorney Work Product Doctrine.
- Do not simply adopt a one-size-fits-all approach that is not based on pilot testing and tailored to your particular situation.
- Be strategic in choosing an option that is right for you: Think about how the approach will work in a various possible scenarios.
- A wait-and-see approach has some benefits, but it also could catch you flat-footed when the agency conducts a compliance review.

Protecting Compensation Analysis from Disclosure



- If you give analysis to OFCCP, it will be discoverable in class action litigation.
- Attorney-client privilege and attorney work-product doctrine may protect confidential, internal analyses.
 - Be very cautious.
 - Understand that how you interact with outside counsel, any people with whom you share the analyses and results, and the steps you take in response to the results, will be evidence used to determine whether these privileges apply.
- Self-Critical Analysis Privilege is not recognized by most courts, so it is not a reliable basis for protecting self-analysis from disclosure.

OFCCP Compliance Issues in Major Corporate Transactions



- OFCCP offers contractors the ability to manage compliance obligations during and immediately after major corporate transactions:
 - Compliance Assistance Agreements:
 - Assistance in developing AAPs
 - Phased-in compliance timetables
 - Limit on compliance reviews
 - Separate Facility Exemptions:
 - Contractor does not have to develop AAP for exempted facilities.
 - Factors to Consider:
 - Value of the contracts
 - EEO track record
 - AAP not meaningful in the context

OFCCP Future Initiatives

- “Corporate Report Cards”:
 - OFCCP assesses contractor’s history of compliance reviews and complaint investigations for ten-year period:
 - Number of PDNs, NOVs, Show Cause Notices, and Conciliation Agreements across the organization.
 - Compared with other contractors in the same industry
 - OFCCP publishes report card giving the contractor a grade:
 - E.g., “D” on EEO compliance
 - Published on OFCCP website
 - Sent to contracting agencies who award contracts
 - Sent to contractor’s board of directors.
 - OFCCP targets particular industries for heightened scrutiny based on these studies.



Morgan Lewis

C O U N S E L O R S A T L A W



LABOR AND EMPLOYMENT LAW SEMINAR

OFCCP Compliance Update

William E. Doyle, Jr.

Alissa A. Horvitz

October 27, 2005