

OFCCP Publishes Proposed Rescission of Compensation Standards and Self-Audit Guidelines

January 4, 2011

In a *Federal Register* Notice published on January 3, the Office of Federal Contract Compliance Programs (OFCCP) proposed to rescind the agency's current systemic compensation discrimination standards and self-audit guidelines.¹ This follows the Obama administration's announcement, as part of the report of the National Pay Equity Task Force issued in July 2010, of its intent to rescind the OFCCP standards and guidelines. The task force's report also called for the passage of the Paycheck Fairness Act, which contained several provisions designed to legislatively rescind the OFCCP compensation standards. The Paycheck Fairness Act passed in the House in early 2009, but stalled in the Senate and eventually failed in a cloture vote held on November 17, 2010.

In proposing to rescind the current standards and guidelines, the OFCCP asserted (i) that the standards "significantly undermine OFCCP's ability to vigorously investigate and identify compensation discrimination" and (ii) that the guidelines were "rarely utilized" by contractors.

The current OFCCP standards were adopted in 2006.² There are three major features of the current standards:

1. *Similarly Situated Employees*: Under the standards, the OFCCP only compares the compensation of "similarly situated" employees, i.e., those with similar job duties who occupy positions of similar responsibility and requiring similar skills.³ Various other considerations may have a role in determining similarly situated employees, such as "department or other functional unit, . . . employment status (e.g., full-time vs. part-time), compensation status (e.g., union vs. nonunion, hourly vs. salaried vs. commissions), etc."⁴
2. *Multiple Regression Analysis*: The standards call for the OFCCP to use multiple regression analysis, a complex statistical technique, to control for legitimate, nondiscriminatory factors influencing pay disparities.⁵ Legitimate factors depend on the contractor's pay practices but may

1. Available at http://www.morganlewis.com/pubs/LEPG_NoticeOfProposedRescission.pdf.

2. See Notice, *Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination*, 71 Fed. Reg. 35124-141 (June 16, 2006).

3. See 71 Fed. Reg. at 35129, 35136-138, 35140.

4. *Id.* at 35129, 35138, 35140.

5. *Id.* at 35130-32, 35138, 35140.

include factors such as education, experience, performance ratings, productivity, location, leaves of absence, employment with a predecessor company, or whether a degree is relevant to the position.⁶ Pay disparities are statistically significant at two or more standard deviations, a threshold most courts find acceptable.⁷

3. *Anecdotal Evidence*: Under the prevailing standards, statistical evidence must be supported by anecdotal evidence of discrimination, i.e., examples of individual cases of disparate treatment, which courts find important to “bring the cold numbers to life.”⁸

The notice of proposed rescission criticized each of these features as too “rigid.” In particular, OFCCP argued that “[t]he Standard’s mandate to use a multiple regression analysis to identify compensation discrimination is also overly narrow and is not required under Title VII principles. While a multiple regression analysis may be a useful tool in identifying compensation discrimination, other statistical or nonstatistical analyses may be better suited, depending on the facts of the case.” OFCCP also contends that anecdotal evidence is not necessary to prove a pattern or practice of pay discrimination and that “[r]equiring anecdotal evidence is particularly problematic in compensation cases as employees often are unaware of the compensation received by co-workers and, as a result, anecdotal evidence from victims of pay discrimination may not exist.”

OFCCP’s contentions regarding multiple regression analysis and anecdotal evidence are controversial. The Supreme Court unanimously approved multiple regression analysis as proof of a pattern or practice of pay discrimination in *Bazemore v. Friday*,⁹ and “[d]iscrimination cases using multiple regression analysis are legion.”¹⁰ Anecdotal evidence has been recognized by the courts as a basic component of pattern or practice claims: “[I]n a pattern and practice discrimination case, a plaintiff will typically not come to court in the first place without anecdotal evidence.”¹¹

OFCCP did not supply any substantive alternative to the current standards but stated an intent to adhere generally to “Title VII principles” when investigating contractors’ compensation practices. Nonetheless, some of the OFCCP discussion in the notice resembles the text of the Paycheck Fairness Act and suggests that the agency will attempt to return to the controversial pay grade method of compensation analysis used in the late 1990s. Under that method, the OFCCP compared the median or average compensation of male and female employees in the same pay grade. Instead of using an initial pay grade analysis to determine whether further investigation into the factors influencing compensation was warranted, the OFCCP relied on the analysis alone to allege systemic pay discrimination. However, the OFCCP’s pay grade analysis did not control for legitimate, nondiscriminatory factors influencing pay, nor did it test for whether the differences were statistically significant.

6. *Id.* at 35132, 35138, 35140.

7. *Id.* at 35131–32, 35139–40. The OFCCP also noted that statistically significant pay disparities may not be practically significant where the regression includes a large number of employees and indicates relatively small disparities. *Id.* at 35131–32.

8. *Id.* at 35133–34, 35139–140.

9. 478 U.S. 385, 400 (1986) (Brennan, J.).

10. *Reference Manual on Multiple Regression, in Federal Judicial Center, Reference Manual on Scientific Evidence*, at 182 n.5 (2000).

11. *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571, 591, 610 (9th Cir. 2010) (noting that “[c]ircumstantial and anecdotal evidence of discrimination is commonly used in Title VII ‘pattern and practice’ cases to bolster statistical proof by bringing ‘the cold numbers convincingly to life.’” (quoting *Teamsters v. United States*, 431 U.S. 324, 339)).

Employers typically responded to the OFCCP allegations by pointing out that the employees being compared in the pay grade were not similarly situated because they were performing different jobs. OFCCP rejected this response without investigating the actual jobs at issue, arguing that the employer has recognized that the jobs have the same worth by placing them in the same pay grade:

Where we determine that each employee in a salary grade system has the same opportunity, subject to performance, to move to the maximum rate of the salary grade range without a change in job title, we believe the employer . . . has already identified certain jobs as having similar value to the organization.¹²

Whatever approach to compensation analysis is ultimately adopted by the agency to replace the multiple regression analysis utilized in the current standards, OFCCP does *not* intend to permit contractors to comment on the new analysis protocols before they are implemented. OFCCP explains this choice in the pending notice:

If the Standards are rescinded, OFCCP will reinstitute the practice of exercising its discretion to develop compensation discrimination investigation procedures in the same manner it develops other investigation procedures. OFCCP will continually refine those procedures to ensure that they are as effective and efficient as possible. OFCCP will develop and issue compensation investigation procedures in the same manner as procedures for investigating other forms of discrimination, for example through the FCCM, directives and staff guidance materials.

Under the circumstances set forth in the referenced Notice, government contractors will have only *one opportunity* to comment on the OFCCP’s proposed rescission and the agency’s proposal both to abandon these standards and to adopt a flexible approach that was rejected by Congress.

Morgan Lewis intends to submit comments in response to the notice of proposed rescission and would welcome input regarding these important issues from government contractors that will be affected by this change.

Because the OFCCP’s new approach is yet to be determined, we do not recommend that employers consider changes to compensation practices or policies at this time. However, government contractors that have not yet implemented privileged legal risk assessments of their pay practices should consider doing so in the near term.

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12. OFCCP informal paper, Update on Systemic Compensation Analysis, as quoted in 71 Fed. Reg. 35136.

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