



Morgan Lewis

C O U N S E L O R S   A T   L A W

**Understanding and Responding to OFCCP's  
Final Standards on Systemic Compensation Discrimination  
and Voluntary Compensation Self-Audit Guidelines**

# Presenters



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# Webcast Overview

- Summary of new Compensation Standards and Voluntary Self-Audit Guidelines
- Practical impact on employers
- Recommendations

# New Compensation Standards

- Govern OFCCP Compensation Audits
- “Definitive Interpretation” of Executive Order 11246
  - Cannot be modified without notice and comment
  - Subject to judicial review under APA

# Voluntary Self-Audit Guidelines

- Incentive for contractors to conduct self-audits using methods recommended by OFCCP
- Can be changed without notice and comment procedures

# Summary of Compensation Standards

- Similarly Situated Employee Groupings (“SSEGs”)
- Multiple Regression Analysis (“MRA”)
- Legitimate factors included in the MRA
- Anecdotal evidence
- OFCCP’s investigation processes

# Similarly Situated Employee Groupings (“SSEGs”)

- Similar work
- Positions involving similar skills, qualifications and responsibility levels
  - Skills and qualifications involved in position, not particular to incumbent employees
- Additional factors:
  - Department or other business unit
    - Budget constraints
  - Employment status (e.g., part-time vs. full-time)
  - Compensation status (e.g., salaried, hourly, commissioned)
- Preference for SSEGs of 30 employees, and 5 of each comparator group
  - Never group dissimilar employees to reach 30/5 preference

# Multiple Regression Analysis (“MRA”)

- OFCCP preference for MRA by SSEG
  - Will use a “pooled” regression to meet objective of covering 80% of employees under review
    - Pooled regression not preferred or intended for widespread use
  - OFCCP will test if interaction terms are required (“Chow Test”)
  - Will only include statistically significant interaction terms
    - Several interactions may only be statistically significant in combination
- Two standard deviation threshold for statistical significance
- Include legitimate factors which influence compensation

# Legitimate Factors Influencing Compensation

- OFCCP will investigate to determine factors on case-by-case basis
- Factors need not be overtly considered in a compensation decision
  - Budget constraints
  - Employer’s compensation policies
  - OFCCP will test for a statistically-significant correlation between compensation and the factor
- No presumption that a factor within the employer’s control is “tainted” by discrimination
  - Correlation between factor and protected classification is not enough to establish, must be independent proof

# Legitimate Factors Influencing Compensation

## -- Examples

- Education
  - Relevance of degree to current position
- Experience
- Location
- Performance
- Productivity
- Significant leaves of absence
- Employment with predecessor company

# Anecdotal Evidence

- OFCCP will investigate to find examples of compensation discrimination against particular individuals
- Not “smoking gun,” direct evidence of discrimination
- OFCCP Expresses a “Strong Preference” for Anecdotal Evidence to Support Statistical Evidence.
  - Expectation that OFCCP will find anecdotal evidence

# OFCCP's Three-Tiered Investigation Process

- Tier 1: Comparison of Average Compensation
- Tier 2: Cluster Regression Analysis
- Tier 3: Comprehensive Investigation and MRA

# Tier 1: Desk Audit Compensation Analysis

- Scheduling letter (No.11), permits OFCCP to seek total compensation and total number of employees by grade, wage rate, or range
- OFCCP calculates average compensation for the “Pay Division”
  - Pay Division is grouping contractor submits
  - If too refined, OFCCP will aggregate
- For each “Pay Division,” calculate average compensation of women, men, minorities and nonminorities
- If average difference is greater than 2%, OFCCP adds affected group population to running tally

# Tier 1: Desk Audit Compensation Analysis (cont'd)

- At conclusion of tally, OFCCP calculates percent women and minorities affected
- If percent of women or minorities affected is greater than 30%, OFCCP compares percentage of affected women and minorities with percentage of affected men and nonminorities
- Where percentage of women or minorities affected is more than 3 times percentage of men or nonminorities, contractor fails test

# Desk Audit Compensation Analysis -- Example

Pay Div.	Women		Men		Percent Pay Difference	Affected Employees	
	Count	Average Salary	Count	Average Salary		Group	Count
1	14	\$22,245.00	26	\$26,295.00	-18.21%	Women	14
2	9	\$25,006.00	20	\$27,030.00	-8.09%	Women	9
3	23	\$27,180.00	27	\$28,902.00	-6.34%	Women	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%	Men	3
6	5	\$46,011.00	12	\$48,020.00	-4.37%	Women	5
7	16	\$47,501.00	60	\$49,480.00	-4.17%	Women	16
<b>Total</b>	<b>96</b>		<b>166</b>				

**Percent women affected: 69.79%**  
**Percent men affected: 1.81%**

Percentage of affected women 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.

## Tier 2: Cluster Regression Analysis

- Computer forms comparator groups based on three criteria
  - Create groups that have at least 30 total employees and 5 employees from each comparator group (e.g., men/women)
  - To extent possible, avoid grouping employees in different job titles; if grouping titles required for 30/5, group titles closest in average pay
  - To extent possible, avoid grouping job titles in different pay grades
- Cluster regression is used as diagnostic screen; it is not sufficient to establish a violation

# Data Used For Cluster Regression

- OFCCP requests
  - Unique employee 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)
- OFCCP will consider any additional information or analysis contractor claims pertinent to determination of whether further investigation is warranted

## Tier 3: Comprehensive Investigation and MRA

- Request for written compensation policies
- Interviews of employees, supervisors, managers, HR and compensation personnel:
  - Determine job duties to form SSEGs
  - Determine legitimate factors which influence compensation under company's pay systems
  - Determine availability of electronic data in HRIS database
- Develop MRA

## Tier 3: Comprehensive Investigation and MRA (cont'd)

- Develop anecdotal evidence of discrimination
  - Additional interviews
  - No conciliation until investigation is completed
- Individualized assessment of qualitative or unquantifiable factors
- Issue NOV alleging systemic compensation discrimination
  - OFCCP will provide enough information to allow contractor to replicate regression analysis
  - OFCCP will summarize anecdotal evidence

# Voluntary Self-Audit Guidelines

- Strictly voluntary
- Provisions to avoid *de facto* compliance standard
  - Decision not to volunteer cannot be considered in assessing compliance status
  - Recognition that there are many other self-audit methods which would be equally appropriate
- Confidentiality
  - OFCCP will not produce unless ordered by court under FOIA

# Compliance Coordination

- If contractor conducts self-audit conforming to guidelines, OFCCP will not audit contractor's pay practices
- Reasonable effort standard
- If only marginally reasonable, OFCCP can offer written recommendations for improvement
  - Must be adopted in order to obtain compliance coordination during future OFCCP audits
- Contractor does not provide compensation data in response to Item 11
  - Instead, contractor responds it seeks “compliance coordination”
  - OFCCP will contact contractor to request information

# Self-Audit Methods Outlined in Guidelines

- Annual self-audit analysis
- By AAP, facility, or larger population
- Create SSEGs
  - Attempt to reach 30/5
  - Do not group dissimilar employees to reach 30/5
  - No OFCCP scrutiny of SSEGs if include 70% of employees encompassed within self-audit study
  - Compensation of employees not in SSEG must be audited through non-statistical methods

# Self-Audit – Statistical Analysis

- Facility or AAP with less than 500 employees
  - Evaluates SSEGs
  - Evaluate effect of Legitimate Factors
    - Contractors may use proxies for actual data if proxies reasonably “track” data
- Can include factors within contractor’s control if contractor has restrained subjective decision-making through formal standards
  - Permits tests of statistical significance generally recognized
- Facility or AAP with 500 or more employees, statistical analysis must be multiple regression analysis
  - Cannot use tiered approach beginning with less sophisticated analysis

## Self-Audit Follow-Up

- Investigate statistically significant pay disparities
  - Two standard deviations threshold
  - Legitimate non-discriminatory factors explain disparities
  - “Otherwise not product of discrimination”
- Corrective action
  - Pay adjustments
  - Back pay (up to two years)

# Recommendations – Preparing For An OFCCP Compensation Audit

- Analyze quality of HRIS database
- Consider correcting/updating HRIS data
- Replicate desk audit analysis to assess exposure and develop “Pay Divisions”
- Consider developing analysis to submit with cluster data
- Do not label any group “SSEG” or “similarly situated” unless carefully analyzed
- Have experienced counsel review and analyze data to be provided

# Recommendations – Internal Risk Assessment Analysis

- Should you do it?
- How should it be done?
- How can you protect it from discovery or disclosure?

# Should You Utilize OFCCP's Voluntary Self-Audit Guidelines?

- Advantages and benefits
- Disadvantages and risks
- How to decide?
- How to do it?

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