

Publications

Labor and Employment Alert: OFCCP Issues New Directive For Analyzing Pay Discrimination Claims For Use By The Federal Contracting Community

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Recently, the Office of Federal Contract Compliance Programs (OFCCP) officially withdrew the Bush-era guidance regarding pay discrimination. In its place, the OFCCP issued Directive 307, accompanied by a fact sheet and answers to frequently asked questions. Directive 307 specifically addresses how the OFCCP will conduct future investigations of compensation discrimination. Directive 307's investigative procedures apply to all scheduling letters issued by the OFCCP on or after February 28, 2013, as well as open reviews as long as Directive 307's investigative procedures do not conflict with the OFCCP's earlier procedures or guidance related to compensation.

The OFCCP's New Approach to Compensation Investigations

The Agency believes that there "is no single way to prove compensation discrimination, and no particular limits on the kinds of evidence or information that might be relevant to proving discrimination in a particular case." Accordingly, Directive 307 emphasizes the need for a flexible, case-specific approach and enables Compliance Officers to group employees in several different ways and use a variety of "investigative and analytical tools." In addition to compensation data, Compliance Officers may also consider the contractor's policies and procedures, as well as any anecdotal evidence collected as part of the investigation.

The \$2,000 or 2% Standard No Longer Applies

The OFCCP would previously flag potential compensation discrimination whenever the average pay for females versus males or minorities versus non-minorities in a given job title varied by at least \$2,000 or 2%. However, Directive 307 officially abandons the \$2,000 or 2% "tipping point" and adopts a more robust Preliminary Analysis which focuses on both quantitative and qualitative factors. The quantitative factors which may be evaluated include:

- The size of the overall pay difference based on gender and race;
- The size of the largest average pay difference within AAP job groups, or the contractor's existing salary band or pay grade system;
- The number of job groups or grades where average pay differences based on gender or race exceed a certain threshold; or
- The number of employees affected by gender-or-race-based average pay differences within job groups or grades.

The OFCCP also identified the following qualitative factors which may be considered:

- Compliance history;
- OFCCP or EEOC complaints;
- Anecdotal evidence;
- Potential violations involving other employment practices; or
- Data integrity issues.

The OFCCP Will Develop Pay Analysis Groups

The next stage in the analysis under Directive 307 "is to develop pay analysis groups that are used to test for statistical significance on large groups of employees." To identify these pay analysis groups, the OFCCP will consider: (i) the particular industry; (ii) the types of jobs and compensation at issue; and (iii) a contractor's actual compensation practices, such as whether the compensation differs by role, level, function, unit or job classification. The OFCCP states that it will then conduct further analysis on these pay analysis groups to determine whether statistically significant disparities in compensation exist.

Best Practices for Contractors Pursuant to Directive 307

Because Directive 307 provides the OFCCP with greater flexibility in investigating compensation discrimination and does not constrain Compliance Officers to use a particular methodology, it may be more difficult for a contractor to determine if it is compliant. Accordingly, it is more important than ever for contractors to conduct privileged self-audits of compensation data and any policies that may contribute to compensation disparities. By conducting an internal review in accordance with Directive 307's new investigative procedures, contractors can take necessary actions to ensure compliance prior to the occurrence of a compensation audit.