

OFCCP ISSUES NEW COMPENSATION DIRECTIVE

Sep 19, 2018

The OFCCP's recent Directive, issued on August 24, 2018, signals a move towards greater transparency in the compensation review process for contractors. With this new Directive, the OFCCP has rescinded former Obama-era guidance on compensation review, for a more open and transparent process. The OFCCP sent out 750 corporate scheduling announcement letters to contractors on September 7, 2018, so compliance reviews may be imminent for a number of employers.

Highlights

Pay Analysis Groupings

The Directive sets out the OFCCP's procedures for grouping similarly-situated employees for statistical compensation analysis. The OFCCP explains that it analyzes compensation for similarly-situated employees by:

- developing pay analysis groupings (PAGs); and
- statistically controlling for further structural differences within the PAGs and individual employee characteristics, such as tenure, prior experience, education and grade level.

In a significant change, the OFCCP will use the contractor's compensation hierarchy and job structure to run its analysis, provided that:

- the structure is reasonable,
- the OFCCP can verify the structure as reflected in the contractor's compensation policies, and
- the groupings are of sufficient size to conduct a meaningful statistical analysis.

If the contractor does not provide information about its compensation system, the OFCCP will as a default use either EEO-1 or AAP job groups. The OFCCP will "control further for sub-job groupings, functions, units, or titles," as well as "tenure, full-time status" and other factors as appropriate.

Statistical Methodology and Modeling

The Directive provides an overview of the OFCCP's methodology for statistical analysis of compensation data during the OFCCP's desk audit and subsequent compliance evaluation. This greater transparency will assist contractors in performing self-audits of compensation data before it is submitted to the OFCCP for review.

In conducting the statistical analysis, the OFCCP will:

- Use multiple linear regression analysis to minimize false positives and false negatives;
- Separately analyze base pay and total compensation, and, if necessary, components of compensation (e.g., bonus, commission, overtime, shift differentials);
- Transform salary to the log of salary in the regression model to account for potentially different pay distributions within PAGs; and
- Analyze statistical outliers for indicators of potentially inappropriate pay analysis groupings.

The Directive also details a number of control variables the OFCCP will use when running its statistical analysis.

Findings and Conciliation

The Directive states that the OFCCP will use the following three practices to facilitate transparency, consistency, and resolution of findings of compensation discrimination:

1. At the conclusion of the desk audit, the OFCCP will notify the contractor of the general nature of any preliminary compensation disparities warranting future information requests or an onsite visit. The OFCCP views the outcome of the desk audit as a screening procedure, rather than a final indicator of discrimination.
2. The OFCCP will attach to any Pre-Determination Notice (PDN) the data necessary to replicate the PAGs and regression analysis in electronic format. At this point, the contractor will have the opportunity to offer a non-discriminatory explanation for the OFCCP's preliminary findings of discrimination.
3. To facilitate the conciliation process, the OFCCP will make available representatives from its Branch of Expert Services (who perform the statistical analysis), to clarify the OFCCP's variable coding, statistical methods and findings, and to answer questions about the process and assumptions used to calculate back pay.

Key Points for Employers

- Pay discrimination continues to be a focus of OFCCP audits.

- While the Directive provides greater clarity on the OFCCP's process for reviewing compensation data, questions still remain as to the actual process and methods the OFCCP will use to run the analysis.
- Employers should conduct periodic self-audits to proactively identify and correct compensation disparities.
- In the event that an employer receives a scheduling letter, employers should conduct a statistical analysis of the compensation data to identify any potential issues before the data is submitted to the OFCCP.
- When submitting data to the OFCCP in response to a scheduling letter, employers should provide information on their compensation hierarchy and job structure, to allow the OFCCP to adopt this information when it develops the pay analysis groupings (PAGs). This will guide the OFCCP regarding the PAG most appropriate for the population at issue.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers assess their employment practices. If you or your organization would like more information on this OFCCP directive or any other employment issue, please contact an attorney in the Employment and Labor practice group.

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