

Client Alert

OFCCP Issues Final Guidance on Systemic Compensation Discrimination and Contractor Self Evaluation

June 16, 2006

More than a year and a half after publishing proposed guidance, the Office of Federal Contract Compliance Programs (“OFCCP”) on June 16, 2006 issued (1) final interpretive standards for systemic compensation discrimination, and (2) voluntary guidelines for contractor self-evaluation of compensation practices. While the final standards and guidelines are not substantially different from the initial proposal, the comments that accompany the final guidance do provide further clarification of the OFCCP’s position on several key issues. The final guidelines reflect OFCCP’s ongoing focus on compensation issues and OFCCP’s goal of becoming increasingly sophisticated in its approach to compensation analysis—two important reasons for contractors to familiarize themselves with the guidance and ensure they maintain defensible compensation practices.

The final guidance confirms OFCCP’s rejection of the controversial “pay grade” methodology “as the basis upon which OFCCP will allege and establish systemic compensation discrimination,” in favor of a more statistically rigorous approach. The key components of the OFCCP’s new approach include: (1) comparison of “similarly situated” individuals; (2) use of multiple regression analysis as a statistical analytical tool and adoption of “two standard deviations” as the level of statistical significance; and (3) reliance on anecdotal evidence of discrimination, in addition to statistical evidence, when determining whether discrimination exists. However, the OFCCP noted that it will continue to use the statistically-infirm “pay grade” methodology as an investigative tool. Perhaps more importantly, the Agency announced that it will use “cluster regressions,” at a second step of the investigative process, to analyze employee-specific information if the pay grade methodology or some other undefined approach at the desk audit “indicat[es] potential compensation discrimination.” So, just when contractors thought the pay grade methodology was dead

The OFCCP’s second regulatory document—“Voluntary Guidelines for Self-Evaluation of Compensation Practices”—offers a “compliance coordination” incentive for contractors who conduct self-evaluations of their compensation practices pursuant to the OFCCP’s methodology. That methodology involves:

- Creating and evaluating “similarly situated employee groups” (“SSEGs”) that are large enough for meaningful statistical analysis – generally at least 30 total employees and at least 5 female or minority employees;
- Conducting annual statistical analyses of the SSEGs that account for factors that legitimately affect compensation; the final guidance increases from 250 employees to 500 employees the threshold at which contractors must use multiple regression analyses to satisfy its standards;
- Investigating any statistically significant compensation disparities and remedying disparities that cannot be explained by legitimate factors;
- Retaining documentation of evaluation process; and

- Providing all such documentation to OFCCP during a compliance review.

The comments that accompany the final guidance note the contracting community's concern that the “voluntary” guidance will not be treated as such, either by the Agency or by the courts. In response, the OFCCP attempted to re-emphasize the voluntary nature of contractors' compliance with this self-evaluation method, but did not back away from issuing the proposed guidance. Thus, contractors should remain rightfully concerned that the guidance will be viewed as mandatory by OFCCP compliance officers and, more importantly, by private litigants and courts. Contractors are wise to fear that private litigants will argue that an adverse inference should be drawn against any contractor who does not follow the guidelines established by the OFCCP.

Full text of the Standards and Guidelines can be found [here](#) and [here](#).

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