

The Complete AAP News

Yocom & McKee, Inc.



OFCCP Issues Guidelines for Evaluating Compensation Issues

The Proposed Guidelines:

- Are not law, merely suggestions
- Give contractors an idea of how the OFCCP will be evaluating compensation practices
- Raise issues regarding the attorney-client privilege or attorney work product doctrine when analyzing compensation issues

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On November 16, 2004, the Office of Contract Compliance Programs (OFCCP) published proposed standards for contractors to self-evaluate compensation practices in compliance with CFR 60-2.17(b)(3). The guidelines can be found in the Federal Register, Volume 69, No. 220 or in the "News" section of our website.

The OFCCP had been using a mean and median salary analysis by salary grade or range to identify potential discrimination. This approach is now expressly recognized as inconsistent with Title VII.

The new guidelines propose that contractors with 250 or more employees use a multiple regression analysis to self-evaluate compensation practices. A Regression Analysis attempts to identify factors which may influence salaries. These could include date of hire, time in position, performance, education, and any other relevant factor. The Complete AAP software and our affirmative action services include a Salary Regression Analysis. The guidelines suggest evaluating groups of employees who are similarly situated. SSEGs (Similarly Situated Employee Groupings) are comprised of employees whose work is similar in content, responsibility,

requisite skill and qualifications. A separate Regression Analysis would be completed for each SSEG.

A contractor must investigate any statistically significant disparities revealed in the regression analysis. Disparities that cannot be explained by relevant factors must be adequately remedied. The OFCCP reserves the right to review whether a contractor has adequately investigated and remedied any disparities.

The proposed guidelines give contractors an alternate option to certify their compliance with the compensation self-examination. In lieu of producing the methodology or results of its compensation self-evaluation analyses to OFCCP during a compliance review, the contractor may certify in writing that a compensation self-examination has been performed at the direction of legal counsel, and that the results of the analysis are subject to the attorney-client privilege or attorney work product doctrine. The OFCCP will then evaluate their compensation practices without regard to the self-analysis.

The proposed guidelines raise a number of issues, including:

1. The Proposed Guideline is not a regulation, so it lacks the full force of law. The OFCCP can suggest con-

tractors follow the guidelines, can follow them themselves or complete any other type of analysis they feel is appropriate. Remember, for the past several years, the OFCCP has been consistently using the "mean and median by salary grade" approach that the new guidelines specifically discredit. How long will the OFCCP use this "new guideline" and will it also be discredited at some point in the future?

2. Item #11 on the Itemized Listing attached to the Compliance Review Scheduling letter requires the submission of "... annualized compensation by either salary range, rate, grade or level showing total number of minorities by race and gender and total compensation by race and gender." Will the OFCCP update this item in light of the new Proposed Guidelines? Changes to the Itemized Listing must be submitted to and approved by the Office of Budget and Management. If this is a regulatory change, the analysis done pursuant to the regulatory requirement would not be protected by the attorney-client privilege or attorney work product doctrine. This would eliminate the option of certifying, but not giving the

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3560 facilities were identified as the worst violators of systemic discrimination and slated for potential compliance reviews in 2005

New Audit Selection System for 2005

The OFCCP announced this fall that it will be using a new process called the Federal Contractor Selection System (FCSS) to select contractors for Compliance Reviews in 2005. The agency employed Westat to construct a mathematical model to select contractors for review based on the EEO-1 report, historical reviews, industry and labor market data, and other factors not identified by the OFCCP. 3560 facilities were identified as the worst violators of systemic discrimination and slated for potential compliance reviews in 2005. 1710 pre-scheduling letters went out November 1st to organizations with 2 or more establishments on the list notifying them of the locations that may be audited in 2005. The exceptions are those contractors that had only one facility on the list, FAAPs, CMRs, pre-award audits, and complaint-generated audits.

In FY 2004, over 80% of all desk audits did not result in an on-site review. This result can be expected to radically change in FY 2005. The FCSS selection system focuses on identifying the potentially worst violators of systematic discrimination. Contractors who are reviewed in 2005 are those the OFCCP expects will have significant af-

firmative action and EEO shortcomings.

Reviews will increasingly be handled by teams of compliance officers. Specialists from various district offices and even from other Regions may be involved in on-site reviews. Expect the reviews to continue focusing on compensation issues, applicant/hire and separation issues.

To bolster its technical analysis of affirmative action issues, the OFCCP has hired Dr. Michael Sinclair as National Director of Statistical Analysis. Regional statisticians have been hired for the Pacific and Southwest/Rocky Mountain regions: Dr. Narika Litras and Dr. Charles McGee.



2005 OFCCP Initiatives

Additional training for Compliance Officers is planned for 2005. Training will focus on statistics in compensation and adverse impact analysis. New investigative and interview techniques will be emphasized.

OFCCP plans to revamp their internal computer systems. More information on companies will be available to the OFCCP: (e.g. previous compliance review results, current federal government contracts

so District Offices do not have to ask companies scheduled for audits if they have federal contracts).

Expect to see some new management teams at the OFCCP. The entire NE Region (NY) management has already been replaced.

More statisticians will be hired to review cases for litigation worthiness. Dr. Richard Fisher has already been hired to review test validity

studies.

More emphasis will be placed on identifying systemic discrimination. See the related article on the new FCSS selection system.

OFCCP Tidbits

New Compliance Manual should be available during 2005.

Compliance Officers appear to be using the following applicant definition:

1. Is the person "minimally qualified" for the job at issue,
2. "Applied" for the openings in question (or wanted to apply, but did not because he or she was deterred by the known prospect of discriminatory rejection), and
3. "Considered" (or should have reasonably considered) for the opening in question.

If an issue related to an AAP audit is decided by an Administrative Law Judge, it is now reviewed by an Administra-

tive Review Board (ARB). The Secretary of Labor previously made the final determination. The ARB has 1 year to make a decision. The Secretary of Labor previously had no time limit.

If past experience is any indication, future AAP reviews will last longer and require tremendous HR resources. OFCCP has been spending an average of 140 hours on each review before initiating this new selection method. Cases will be allowed to stay open much longer now.

EO Survey will probably be issued again in 2005.

The OFCCP is not consistent on whether part-timers should be included in an affirmative action plan. By "podium pol-

icy" the OFCCP has stated part timers should be included, but many AAP's that excluded them have been approved.

For those who used the 1990 Census data broken down by income level, this break down is not available for 2000 census.

Remember that the 2000 Census data must be used in your 2005 Affirmative Action Plan!



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Training Classes to use the Complete AAP software

We offer training classes in our training facility in beautiful Golden, Colorado. The first half day is spend reviewing affirmative action principles, history and new developments. The second day you will learn all the secrets of using the software to produce a fully compliant AAP. The final day is spent using the software with your data. Many students complete the bulk of their plan during class! Check our website for scheduled training dates. Additional dates can be arranged for your group. Call us for details.

Our instructors are also available to conduct on-site training

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- OFCCP the results of your compensation analysis.
3. A thorough regression analysis of compensation practices may be costly and time consuming, necessitating the use of an expert consultant. All the variables that contribute to salaries are usually not simply available in HR systems.
 4. If statistically significant compensation differences are identified, what is the acceptable solution? May a contractor adjust the salaries to reduce the difference below 2std deviations or must the difference be reduced to zero?
 5. What is meant by the proposal that contractors with

at least 250 employees must used a regression analysis to analyze compensation? Does 250 apply to the entire organization, the particular site? How does it apply to Functional Business Unit AAP?

Contractors must carefully evaluate any benefits versus burdens of following the Proposed Guidelines. Clearly the OFCCP intends to follow these guidelines when conducting compliance reviews. There is some benefit for a contractor to know where potential issues might arise during the OFCCP review.

If and until the Proposed Guidelines become part of the actual regulations, contractors con-

tinue to have the option of analyzing their compensation practices in any manner they choose and cover it by the attorney-client privilege or attorney work product doctrine.

