



# Complete AAP News

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## OFCCP Issues Voluntary Compensation Evaluation Guidelines

On June 16, 2006, the Office of Federal Contract Compliance Programs (OFCCP) published The Interpretative Standards for Systemic Compensation Discrimination under E.O. 11246 ("Standards") that will govern OFCCP's analysis of contractors' compensation practices during Compliance Reviews.

In the past, OFCCP has employed a variety of methods to analyze a contractor's pay practices, including the Salary Grade theory in which the average salaries of employees in the same salary grade were compared for evidence of race and gender discrimination. The use of the Salary Grade method of analysis is now officially discredited as invalid under Title VII requirements because employees in the



same salary grade may be performing dissimilar work. According to the Standards, employees must be "similarly situated" before their salaries can be compared in a valid compensation analysis. Employees are similarly situated only if they actually perform similar work activities, occupy positions involving similar skills and qualifications, and have similar levels of responsibility.

OFCCP will segregate a contractor's workforce into groups of employees that are

similarly situated and perform statistical tests to determine if systemic compensation discrimination exists. Systemic discrimination is defined as statistically significant compensation disparities between men and women or minorities and non-minorities after taking into account legitimate factors which influence compensation, such as education, experience, performance, productivity, seniority, location, etc. Compensation disparities of two or more standard deviations are considered to be significant using a Multiple Regression Analysis. Except in unusual cases, OFCCP will not issue a Notice of Violation in the absence of anecdotal evidence to support the statistical analysis. Anecdotal evidence consists of any non-statistical evidence of past discrimi-

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natory practices.

Due to limited resources, OFCCP has indicated it will continue to initially analyze contractors' compensation by salary grade in spite of the fact that this methodology does not meet Title VII standards. The female average salary will be compared to the male average salary in each salary grade. Likewise, the average salaries of minorities and non-minority in each salary grade will be compared. OFCCP will use these comparisons to determine if a potentially significant wage disparity exists that may warrant a more comprehensive analysis that comports with the Guidelines.

OFCCP will also assert a compensation discrimination violation if the contractor establishes lower compensation rates for jobs predominantly occupied by women or minorities based on the sex, race or ethnicity of the employees in those jobs. For example, a contractor that adopts a market survey to determine wage rates for jobs, but

establishes the rate for predominately women or minority jobs significantly lower than the market rate, while establishing for predominately male or non-minority jobs the full market rate will be considered evidence of a violation of this provision.

On June 16, 2006, OFCCP also published the Voluntary Guidelines for Self-Evaluation of Compensation Practices ("Guidelines") that contractors can use to evaluate their compensation practices. As indicated in the title, these Guidelines are voluntary. OFCCP regulations require contractors to evaluate their compensation system to determine whether there are disparities based on gender, race or ethnicity. The regulations do not, however, specify any particular method of evaluation. The Guidelines are intended to provide suggested techniques for complying with this self-evaluation requirement. While contractors are free to choose their

own method of evaluation, OFCCP has provided an incentive for contractors to follow the Guidelines. If a contractor implements a self-evaluation system that conforms to the Guidelines, OFCCP will coordinate its monitoring activities to the results of the contractors own analysis, provided the contractor meets the following requirements:

1. The self-evaluation must be performed on Similarly Situated Employee Groupings ("SSEGs") consisting of employees that have similar job duties and responsibilities and occupy positions that require similar skills and qualifications. Other factors that have a significant bearing on whether employees are similarly situated may also be considered, such as department or functional unit, employment status (e.g. full-time vs. part-time), and compensation status (hourly vs. salaried vs. commissioned), etc.
2. A reasonable attempt must be made to produce SSEGs that are large enough for a



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meaningful statistical analysis. SSEGs should contain a total of at least 30 employees, and five or more employees in each gender group (male/female) or each race group (minority/non-minority). The compensation of employees that are not similarly situated enough to be grouped in an SSEG must be evaluated using non-statistical methods.

However, if the contractor's SSEGs do not encompass at least 70% of the workforce at the establishment under review, OFCCP will carefully scrutinize the statistical analysis and non-statistical evaluations

3. The contractor must perform an annual statistical analysis that accounts for factors that legitimately influence compensation, such as experience, education, performance, productivity, location, etc. A Multiple Regression Analysis must be performed for establishments with 500 or more employees. (The Complete AAP software includes a Multiple Regression Analysis.)

4. The contractor must investigate all statistically significant pay disparities, defined as two or more standard deviations. Appropriate remedies must be provided for any statistical disparities that are not explained by legitimate factors. OFCCP will seek two years of back pay adjustments for unexplained disparities.

5. The contractor must maintain for two years sufficient documentation to explain and justify its SSEGs, the exclusion of certain employees from SSEGs, factors included in the statistical analysis, and the type of statistical analysis. Documentation of any non-statistical evaluations, as well as any follow-up investigations and any pay adjustments made must also be retained for two years.

6. The compensation analysis and all supporting documentation must be made available to OFCCP during a Compliance Review. OFCCP may also review any personnel record and conduct any

employee interviews it deems necessary to verify the accuracy of any representations made by the contractor. OFCCP will assess whether the contractor's compensation evaluation program reasonably complies with the Guidelines and may suggest changes to the contractor's program to improve its conformity with the Guidelines. The contractor's compensation evaluation program may be rejected if OFCCP determines that the program does not reasonably comply with the Guidelines, or if it is determined during future Compliance Reviews that the suggested changes to the program were not implemented.

Contractors who do not wish to make their self-evaluation programs available to OFCCP may certify that they have complied with the regulations. The certification must be in writing, signed by a duly authorized officer under penalty of perjury, and the certification must state that the contractor has performed a com-



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pensation self-evaluation with at the direction of counsel, and that counsel has advised the contractor that the self-evaluation and results are subject to the attorney-client privilege and/or the attorney work product doctrine. Since OFCCP is not able to assess whether contractors who opt for this certification alternative have complied with the Guidelines, OFCCP will perform its own analysis of the compensation practices without regard to the contractors' self-evaluation.

Interestingly, this certification option is voluntary and contractors can produce compensation analyses under the protection of attorney-client privilege and/or the attorney work product doctrine whether or not they have certified their compliance with the regulations.

Yocom & McKee, Inc.'s Complete AAP version 9 software currently produces several salary reports that help contractors evaluate their compensation practices.

1. The Salary Analysis report reports "Mean" and "Median" salaries Company-wide, by Department, Job, Job Group, EEO Category, or Salary Grade.

2. The Salary Summary Report is a helpful response to Item 11 of OFCCP's audit scheduling letter. It lists employee counts and salary totals by race and gender Company-wide, or by Department, Job, Job Group, EEO Category, or Salary Grade.

3. The Salary Regression Analysis report gives the contractor the ability to analyze compensation practices using a multiple regression analysis. Not intended to be an exhaustive analysis, up to five factors affecting compensation can be tested.

We are working on a new, more powerful version of the Complete AAP software that will allow users to analyze their compensation practices by SSEGs. We plan to have this new version, which will

include the new racial and EEO categories, available early in 2007. SSEGs are a new, somewhat controversial concept in affirmative action and Title VII law. There is little guidance concerning how similar jobs need to be grouped for comparing compensation. Courts have roundly rejected the concept of "Comparable Worth" which tried to compare different jobs that arguably had similar worth to an organization. During OFCCP audits, our clients have had good success submitting compensation data analyzed by job.



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*Yocom & McKee, Inc. was founded in 1988 by two attorneys with backgrounds in employment law, representing management. Focusing on affirmative action compliance, we currently offer the Complete AAP software for those wishing to complete their own affirmative action plan(s) and our affirmative action services for those organization who have limited time and want the assurance their plan(s) have been accurately prepared and reviewed.*



## Training

Yocom & McKee, Inc. offers several group training opportunities every year at our office in Golden, Colorado. Check our web site for the latest dates and availability.

We also offer group and individualized training at your site. Call us to discuss dates and costs.

Individualized training is also available with an Affirmative Action Specialists at our office in

Golden, Colorado. Coaching you to effectively use your employee and activity data, the bulk of the statistical and narrative portions of your plan can often be completed in one day!

Call Yocom & McKee, Inc. at 1-800-765-1176 for more details or email [info@yocom-mckee.com](mailto:info@yocom-mckee.com)