

OFCCP Rescinds Its 2006 Compensation Standards in Favor of More Flexible Approach to Pay Discrimination Compliance Evaluations

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Effective February 28, 2013, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) rescinded its much criticized 2006 Compensation Standards and Voluntary Guidelines (Compensation Standards) utilized in pay discrimination compliance evaluations of federal contractors. The Compensation Standards essentially had applied one analytic approach to pay discrimination, regardless of industry, job type or other data specific to the federal contractor's pay practices. Not surprisingly, the OFCCP claims that the narrowly defined "cookie cutter" compliance evaluation procedures imposed by the Compensation Standards impeded the OFCCP's investigation efforts.

The OFCCP has issued Directive 307 as guidance in place of the Compensation Standards, stating that the agency will align its enforcement activities more with "the longstanding principles under Title VII." In doing so, the OFCCP emphasized there is no single way to prove compensation discrimination, and no particular limit on the kinds of evidence or information that may be relevant.

Directive 307: The New Wide-ranging Approach to Investigating Pay Discrimination

OFCCP Directive 307, effective February 28, 2013, outlines the new procedures for reviewing federal contractor compensation systems and practices during the OFCCP's compliance evaluations. In the directive, the OFCCP emphasizes that compliance evaluations will be conducted in a manner consistent with Title VII's flexible, fact-specific approach to proof. As a result, OFCCP compliance officers have more discretion to determine how and what to investigate, which will almost certainly create more of a burden upon federal contractors.

While Directive 307 does not provide much in the way of specifics, it sets forth the following eight-step process for compliance officers to follow on a case-specific basis:

1. Conduct a preliminary analysis of summary data to determine the existence or size of any pay differences.
2. Conduct an analysis of individual employee-level data (if individual data is provided or requested).
3. Determine the most appropriate investigative approach from a range of investigative and analytical tools, which may depend upon the underlying facts, available data and the federal contractor's compensation system and practices.
4. Consider all employment practices that may lead to compensation disparities.
5. Develop pay analysis groups (groups of employees who are comparable for purposes of the federal contractor's pay practices) to determine whether disparities in pay exist.
6. Investigate systemic, small group and individual discrimination.
7. Review and test the factors the federal contractor considered in making compensation decisions before accepting the factors for analysis.
8. Conduct onsite investigation, offsite analysis, and refinement of the analytical model for determining whether pay discrimination has taken place.

Notably, the OFCCP states that the order in which these procedures are utilized may vary based upon the facts and circumstances of each case.

How the OFCCP Is Handling Open Compliance Evaluations

The rescission of the 2006 Compensation Standards and issuance of Directive 307 are both effective as of February 28, 2013. However, the 2006 Compensation Standards will continue to apply to the OFCCP's determination of whether to issue a notice of violation in any OFCCP compliance evaluation scheduled, open or otherwise pending as of February 28, 2013. The investigation procedures established in Directive 307 apply to all OFCCP compliance evaluations scheduled on or after February 28, 2013, and they apply to compliance evaluations open as of February 28, 2013 to the extent that they do not conflict with OFCCP guidance or procedures existing prior to that date.

Current Scheduling Letter Still in Effect, but Changes Currently Under Review

Directive 307 does not alter any existing recordkeeping or reporting requirements that already apply to federal contractors. However, the OFCCP has stated its current scheduling letter that requires federal contractors to provide certain compensation data at the beginning of a compliance evaluation is currently under review.

The proposed, new scheduling letter would require federal contractors to provide employee level compensation data for all employees – compared to the current scheduling letter's requirement for only annualized compensation data by

salary range, rate, grade or level showing the total number of employees by race and gender. The OFCCP has not indicated if or when the proposed scheduling letter will be adopted. For now though, individual compensation data will only be requested after the OFCCP conducts a preliminary analysis of the aggregate compensation data provided at the outset of a compliance evaluation.

What Federal Contractors Can and Should Do Now

Federal contractors should consider conducting self-audits, under the attorney-client privilege, to examine any indicators of disparate treatment in pay and ensure their compensation practices are non-discriminatory. Furthermore, given that the OFCCP may be requesting individualized data up front in the near future, federal contractors also may want to begin determining how they would organize and report this data.

The OFCCP will offer a compliance assistance webinar regarding Directive 307. Information about this webinar is available [here](#).

If federal contractors have any questions or concerns, they should contact Debra S. Friedman or another member of Cozen O'Connor's Labor & Employment Department for more information.