

July, 2006

OFFCP Issues Guidance for Government Contractors on Evaluating Systemic Compensation Discrimination

By: Laurie A. Petersen, Esq.

In addition to the non-discrimination obligations of Title VII and state fair employment laws, employers who are contractors or subcontractors on government contracts have affirmative action obligations with regard to minorities, females, covered veterans, and disabled individuals. Employers who are government contractors or subcontractors, have a contract of \$50,000 or more, and have 50 employees, must comply with Executive Order 11246 and other laws and regulations that require them to develop written affirmative action plans and make good faith efforts to hire, retain, and promote qualified females and minorities. These written affirmative action plans are then subject to review by the Office of Federal Contract Compliance Programs (OFFCP), an office of the Department of Labor.

During the past decade, the review of a company's compensation program has played a key role in the audit of employer affirmative action plans and efforts. A pay grade theory was pursued under the Clinton administration, which many government contractors saw represented by the EO Survey of that era. That theory required the comparison of similarly-paid, but substantively dissimilar jobs, in an employer's workforce.

In the June 16, 2006 Federal Register, the OFCCP published a final rule setting forth guidelines for evaluating systemic compensation discrimination issues for females and minorities under Executive Order 11246. These guidelines outline three key areas for assessing compensation discrimination by the OFCCP:

- a. Comparisons of employees who perform similar work and occupy positions involving similar responsibility levels, skills, and qualifications, referred to as similarly-situated employees;

- b. Use of multiple regression analysis to analyze an employer's pay system for potential discrimination which allows for the consideration of variable legitimate factors affecting compensation such as years of experience, education and performance evaluations; and
- c. Anecdotal support of statistical findings of systemic discrimination.

In adopting these criteria for assessing compensation discrimination, the OFCCP admitted that its earlier interpretation of compensation discrimination was inconsistent with both Title VII and Executive Order 11246. The new method of analysis is backed by significant references to case law and provides specific standards for analyzing compensation discrimination.

The OFCCP has noted that it will still use pay grade information as an indicator of potential compensation discrimination to target workforces for further investigation. However, it will not use that theory as a basis for alleging and establishing systemic compensation discrimination.

As part of its new guidelines, the OFCCP has proposed a method for federal contractors and subcontractors to perform a self-evaluation of their compensation practices. These are voluntary guidelines and employers who adopt different guidelines will not be deemed in violation of the law; however, contractors and subcontractors who meet the standard set out by the OFCCP will be presumed by the OFCCP to have a compensation system in compliance with Executive Order 11246. In summary, the self-evaluation must meet the following general criteria:

1. The self-evaluation must be based on similarly-situated employee groupings (SSEGs) defined as groups of employees who perform similar work, and occupy positions with similar responsibility, involving similar skills and qualifications. The SSEG must contain at least 30 employees and at least 5 employees from each comparison group. Certain employees who occupy unique positions not similar to any other position must also be evaluated by using non-statistical methods of evaluation. The self-evaluation and groupings must encompass at least 80% of employees in the workplace.
2. The self-evaluation must use some form of statistical analysis that permits assessment of the SSEG while accounting for legitimate factors that influence compensation such as experience, education, performance, productivity, and location. For establishments or AAPs with 500 or more employees, the statistical analysis used must be a multiple regression analysis.

3. The self-evaluation must be conducted on an annual basis. The employer must investigate any statistically significant compensation disparities and provide appropriate remedies, including back pay relief, if the disparities that cannot be explained by legitimate factors.
4. The contractor must contemporaneously create and retain documents and data necessary to explain and justify the SSEG groupings, data used in the statistical analyses, results of any statistical and non-statistical methods that the contractor used, and documentation as to any follow-up investigation and adjustments made on the basis of the investigation. These documents must be retained for two years from the date the statistical analyses were performed and made available to the OFCCP during a compliance review. If the contractor performs the self-evaluation but asserts protection from disclosure based upon advice of counsel, and elects only to certify compliance as opposed to providing the results of the self-evaluation to the OFCCP, the contractor opts out of coordination incentive outlined by the OFCCP during an audit.

This represents both good and bad news for contractors. The OFCCP has moved to an evaluation standard of compensation that is consistent with those standards applied by the courts in litigation. This will reduce some of the unwarranted findings and defense costs associated with OFCCP action on compensation issues that would not withstand challenge in court. However, it also means that when the OFCCP pursues compensation issues, the Solicitor of Labor and the Agency have determined that they have sufficient evidence to prove compensation discrimination, making the Agency more willing to pursue litigation in the courts.

Lindner & Marsack, S.C. employers on issues involving government contractor status, provides educational seminars for staff, assists in drafting affirmative action plans, and assists with audits, notices of violations, negotiation with the OFCCP and litigation when appropriate. Laurie A. Petersen teaches a class twice a year in conjunction with UWM Continuing Education in Milwaukee, Wisconsin on the issue of Affirmative Action. You can reach her at lpetersen@lindner-marsack.com.

If you have any questions about the issues raised by this e-alert, please feel free to contact Laurie Petersen at (414) 273-3910 or by e-mail at lpetersen@lindner-marsack.com

Lindner & Marsack, S.C. represents management exclusively in labor, employment, and employee benefits law, including the administration of employee health and retirement programs. Established in 1908, Lindner & Marsack, S.C. is consistently rated among the top labor and employment law firms in the nation. We are located at 411 East Wisconsin Avenue, Suite 1800, Milwaukee, Wisconsin, 53202. Call us at (414) 273-3910 or visit our website, www.lindner-marsack.com, to learn more about our firm and its talented and innovative legal professionals.

If you would like to unsubscribe to this E-Alert, please notify Mary Gemeinhardt at mgemeinhardt@lindner-marsack.com

This update is intended for general informational purposes and is not a substitute for legal advice.