

Management Alert

OFCCP Publishes Advance Notice of Proposed Rulemaking for Compensation Data Collection Tool

As promised by Office of Federal Contract Compliance Programs (OFCCP) Director Patricia Shiu, that agency has officially begun the process to create a new compensation data collection tool that, on a regular basis, will allow the agency to collect pay data from contractors and more specifically target contractors for audit based on race/ethnicity and gender disparities in their reported employee compensation data. The first step happened on August 10, 2011 when OFCCP published an Advance Notice of Proposed Rulemaking (ANPR) in the Federal Register inviting the public to comment on the agency's development and implementation of a compensation data collection tool. The ANPR is available by clicking [here](#).

The development of this tool signals the OFCCP's further implementation of steps under President Obama and the Secretary of Labor's mandates to vigorously pursue pay discrimination among contractors. Heretofore, the OFCCP has been generally limited in identifying pay issues to only those contractors it audits. With this tool, it is the OFCCP's desire to implement a regularly required report by which contractors would report pay data that would be analyzed by the OFCCP to generate a list of contractors it would pursue.

Elimination of Compensation Discrimination A Priority Target of OFCCP

Identifying and remedying compensation discrimination is now one of the most, if not the most important, goals for OFCCP. The agency's increased focus on compensation discrimination began in 2000 when it started requiring contractors to proactively conduct in-depth analyses of compensation systems and to submit compensation data at the outset of a compliance evaluation to permit evaluation of compensation practices as a matter of course in compliance reviews.

It was also in 2000 that OFCCP began using the Equal Opportunity Survey (EO Survey), which required contractors to submit information about personnel activities, compensation and tenure, and certain information about the contractor's affirmative action program. OFCCP had envisioned the EO Survey as a means of targeting federal contractors most likely to be engaging compensation discrimination. Despite its intended purpose, the EO Survey was never effective as a tool to target non-compliant contractors, and as a result, OFCCP rescinded the EO Survey in 2006.

New Tool Will Be Used to Target Contractors for Enforcement

With the proposed new data collection tool, OFCCP is again seeking to target federal contractors by “effectively and efficiently identify[ing] supply and service contractors whose compensation data indicates that further investigation is necessary to ensure compliance with the non-discrimination requirements of the Executive Order.” The proposed new tool is intended to “provide insight into potential problems of pay discrimination by contractors that warrant further review or evaluation by OFCCP or contractor self-audit.” To this end, OFCCP envisions the new tool “primarily as a screening tool, although it may have research value.” OFCCP also says that the tool will provide contractors with a self-assessment method for them to evaluate the effects of their employee compensation decisions. Data collected with the tool will be used to identify contractors for both compensation focused reviews as well as full compliance reviews.

Topics for Public Comment

The purpose of the Advance Notice is to “solicit comments from interested parties as early as possible in the development process of this new data collection tool” and to “maximize the opportunity to participate in the rulemaking process.” OFCCP “is especially interested in public comment on the nature of data that would be most useful for analysis, and any practical implementation issues.” A significant issue with any such report regarding employee pay is the number and complexity of factors that influence pay.

Accordingly, contractors should consider submitting comments or contributing to comments to be filed by Seyfarth Shaw or others since it is critical that OFCCP minimizes the burden on employers and does not design a report that leads to erroneous indicators of pay disparities. This opportunity for input is of utmost importance to contractors since any tool will be a greater burden than contractors currently have, and a flawed tool will result in a significant loss of time and effort by contractors in defending pay differences that are fully justified. A key issue here is whether any such tool or report, without a level of sophistication similar to a multiple regression analysis, can be anything but a waste of time and resources.

In general terms, OFCCP is seeking public comment on “issues relating to the scope, content and format of the data collection tool, as well as suggestions for ensuring that the tool will be an effective and efficient means of identifying contractors for review.” Significantly, OFCCP also seeks comment on the “reporting burden created for contractors and the technology and/or analytic burdens placed on the agency.” Recently in connection with its proposed veterans regulations, OFCCP grossly understated the burden to be shouldered by employers. It is quite clear that OFCCP, on its own, has little ability to accurately judge contractor burden. This is another significant reason to submit your comments to OFCCP.

OFCCP seeks comment on the following extensive list of issues relating to possible design of the new data collection tool, as well as other aspects of the tool “that would assist the agency in carrying out its mission”:

- Type of data or information that would allow OFCCP to assess the necessity of further investigation into the contractor's compensation decisions and policies;
- Methods for data collection, e.g., by EEO-1 categories, AAP job groups, job titles, etc.;

- Elements of compensation to be collected;
- Questions that would help to understand a contractor's compensation system, such as policies relating to promotion decisions, bonuses, shift pay, setting of initial pay, etc.;
- Types of compensation trend analyses that should be conducted on industry-wide basis;
- Categories of data to collect in order to compare compensation data across contractors in a particular industry and what job groupings to use;
- Specific categories of data most useful for identifying contractors in specific industries for industry focused compensation reviews;
- Specific categories of data most useful for conducting compensation analyses across a contractor's various establishments;
- Benefits and drawbacks of collecting contractor's compensation data on a nationwide basis rather than on an individual establishment basis;
- Benefits and drawbacks of collecting contractor's compensation data on a nationwide basis and an individual establishment basis;
- Practical concerns in responding to a compensation data request on an establishment basis and how contractors currently record and maintain compensation data;
- General tasks required by a contractor in order to provide compensation data;
- Categories of compensation-related data currently maintained in computer-based personnel or payroll systems;
- Specific costs and/or benefits associated with collecting this type of compensation data;
- Specific categories of data most useful to contractors interested in using the tool to conduct self-assessments of their compensation decisions;
- Strengths and weaknesses of the compensation section of the 2000 EO Survey;
- Factors OFCCP should consider when designing data collection tool, such as suggested preferred formats - i.e., a web-based form (like the EEO-1), excel spreadsheet, etc.;
- Types of databases currently used, if any, to maintain personnel and payroll data;
- Thoughts on OFCCP requiring businesses that are bidding on future Federal contracts to submit compensation data as part of the Request for Proposal process;
- Benefits and drawbacks to using data collected to target contractors for post-award compliance reviews;
- Whether OFCCP should expand scope of compensation data collection tool to include construction contractors, and any

factors or issues particularly relevant to such contractors OFCCP should keep in mind when designing and implementing the tool;

- Other constructive suggestions for the design, content, analysis, and implementation of a compensation data collection tool;
- Potential impact of new data compensation tool on small entities, including small businesses, small nonprofit organizations and small governmental jurisdictions with populations under 50,000; and
- Potential identifiable costs of the data collection on small entities, and possible alternatives to the proposed measures that would allow OFCCP to achieve its objectives while minimizing any likely adverse impact to small businesses such as allowing smaller establishments to submit administrative data - for example, quarterly unemployment insurance tax payments that would include wage information – augmented by gender and race/ethnicity identification, but without other compensation details.

What Contractors Should Do Now

While OFCCP plans to conduct web-based and Town Hall listening sessions to “provide an opportunity for stakeholders to offer suggestions and recommendations related to the scope, content and format of the data collection tool,” we recommend submission of written comments in order to make a record that can be reviewed by other government bodies that must approve new OFCCP rules. OFCCP says that comments to the ANPR will be considered both in developing the next step of its process, the Notice of Proposed Rulemaking (NPRM), and in developing the new data collection tool itself.

Comments to the ANPR must be received by October 11, 2011. Seyfarth Shaw will be providing comments to the proposed data collection tool. If you would like to participate in Seyfarth Shaw’s comments to OFCCP, either with or without attribution, please share your thoughts with us, and we will include them with our submission.

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