

Management Alert

OFCCP & VETS Recent Developments

OFCCP Modifies Multi-tiered Compensation Analysis: New Method Broadens Platform for Findings of Disparity

The Office of Federal Contract Compliance Programs (OFCCP) has modified its methodology for evaluating contractor compensation practices. Compensation disparities affecting minorities and women continue to be a principal focus of the OFCCP's compliance reviews. The Agency last published guidance regarding compensation evaluation procedures in June, 2006 when it adopted a three-phase approach to its process. The updated method will continue to follow this multi-phased approach, however, several of the models used to evaluate compensation have changed.

Update to the 30-30-3 Test

Until now, the OFCCP most commonly used what is generally referred to as the 30-30-3 test as the first step in its multi-phase compensation evaluation process. The Agency's new method uses an analysis identified as the 30-10-3 test. The tests are similar in that each evaluates average pay differences between race and gender groups based upon certain pay divisions (job group,

job title, grade, etc.). Also, each uses a tiered approach to evaluating compensation. There are important differences, however, in key prongs of the analysis.

First, the 30-30-3 test uses a trigger equal to an average pay difference of 2% between gender or race groups within a pay division, whereas the new test uses the average pay difference of 5%. For both tests the pay difference must negatively affect 30 females or minorities. Also, contractors formerly had the authority to select the pay division used to present their analyses to the OFCCP. Using the new test, the OFCCP will always use job groups as the pay division when it conducts its analyses. This means it is critical that contractors closely reexamine their job groups to ensure they are truly representative of jobs with common functions and pay scale.

Second, in the new test the number of affected individuals falling into the negatively affected pay division must make up at least 10% of the entire workforce for that gender or racial category. The old test's threshold was set at 30%. The last tier of 30-30-3 test remains unchanged; the OFCCP will determine if the percentage of the total workforce in the affected job group is at least three times as large as the percentage of males and non-minorities falling into a job group where the males or non-minorities are negatively affected. Failing the 30-10-3 test will trigger the OFCCP to investigate further.

It is expected the OFCCP will, from time to time, re-examine the set of triggers it uses to evaluate compensation practices based on their current findings. We suspect the Agency may not have found as many instances of systemic compensation discrimination as it initially hoped with the use of the 30-30-3 test. The new thresholds are more sensitive and will likely result in the OFCCP's identifying more contractors alleged to have systemic compensation discrimination. Contractors should consider conducting an audit or self-evaluation of their compensation analysis practices, especially those who are not currently using job groups in their pay analysis.

Cluster Regression Analysis

If a contractor fails the 30-10-3 test, the next phase in the OFCCP's evaluation process is a cluster regression analysis. Like the former methodology, the Agency may request more detailed compensation data to perform this more detailed analysis. Data categories the Agency may request include the following:

- Employee ID number
- Gender
- Race
- Date of hire
- Date in position
- Date of birth
- Current salary
- Part-time / Full-time status location
- Exempt / Non-Exempt status
- Job title
- Salary grade or band level
- Employee location

Using its former methodology, the Agency would conduct its analysis using "clusters" of small pay divisions based on similar pay and apparent job responsibilities. Should cluster regression fail to explain pay disparities, contractors should expect the Agency to proceed with Phase 3, a full scale regression analysis.

Action Items

- Audit current compensation analysis practices to determine if your results will closely match OFCCP findings in the event of a compliance evaluation.
- Consider conducting a tiered test as a component of standard compensation analysis.
- Consider reevaluating the pay divisions used to conduct compensation analysis to reflect job groupings.
- Examine existing job group structure to ensure jobs are appropriately grouped according to job function and pay scale.
- Assess information obtained from any self-evaluation to assess whether any remedial actions are warranted.

Veterans: New Regulations & New Form for Federal Contractors

In late May, the Veterans' Employment and Training Service (VETS) published revised regulations and adopted a new employment report for federal contractors, the VETS-100A report ([link to Federal Register](#)). Effective, June 18, 2008, the new regulations implement the amendments to the reporting requirements under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) of 1974 that were made by the Jobs for Veterans Act (JVA) in 2002.

Under the new rules, contracts in the amount of at least \$100,000, that were entered into or modified on or after December 1, 2003 trigger the new compliance requirements and VETS-100A filing. Contracts in the amount of \$25,000 or more, entered into before December 1, 2003 will continue to follow the old regulations and filing of the form VETS-100. As a result, some contractors will be subject to “dual coverage.” VETS stresses that for those complying with both sets of rules, the extra load will lessen significantly over time as pre-December 1, 2003 contracts are completed and modified. In either event, contractors should consider examining their contracts’ terms to determine how they will be affected by the new regulations.

The JVA amendments also modified the job and veteran categories that contractors are required to track and report. The VETS-100A report uses job categories that are aligned with those used by the Equal Employment Opportunity Commission’s (EEOC) EEO-1 form that requires contractors to report the race and gender composition of their workforce.

The new veteran categories are as follows (it is important to note that while JVA has eliminated the category, *Vietnam Era Veterans*, the majority of these individuals will be covered under one of the new modified veteran categories):

- A *Disabled Veteran* is defined as a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered under Veterans Affairs, or a person who was discharged or released from active duty because of a service-connect disability.
- *Other Protected Veterans* are defined as veterans who served in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense.
- An *Armed Forces Service Veteran* is an veteran who, while serving in the United States military, was the recipient of a service medal pursuant to Executive Order 12985.
- A *Recently Separated Veteran* is defined as a veteran during the three-year period beginning on the date of such veteran’s discharge or release from active duty in the U.S. military.

Filing of the new VETS-100A Report will not be required until the 2009 reporting cycle. However, to report on a complete 12 month period contractors must begin collecting and maintaining data based on the new categories beginning this year between July 1 and August 31. It is important to note that the new regulations do not require contractors to administer a self-identification process for veterans. Many contractors, however, have adopted self-identification process for veterans. Those who have should review and modify the veteran’s categories on their self-identification questionnaire.

If you want to learn more about affirmative action and diversity, or have specific questions related to the matters addressed above, please contact the Seyfarth Shaw attorney with whom you work, or one of the affirmative action and diversity attorneys listed on our website at www.aap-seyfarth.com.

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