



OFCCP's New Compensation Directive 307: Where We Are and What to Expect

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Goals For Today's Presentation



The Back Story

- Rescission of 2006 Guidance
- Directive 307

What You Should Know

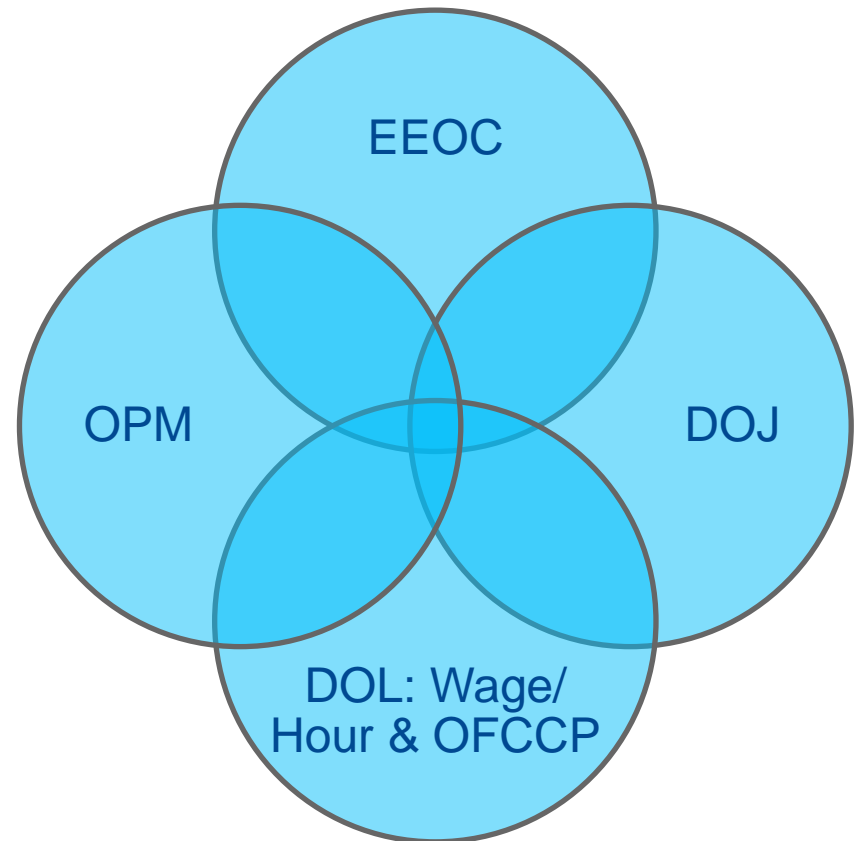
- Ins and outs of Directive 307

Practice Tips

- What should you do now?

National Equal Pay Task Force

- Created in 2010 following State of the Union Address
- Intended to foster collaboration among the agencies:
 - Greater information sharing
 - Greater expertise sharing
- Strengthen each Agency's tools to address pay discrimination and pay equity issues





Overview of Directive 307

- OFCCP’s latest on compensation, effective “immediately” (February 28, 2013)
 1. Withdrawal of the two Bush-era compensation guidance documents
 2. Implements internal guidance OFCCP will use to evaluate compensation systems and practices
 3. Fact sheet
 4. Answers to frequently asked questions
 5. Other guidance materials
- Available at:
<http://www.dol.gov/ofccp/regs/compliance/CompGuidance/>



What Does Directive 307 Do?

- Effective February 28, 2013
 - Applies only to audits initiated after effective date – the date of your scheduling letter controls
- Replaces all previous compensation directives
- Allows:
 - More flexible groupings than “SSEG’s”
 - Access to a full arsenal of statistical tools and methodologies for analyzing compensation
- “Case specific” and flexibility --the new mantra
 - OFCCP is not required to use a specific tool, test or analysis
- Triggers for threshold analysis are unknown
- Applies Title VII “principles”



Title VII - Compensation

- Title VII prohibits discrimination in "compensation" based on race, color, religion, sex, national origin, or protected activity.
- The term "compensation" includes any payments made to, or on behalf of, an employee as remuneration for employment
- Compensation discrimination in violation of Title VII
 - Disparate treatment
 - "Pattern or practice" (systemic disparate treatment)
 - Disparate impact



Executive Order 11246 - Compensation

- Executive Order 11246 prohibits discrimination based on “pay or other forms of compensation”
- Requires that employers evaluate their “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.”
- Directive 307 describes OFCCP’s approach to compensation evaluations
 - It does not require that employers do anything



OFCCP Directive: Three Key Questions

1. Is there a measurable difference in compensation on the basis of sex, race, or ethnicity?
2. Is the difference in compensation between employees who are comparable under the contractor's wage or salary system?
3. Is there a legitimate (i.e. nondiscriminatory) explanation for the difference?

OFCCP's Investigation Process

1) Preliminary Analysis of Summary Data

2) Analysis of Individual Employee-Level Data

3) Determine Method For Analyzing Compensation (Case-by-case)

4) Consider all Practices that May Lead to Compensation Disparities

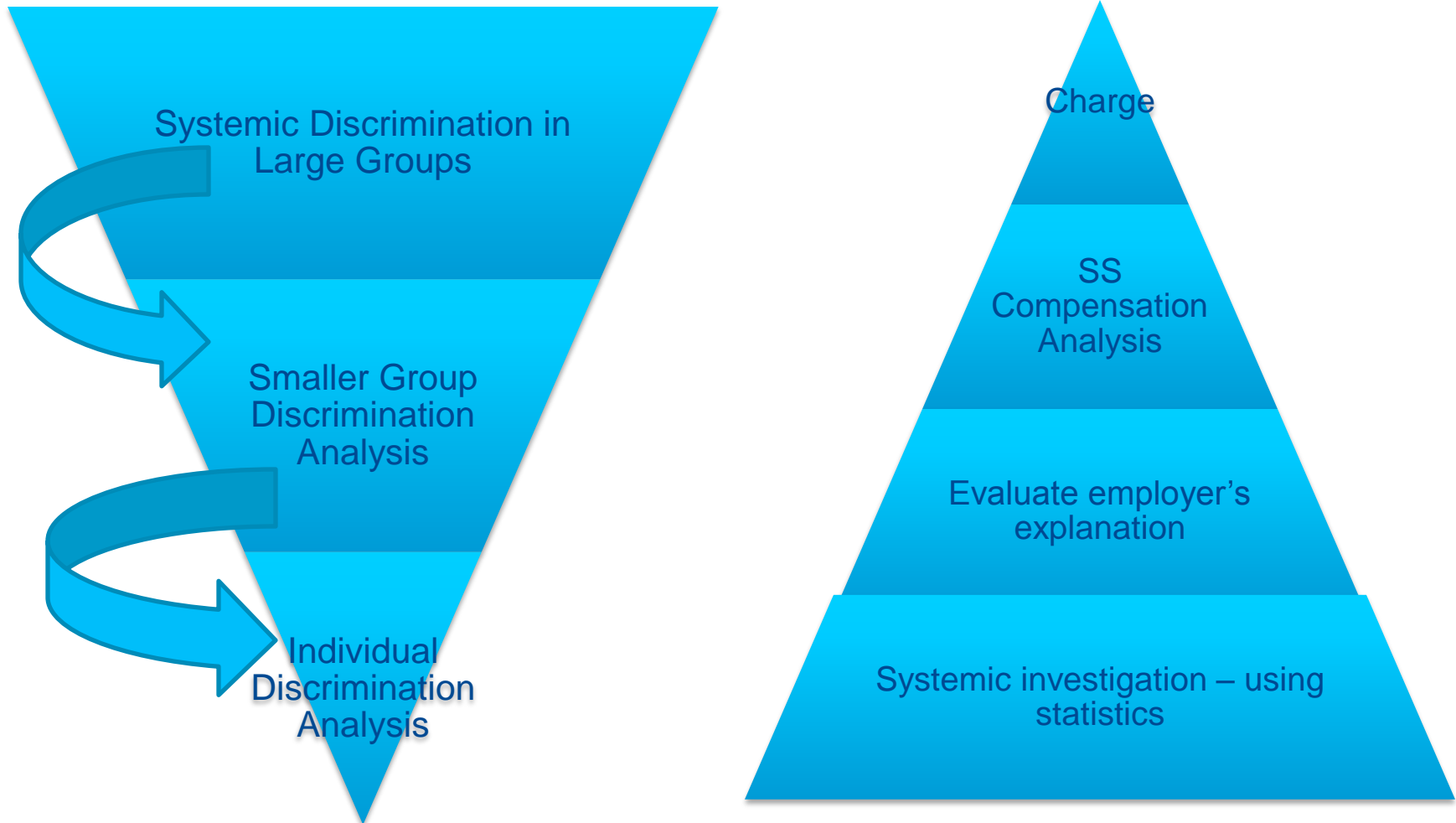
5) Develop Pay Analysis Groups

6) Investigates Systemic, Small Group and Individual Discrimination

7) Review and Test of Factors in Statistical Models

8) Onsite Investigation and Refinement of the Model

OFCCP Approach v. EEOC Approach





Differences Between OFCCP and EEOC Approaches

OFCCP

- Audit
- EO 11246
- Evaluates current comp
- Starts with a large pay analysis groups, then refines
- Similarly situated defined by OFCCP

EEOC

- Title VII
- Complaint / Charge
- Evaluates pay decisions
- Starts with a single complaint (or class), then considers systemic issues
- Similarly situated defined by facts and case law



Significant Issues Regarding Appropriate Legal Standards

- OFCCP enforces Executive Order 11246 -- not Title VIII
- Large body of law guides enforcement under Title VII
- EEOC procedural prerequisites do not bind OFCCP
- OFCCP brings in Title VII concepts (and some would argue elements of the Equal Pay Act)
 - But is not limited by the Title VII procedural framework
- Similarly situated analysis may be broader than Title VII
 - “Employees are similarly situated where they are comparable on the factors *relevant to the investigation*, even if they are not comparable on others.”
- Seemingly unfettered authority
- But . . . legal challenges will be exceedingly difficult



What You Won't Hear Anyone Say About Directive 307

#1: Now I Know *Exactly*
What to Expect During an
OFCCP Audit



Welcome to the World of Flexible and Case-Specific Analysis

- OFCCP says: “there is **no single way** to prove compensation discrimination, and **no particular limits** on the kinds of evidence or information that might be relevant to proving discrimination in a particular case.”



Welcome to the World of Flexible and Case-Specific Analysis

- OFCCP means: CO's have free rein
 - **Different groupings**
 - by job group, by level, by band
 - **Different measures**
 - Pooled regression, non-pooled regression, cohorts, anecdotal evidence (but not required)
 - **Different kinds of pay**
 - base, bonus, overtime, commission
 - **Different practices**
 - job assignment or placement



What You Won't Hear Anyone Say About Directive 307

**#2: This Preliminary
Analysis Idea Is Much Less
Confusing Than Was the
2%/\$2,000 Screen**



Preliminary Analysis

- Two components:
 - Quantitative
 - Qualitative
- Replaces 2%/\$2,000 threshold screen (but may be skipped)
- If fail, employee-level data for **all employees** not just those in groups that flagged
- Critical question: will anyone “pass” or will it be more of the same?



Preliminary Analysis - Quantitative

- “May” evaluate the following quantitative factors:
 - **Overall average pay difference** based on race/ethnicity and gender;
 - **Largest average pay difference** within AAP job groups, or salary band or pay grade system;
 - **# of group or grades** where average pay differences based on race or gender exceed an unstated-by-the-OFCCP threshold; or
 - **# of employees affected** by above-threshold average pay differences within job groups or grades.



Preliminary Analysis - Qualitative

- The qualitative factors may include:
 - Compliance history
 - OFCCP or EEOC complaints
 - Anecdotal evidence
 - Potential violations involving other employment practices or
 - Data integrity issues, among others



What You Won't Hear Anyone Say About Directive 307

**#3: These Pay Analysis
Groups Will be Easy to Set;
Our Comp Team Should
Have this Wrapped Up by
the End of the Week**



Regression Analysis: Pay Analysis Groups

What Are Pay Analysis Groups?

- Group of employees
 - May be limited to a single job or title, or may include multiple distinct units or categories of workers and/or job groups
- Who are comparable for purposes of the contractor's pay practices

Pay analysis groups that are used to test for statistical significance on large groups of employees

- May use different groups for different types of analyses



What You Won't Hear Anyone Say About Directive 307

**#4: I'm So Happy that a
“Glass Ceiling” Review is
Limited to Glass Ceiling
Audits**



Every Audit a Policy/Practice Review

- In every audit, will look at policies and practices that drive differences in compensation
 - Excessive subjectivity (end-run around *Wal-Mart*?)
 - Steering
 - HiPo and training programs
 - Territory assignments



Every Audit a Policy/Practice Review

- COs directed to determine if "glass ceiling" issues exist
- Typically seen only in Corporate Management Compliance Evaluations (CMCEs)
 - Directive 307 specifically directs compliance officers to the CMCE section of the Federal Contract Compliance Manual (FCCM) to conduct this inquiry



What You Won't Hear Anyone Say About Directive 307

**#5: The OFCCP is
Starting Over
on its Compensation Review
in Your Current Audit**



Only Applies to Future Audits

- OFCCP says that the 2006 guidance will apply to OFCCP's determination of whether to issue a notice of violation in any OFCCP review “scheduled, open, or otherwise pending on the effective date of the Rescission.”
- So . . . only applies if scheduling letter dated after February 28, 2013



What You Won't Hear Anyone Say About Directive 307

**#6: The OFCCP's Policies
are Internally Consistent**



Conflict Between Directive 307 Materials and Current Scheduling Letter

- There are inconsistencies with current scheduling letter and itemized listing and the Directive 307 materials
 - Permits contractors to submit by Job Group or Salary Range
 - But OFCCP may skip preliminary analysis
 - No longer true “choice”
 - Conflict with OFCCP’s FAQs regarding date of submission
 - FAQ: Same date as AAP
 - Scheduling Letter: In the manner most consistent with your current compensation system (not necessarily the same date as your AAP)

ITEMIZED LISTING

11. Please provide annualized compensation data (wages, salaries, commissions, and bonuses) by either salary range, rate, grade, or level showing total number of employees** by race and gender and total compensation by race and gender. Present these data in the manner most consistent with your current compensation system. If you maintain the information in electronic format, please submit in that format. See 41 CFR 60-1.4(a)(1). You may also include any other information you have already prepared that would assist us in understanding your compensation system(s). Alternatively,

**For this purpose, the method used to determine employee totals by the contractor should be the same as that used to determine employee totals in the organizational profile for the AAP.



What You Won't Hear Anyone Say About Directive 307

**#7: The OFCCP Has Taken
Sufficient Steps to Ensure
the Confidentiality of Your
Compensation Data**



Data Privacy / Confidentiality Concerns

- OFCCP moved full-steam ahead, even after National Academy of Sciences Report was issued August 2012
 - Written by nation's top statisticians; commissioned by the EEOC
 - Conclusion: federal government not prepared to implement a tool to collect compensation data
 - Serious concerns about data privacy
- Use proper disclaimers
- Use ID #s (or, dummy ID #s) rather than names

Practice Tips: What Should You Do Now



Ensure You are doing Some Type of Compensation Analysis

- 41 CFR Section 60-2.17 (b) Identification of problem areas: *At a minimum the contractor must evaluate:*
 - (3) *Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities*
- Not enough to simply review written policies
- Must review data to determine disparities
- But there is NO REQUIRED method



Establish Attorney Client Privilege over Compensation Analysis

- OFCCP may ask to see internal compensation analysis
- Agency has a broad right to obtain documents relevant to its audit
- Unprotected internal analysis is also subject to discovery requests in litigation and EEOC subpoenas
- Your pay analysis & evaluation may contain
 - Indications of issues
 - Apparent issues (that are non-issues) revealed by various versions as you are modeling to find the appropriate groupings, variables, etc.

Report Warned Wal-Mart of Risks Before Bias Suit

By [STEVEN GREENHOUSE](#)

Published: June 3, 2010

More than six years before the biggest sex discrimination lawsuit in history was filed against [Wal-Mart Stores](#), the company hired a prominent law firm to examine its vulnerability to just such a suit.

[Enlarge This Image](#)



Kimberly White/Reuters

Brad Seligman, center, a lawyer for plaintiffs in a gender discrimination case against Wal-Mart, spoke to the media in San Francisco in 2009.

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employment patterns.”

The law firm, Akin Gump Strauss Hauer & Feld, found widespread gender disparities in pay and promotion at Wal-Mart and Sam’s Club stores and urged the company to take basic steps — like posting every job opening and creating specific goals to promote women and minorities — to avoid liability.

The 1995 report said that women employed by Wal-Mart earned less than men in numerous job categories, with men in salaried jobs earning 19 percent more than women. By one measure, the law firm found, men were five and a half times as likely as women to be promoted into salaried, management positions.

Without significant changes, the lawyers said in their confidential analysis, Wal-Mart “would find it difficult to fashion a persuasive explanation for disproportionate

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Protecting the Attorney-Client Privilege- DON'T lose it

- Communication between an attorney & client in order to obtain legal advice
- Must not be shared unless “need to know”
- Key Standards
 - Ground analysis in request for legal advice
 - Counsel directs the analysis & provides legal advice
 - Tap internal resources judiciously- “need to know”
 - Implement privilege protocol before starting analysis
 - Mark all documents “Attorney-Client Privilege”
 - Number copies of written reports & ask for their return



Conduct An Appropriate, Sensible & Defensible Compensation Analysis

- Conduct the Analysis according to justifiable standards
- For OFCCP audit defense purposes, analyze by AAP
 - For best practices purposes, conduct across organization
- If sufficient numbers, conduct multiple regression analysis, identifying appropriate groupings & variables
 - include job titles and pay ranges/grades
- Conduct cohort analysis for small groups
- Use current pay (but possibly incorrect under T VII)
- Use race/ethnicity subgroups



Conduct an Analysis of Compensation Decisions/ Practices

- Appropriate standard under Title VII : decision or practice
- What employment decisions/ practices are the most significant in the amount of pay provided?
 - Initial starting pay
 - Promotion increases
 - Merit increases
- Challenges
 - Need complete data set of all those starting at the same time (some employees have terminated)
 - May not have a consistent definition of promotion



Conduct an Analysis of Other Types of Compensation

- Directive 307: “Overtime, shift differentials, commissions, bonuses, vacation & holiday pay, retirement & other benefits, stock options & awards, profit sharing”
- Realistically:
 - Bonus
 - Incentive Pay
 - Stock Awards
 - Commissions



Review Your Compensation Policies, Written Documents

- ALL Written Materials, including
 - Starting salary
 - Promotion increases
 - Access to overtime hours
 - Incentive compensation
 - Commissions
 - Territory assignment
 - Promotion- definition
- Watch out for
 - “Pay for Performance”
 - “Glass ceiling” issues



Consider Anticipating OFCCP Analysis

- Conduct Preliminary Analysis as OFCCP Would Do
 - See what they will see—
 - But don't know triggers/ thresholds, groupings or formula
 - Likely pay grades
 - Likely 5-6%
- Consider modifying your Job Groups, Pay Grades
 - Reconsider broad-banding
 - Consider establishing smaller job groups



Consider Anticipating OFCCP Analysis

- Develop Data for Factors to assist determining which employees are Similarly Situated
 - “Tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications & other objective factors”
 - E.g., skill charts & coding, responsibility level coding, etc.
- Develop Data for Factors relating to Controls
 - Controls account for potential explanations of pay differences
 - E.g., database of prior related experience



Consider Remediation Only After Appropriate Investigation

- Results of analyses may not tell entire story
 - Must investigate to determine if disparities are explained by legitimate factors not contained in data
 - Do not rely only on model: “reality check” the model with remediation cohort review
 - Data accurate?
 - Other legitimate factors? (scope of duties)
 - Pay adjustments appropriate?
- If appropriate, consider pay adjustments
 - Less expensive to fix now than pay back pay and interest later



Compensation Best Practices

- Room for continued **partnership** with your Compensation group
- Consider timing compensation analysis so adjustments can coincide with **pay cycle**
- Ensure **follow up and privileged explanation** of differences
- If unexplained pay disparities identified, examine policies, practices and guidelines around compensation to **prevent future disparities** being created



Practical Realities

- You will likely need additional resources & budget to:
 - Conduct appropriate compensation analyses
 - In case of audit, respond to detailed compensation inquiries by OFCCP and defend against allegations
- Alert in-house counsel to OFCCP's intent: increased enforcement & effort to find pay discrimination issues
 - OFCCP trend: aggregate/manipulate data until it finds an issue
 - OFCCP is poised to make broad allegations and large settlement demands requiring substantial defense (and litigation if settlement terms unacceptable)
 - OFCCP's overbroad approach: unexplained pay differences = discrimination (not unlike inference of hiring discrimination when there are only applicant tracking & recordkeeping issues)



**Thank You for Joining
Us!**