

# One Minute Memo<sup>®</sup>



## OFCCP's New Compensation Plan Provides Little Direction

As if the specter of sequestration was not headache enough for one week, the OFCCP dropped muddled new compensation guidelines on the federal contractor community today.

The OFCCP officially *withdrew* the Bush-era compensation guidance and swapped it for a *new Directive* that purports to “clearly” explain how the Agency will investigate compensation discrimination. In addition to the out with the old, in with the new policy swap, the OFCCP issued a compensation-focused *fact sheet* and *answers to frequently asked questions*. All go into effect on Thursday, February 28, 2013.

### What Does the Directive Do?

OFCCP Directive 307 replaces all previous compensation directives and is currently your only roadmap to understand how the OFCCP will conduct future compensation evaluations.

Yet despite OFCCP Director Patricia Shui's eminently sensible statement that it is “fair and reasonable for companies under OFCCP's jurisdiction to know *exactly* how they will be evaluated when one of our compliance officers come knocking,” the new Directive only lists a number of different paths that the OFCCP *may* (or may not) take in compliance evaluations.

### How Then Should We Evaluate Our Compensation?

Flexible and case-specific are the OFCCP's new buzz words.

The Agency believes that 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.” So compliance officers will be given free rein to group employees in several different ways (e.g., by job group, by level, by band). They will also be free to use “statistical analysis, including pooled regression analysis for large pay analysis groups or non-pooled regression analysis for small pay analysis groups; non-statistical analysis, including cohort analyses; and anecdotal evidence collected as part of the investigation.”

Rather than looking at only base compensation, the OFCCP will also look at differences in job assignment or placement; earnings opportunities (like overtime); and differences in access to salary increases, such as bonuses or commission pay.

As the OFCCP compliance officers are largely unprepared to use the new tools in their toolboxes, we recommend that contractors do a thorough evaluation of their pay practices so they can be in the driver's seat in any audit, guiding the OFCCP through their compensation systems. For example, contractors should determine *before* submitting the Item 11 compensation data in response to a *scheduling letter* whether it is most appropriate to submit data by, for example, AAP job group, or the contractor's pay grade, level or band system.

## Should We Still Do the 2%/\$2,000 Screen?

Through Directive 307, the OFCCP has officially abandoned the 2%/\$2,000 screen by job title, within affirmative action plans. As we previously reported, we have seen a major step back from this test in the last couple of months so we were not surprised to see this go. The OFCCP's new Preliminary Analysis will be more robust, focusing on both quantitative and qualitative factors.

In its Preliminary Analysis, the OFCCP says it "may" evaluate the following quantitative factors:

- The size of the overall average pay difference based on race and gender;
- The size of the largest average pay difference within AAP job groups, or the contactor's existing salary band or pay grade system;
- The number of job groups or grades where average pay differences based on race or gender exceed an unstated-by-the-OFCCP threshold; or
- The number of employees affected by race-or gender-based average pay differences within job groups or grades.

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.

## Every Audit a Glass Ceiling Audit?

Compensation evaluations are not just about compensation anymore.

The OFCCP now says that compliance officers should also examine policies and practices to determine if women or minorities are limited in their opportunity to earn higher pay, giving the following examples of practices that may lead to compensation disparities warranting review and investigation for potential discrimination:

- Hispanic customer service agents are paid less than white employees in the same or similar positions due to highly subjective salary system.
- Women hired into entry-level grocery store positions are disproportionately assigned to the bakery department, while men are assigned to the meat department where pay and promotion opportunities are better.
- Certain managers refer mostly white males for training or hi-potential programs.
- African American employees are assigned to territories with less potential.

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Directive 307 also provides that high level professional and managerial positions should be examined to determine if “glass ceiling” issues exist. These types of inquiries are typically seen only in Corporate Management Compliance Evaluations (CMCEs), which are often referred to as “glass-ceiling audits”. In fact, Directive 307 specifically directs compliance officers to the CMCE section of the Federal Contract Compliance Manual (FCCM) to conduct this inquiry.

## Am I Having a Flash Back to SSEGs? What Are Pay Analysis Groups?

After the preliminary analysis and the policy review, the OFCCP will develop “pay analysis groups” to test for statistical significance on large groups of employees.

In what appears to be a step backwards towards the OFCCP’s long-abandoned use of similarly-situated job groups (or SSEGs), a pay analysis group according to the OFCCP is a group of employees (potentially from multiple job titles, units, categories and/or job groups) who are comparable for purposes of the contractor’s pay practices. A pay analysis group may be limited to a single job or title, or may include multiple distinct units or categories of workers.

OFCCP asserts it will conduct regression analysis on the pay analysis groups to determine whether statistically significant disparities in compensation exist.

## We Have an Open Audit; Is the OFCCP Changing the Game Mid-Stream?

The OFCCP says it is not. The OFCCP says that the 2006 guidance documents - the Compensation Standards and the Voluntary Guidelines -- 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. However, our experience has been that some OFCCP offices are attempting to change course in pending audits.

Come join us on **March 15th** for a webinar to take a look at the current state of OFCCP pay equity enforcement and for practical solutions for managing your risks.

If you have questions about this Management Alert, please contact the Seyfarth Shaw attorney with whom you work or any attorney on our [OFCCP & Affirmative Action Compliance Team](#).

[Click Here to Register for the Webinar:](#)

**March 15th**

**1pm to 2pm Eastern**

**12pm to 1pm Central**

**11am to 12pm Mountain**

**10am to 11am Pacific**



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