



FROM SCRUTINY TO TRANSPARENCY

OFCCP Pay Enforcement Uncovered

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Introduction:

Beginning with the issuance of Directive 307 in 2013, Office of Federal Contract Compliance Programs (OFCCP) slowly but steadily changed the way it examines a federal contractor's compensation practices during compliance reviews.

The agency's mission to uncover pay disparities was bolstered by the revised Scheduling Letter, released in 2014, requiring contractors to provide individual, employee-level compensation data in every review. More recently in 2015, large scale data requests for pay factor information, along with detailed compensation manager interviews, suggests the agency's efforts continue to intensify. This increased scrutiny is not likely to go away in 2016—the last full fiscal year of President Obama's administration.

OFCCP's approach to pay discrimination goes beyond its enforcement practices and extends to its regulatory agenda. The agency recently finalized regulations to implement Executive Order 13665, which amends Executive Order 11246, prohibiting contractors from taking adverse action against certain employees and applicants for discussing or disclosing pay information. This regulation is effective for all federal contracts and subcontracts entered into or modified after January 11, 2016. These new rules are intended to allow employees and applicants to unearth unfair pay practices by freely discussing their pay with others. In addition, on January 29, 2016, President Obama announced a new plan to eliminate pay discrimination. The proposal would revise the current Employer Information Report (EEO-1) to require employers with 100 or more workers to report additional pay data by employees' sex, age, and job groups.





Shedding Light on OFCCP Pay Analyses

OFCCP shed some light on how they are analyzing compensation during the 2015 Industry Liaison Group's National Conference in July. OFCCP's Branch Chief for Expert Analyses, Robert LaJeunesse, Ph.D., spoke at the conference and provided additional insight into OFCCP's compensation investigations.

As with adverse impact, OFCCP has shifted its approach to reviewing compensation by individual racial groups as opposed to minorities as a whole. According to Dr. LaJeunesse, compensation analysis during audits is focused on identifying any measurable differences in pay (two standard deviations with at least thirty in the group and five comparators) between comparable employees, and determining if the differences are based on legitimate, nondiscriminatory factors. During his remarks, Dr. LaJeunesse highlighted five areas of particular concern contractors would be wise to examine proactively:

- **Salary/hourly rate differences**
- **Assignments/placements/promotions**
- **Earning opportunities**
(i.e. females get the tougher service calls)
- **Steering**
- **Incentive Pay**

In most audits the Compliance Officer (CO) determines employee groupings used to analyze pay. Groupings are based on skills, working conditions, duties, and if employees are subject to the same pay decisions. Dr. LaJeunesse also indicated COs may aggregate employee groupings in certain instances. A special note for contractors who have Collective Bargaining Agreements—in most audits the COs remove unionized employees from their analysis. Contractors should be certain to mention and identify union employees in their workforce.

Job Title Alone Does Not Explain Pay

In a move that highlights the agency's focus on compensation, OFCCP hired additional statisticians. While the CO manages initial data inquiries, in many cases, regression analyses or other more refined analyses are performed at the OFCCP regional or national office level, which can extend the timeline of OFCCP responses to contractors under audit. Often, the CO has little discretion to limit or narrow the scope of data requests. In practice, COs appear to be examining differences in pay at a macro workforce level, and then by job group, or another large grouping. The agency strongly disfavors analyses by job title, and COs are



consistently rebuffing contractor efforts to explain pay by job title alone. If the CO's initial analysis indicates areas of concern, contractors are typically asked to supply legitimate non-discriminatory factors to explain the pay differences throughout the entire workforce and not just for those employee groupings with a measurable difference in pay.

The Interview: What to Expect

Berkshire is also seeing an increase in OFCCP requests for interviews with compensation managers. Sometimes this is in conjunction with an onsite visit, but more frequently it is completed over the phone. The first question that comes to most companies' minds is, "whom should OFCCP interview?" The answer depends on the contractor's compensation management structure. When deciding whom to make available for an interview, contractors should remember OFCCP is looking for someone knowledgeable about how a company determines pay at the location under audit, as well as the company as a whole.

The interviews focus on six major topics; we will explore each in turn.

1

Getting to know the interviewee: OFCCP starts the interview with getting to know the person they are interviewing. These opening questions revolve around their role in the organization, along with their responsibilities. Particularly, the agency is interested in understanding the individual's role regarding compensation and the locations he or she oversees. Often the agency asks about the interviewee's previous roles, as well as, relevant experience and education.

2

Compensation policies: OFCCP also attempts to gather additional compensation policy information and uncover inconsistencies between policy and practice. Questions include, "Are there any additional compensation policies you would like to provide to us?" OFCCP also wants to know if policies are uniform throughout the organization, who is responsible for implementing the policies, and how long have they been in place.



3

Starting pay: OFCCP and Equal Employment Opportunity Commission (EEOC) have expressed concerns about the impact of starting pay and the impact negotiation skills have on an employee's initial starting pay. These questions are typically explored during the compensation manager interview. Questions usually begin with, "How is starting salary determined?" From here, the agency uses more probing questions to determine if salary ranges or formulas are used to set starting pay. The agency also explores whether specific pay factors are used in determining starting pay, such as geography, prior salary, education, or shift differential. Once the factors are identified, the CO asks the interviewee to "prioritize" each factor in the order of importance. The agency also wants to know how salary negotiations are handled and if other incentives, such as signing bonuses, are offered during negotiations where starting pay cannot be negotiated.

4

Other types of compensation: OFCCP's goal in this line of questioning is to determine if potential discrimination exists in other areas of pay or selection processes. The agency asks who is eligible and ineligible for other types of compensation, how these are determined, the factors used, and whether the compensation varies by location, department, or business unit. In many cases, the CO asks the interviewee for any documentation related to:

- Bonuses
- Commission
- Stock
- Overtime
- Shift Differential





Contractors with a commissioned sales force can anticipate questions regarding who is eligible, how much, and how draw pay, sales territories, and sales targets are assigned regarding:

5

Merit increases: The purpose behind these questions is to determine if pay increases, promotions, and performance evaluations at the contractor's site are fair and equitable. OFCCP wants to know if merit increases differ among certain groups of employees (i.e. exempt versus non-exempt). They will also seek to understand when merit increases are given, what is the range, and what documentation is available. If performance is identified as a factor that impacts pay, the CO will look further to understand when performance appraisals are conducted, who conducts them, and what ratings an employee can receive. The CO will also pursue information on how promotions are awarded, who makes promotion decisions, and whether promotions result in salary, benefits, or incentive increases.

6

Internal reviews of compensation: In an effort to uncover past discrimination, OFCCP will investigate whether a company conducts one or more of the following internal analyses: self-audits, pay equity studies, or salary surveys. The agency will probe further to determine how the results of these internal analyses are communicated, and if adjustments to pay are made based on the results. OFCCP will also want to know if the compensation manager has ever received training on the company's AA/EEO policies, and if officers of the company are evaluated on their EEO/diversity efforts.

During the interview, the CO takes notes of the compensation manager's responses. After the interview, the CO sends a transcript to the compensation manager, who will be offered the opportunity to review and correct any misinterpreted answers. Once the answers are finalized, the compensation manager is required to sign and date the response. Compensation managers should understand this informational interview is used by the agency to identify additional data requests. For example, during the interview, prior experience as a factor in determining pay may have been mentioned. The CO may ask for prior experience documentation for all employees in the contractor's roster. Given this, contractors would be wise to proactively think through the factors that impact pay at their organization, and whether data regarding those factors is readily retrievable.



Managing the End of Pay Secrecy

While compensation manager interviews are an ongoing aspect of audits that contractors need to contend with, the issue of pay transparency is an emerging topic within compliance.

On April 8, 2014, President Obama signed Executive Order 13665 which amended Executive Order 11246 to prohibit contractors from taking adverse action against employees or applicants because they inquire about, discuss, or disclose their own compensation or the compensation of another employee or applicant.



“OFCCP issued the final regulations on this Executive Order on September 11, 2015, and they became effective on January 11, 2016. The final regulations apply to all federal contractors and subcontractors who have new or modified federal contracts or subcontracts with a date of January 11, 2016, or later and who have covered contracts totaling over \$10,000 in one year.

The changes required by the new regulations are minimal. Contractors will be required to post a revised EEO is the Law poster in places where both applicants and employees can view it. In addition, contractors must update existing employee handbooks and manuals to incorporate a particular nondiscrimination statement regarding these new requirements, and also must distribute this information to applicants and employees. The statement may be an electronic or a hard copy posting in conspicuous places at work sites. The particular language of the required statement is prescribed by the Director of OFCCP and is found on its website in the **Final Rule Announcement** as the **Required Nondiscrimination Provision**.

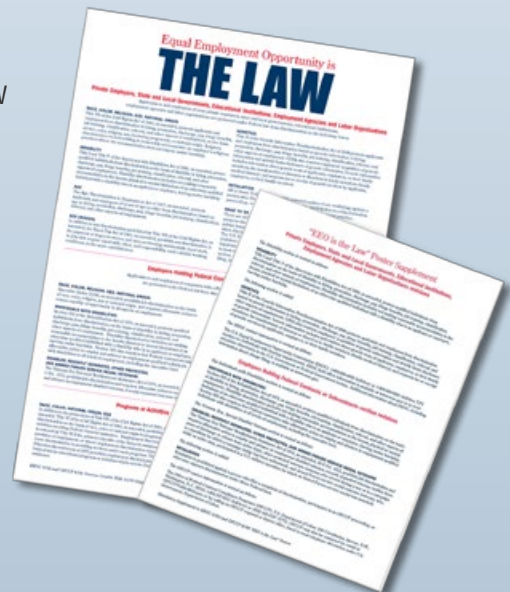
Importantly, the new regulations do not require contractors (or other employees or applicants) provide pay information requested by an applicant or employee. Instead, the new rule simply prohibits a contractor from discriminating against employees or applicants who decide to voluntarily share this information with others. Additionally, the rule does not require any additional data analysis, reporting or tracking, nor does it require any changes to language used in job postings or advertisements.



While the new rule covers most pay discussions or disclosures, there are exceptions to the rule. One exception to the rule is the **“Essential Job Functions”** exception. This exception applies to compensation information obtained as part of an employee’s essential job functions, if access to compensation information is necessary to perform that function or another routinely assigned business task, or the function or duties of the position include protecting and maintaining the privacy of employee personnel records. In these circumstances, inquiries, discussions, or disclosures of compensation information are not protected by the rule. For example, an HR Manager with access to sensitive compensation information is covered by this exception and can be disciplined or discharged for disclosing confidential pay information obtained as part of the manager’s job. However, a Secretary who has incidental contact with compensation information may not fall under the exception. Importantly, even employees who are covered by the essential job functions defense retain the right to discuss or disclose their own compensation, any compensation information of others they learn through other means (*such as in the lunchroom*), or when raising concerns about the pay of others through internal processes or formal investigations.

Another exception to the rule is the **“Workplace Rule”** exception. Under the Rule, a contractor may take adverse action against an employee for violating a consistently and uniformly applied workplace rule while discussing or disclosing pay. For instance, if an employee is standing in a busy traffic lane in a warehouse shouting out their own pay information and creating an unsafe situation, a contractor may discipline for the violation of the workplace safety rule. The **“Essential Job Functions”** exception is a total exception to the rule while the Workplace Rule is only a partial exception—while the contractor is covered for disciplining for the Workplace Rule, they may still be liable for prohibiting discussions of pay, depending on how the employee is disciplined.

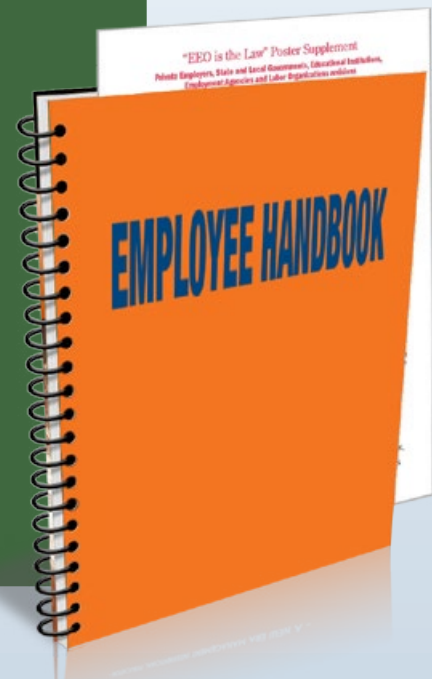
There are some things that federal contractors should do now to make sure they are ready when the final regulations become effective. First, contractors should download and post the mandatory **“EEO is the Law Supplement”** *with the current poster.*





The supplement covers pay transparency, the new gender identity and sexual orientation protections, and the new requirements under Section 503 and VEVRAA. Contractors should make the supplement available electronically, as part of the application process, and post a hard copy at work locations. Contractors should also review their contract information so they know what contracts are pending or are being updated after January 11, 2016. Information on contracts can be found on the Federal Procurement Data System website. Contractors should also review policies, procedures, practices, and workplace rules, and consult legal to review any policies that prohibit pay disclosure. Lastly, contractors should examine how compensation information is stored, how it is disposed, and who has access to it.

Now that the Rule is in effect, contractors are required to update employee handbooks and manuals to incorporate the Required Nondiscrimination Provision. Also, contractors must post the required statement conspicuously so applicants and employees can view it. Finally, review the EO clause used in contracts and purchase orders to determine if it needs updating. Contractors may also incorporate the new pay transparency requirements into these documents by reference and need not include the Required Nondiscrimination Provision verbatim.



Conduct Salary Equity Analyses

As a best practice, continue to conduct annual salary equity analyses to proactively uncover pay problems. Provide training for managers and supervisors about the Rule, and provide oversight to disciplinary actions and terminations. Additionally, improve the security of compensation data storage and disposal practices, and reduce the likelihood of incidental access by individuals not covered by the essential job functions defense.



OFCCP is in charge of enforcing these regulations, which permit applicants and employees to file complaints of discrimination with the agency. Beyond investigating complaints, during compliance reviews, OFCCP may confirm the contractor has posted the “EEO is the Law” poster and confirm the pay transparency policy statement is posted and in employee manuals. OFCCP may also review existing company policies for pay transparency problems, and interview employees about company practices, and culture surrounding pay discussions.

Conclusion

Berkshire’s consultants continue to observe OFCCP’s intense focus on compensation, and pay remains a top audit trend. Federal contractors should be proactive in this area. Identifying factors that impact pay, making this information easily retrievable, and conducting self-critical analyses of pay practices, are steps to take in becoming proactive. Contractors should now be taking measures to comply with the new pay transparency regulations.

Compensation Compliance Support Information

Whether identifying pay disparities, conducting market analyses, or providing support to remedy pay issues, companies choose Berkshire because we are especially qualified to handle a wide-range of compensation challenges. From the everyday pay practices to high-demand, complex regulatory situations, our certified compensation consultants possess the know-how to successfully accomplish your objectives.

Berkshire’s Comprehensive Compensation Services:

We start with evaluating your needs and creating a plan that meets your objectives. Our goal is to ensure you have a fair pay compensation model that’s both compliant and easy to maintain. Berkshire gives you end-to-end solutions including:

- *Salary Equity Analyses*
- *Market Surveys*
- *Base Pay Grade Structures*
- *BALANCEpay Compensation Management Software*

For assistance ensuring your company is meeting the latest salary equity requirements, contact a Berkshire compliance expert at 800.882.8904 or bai@berkshireassociates.com.



Additional Free Resources

Click on a link below to view Berkshire's other resources on compliance and other compensation related topics.

Webinars:

- [The End of Pay Secrecy: Complying with OFCCP's Pay Transparency Rule in 2016](#)
- [OFCCP Enforcement Trends & How to Survive an Audit](#)
- [Common Resume Lies and How to Protect Your Company](#)
- [Big Company, Big Problems: Bridging the Gap Between Affirmative Action and Diversity](#)

White Papers:

- [OFCCP's Top Compliance Trends: What the Contractor Community Needs to Know](#)
- [Structuring Your BIG Affirmative Action Plans: Drilling Down and Rolling Up!](#)
- [Big Data & Recruitment](#)

Blogs and Forums

- [BALANCEview HR and Affirmative Action News](#)
- [HR Compliance & Management Forum](#)
- [Applicant Tracking & Recruitment Forum](#)

Training

- [Fundamentals of Affirmative Action Planning](#)
- [Affirmative Action Boot Camp](#)



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