

Office of Federal Contract Compliance Programs "OFCCP" Investigations Likely to Rise

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Two recent policy changes announced by the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") likely will lead to a significantly greater number of and increased scope for investigations conducted by that Office into allegations of discrimination and pay disparity against Government contractors.

On December 2, 2010, OFCCP Director Patricia A. Shiu issued a directive announcing that OFCCP would be discontinuing its Active Case Management ("ACM") process. ACM was a policy developed by OFCCP in 2003, during the Bush Administration, ostensibly to streamline OFCCP resources. As part of the ACM process, OFCCP would only conduct an abbreviated desk audit where there had been allegations of discrimination by a contractor. If no indicators of systemic discrimination, which required at least 10 potential victims, were found, the OFCCP review would be closed. As a "quality control" measure, OFCCP would conduct a full desk audit of one out of every 25 contractors who did not show indicia of systemic discrimination, and an onsite review of one out of every 50 such contractors.

The rescission of the ACM process is likely to lead to a significantly higher number of both full audits, as well as onsite investigations of alleged discrimination. Additionally, OFCCP will likely no longer consider itself bound to acting only upon "systemic" discrimination, involving 10 or more employees. This could lead to OFCCP intervention based even upon individual cases of alleged discrimination. Moreover, while the abbreviated ACM reviews were limited in scope to the discrimination complained of, OFCCP reviews going forward will likely be far more broad-based, examining many or all aspects of contractors' affirmative action and equal employment opportunity programs that are within the scope of OFCCP.

The full text of OFCCP Director Shiu's directive rescinding ACM is available at <http://www.dol.gov/ofccp/regs/compliance/directives/dir292.htm>.

Additionally, the OFCCP has announced its intention to rescind another Bush-era policy regarding investigations of alleged pay discrimination. Specifically, on January 3, 2011, the OFCCP published notice in the Federal Register of its intention to rescind the current standards for grouping employees while investigating pay disparity.

The current standards were implemented in 2006 and have three primary criteria. The first is that allegations of pay disparity should be examined by comparing the compensation of “similarly situated employees,” which involves an examination of whether employees perform similar work, as well as whether they have similar levels of responsibility, similar skills, and similar qualifications.

The second aspect of the current standards requires OFCCP to use a complex statistical analysis, “multiple regression,” in comparing similarly situated employees. Multiple regression determines whether pay disparity among similarly situated employees is statistically significant while controlling for non-discriminatory factors such as levels of education, experience, performance, and productivity.

The final component of the current standards requires OFCCP to support those cases in which multiple regression has suggested that statistically significant pay disparity exists with “anecdotal evidence,” consisting of first-hand accounts of allegedly discriminatory acts by a contractor.

In its notice of proposed rescission, OFCCP contended that the 2006 standards “significantly limit OFCCP’s ability to identify compensation discrimination by imposing overly narrow investigation procedures that go beyond what would be required under Title VII [of the Civil Rights Act of 1964] principles in litigation.” Specifically, OFCCP noted that Title VII permits disparate treatment to be proven by statistics alone, without reliance upon anecdotal evidence. OFCCP further noted that “requiring anecdotal evidence is particularly problematic in compensation cases as employees often are unaware of the compensation received by co-workers and, as a result, anecdotal evidence from victims of pay discrimination may not exist.” Additionally, OFCCP contended that other statistical or non-statistical analyses may be better suited to establish discrimination, rather than the multiple regression analysis required by the 2006 standards.

Significantly, OFCCP did not propose alternative standards to replace the 2006 standards, instead merely stating that “OFCCP will continue to follow Title VII principles in investigating and analyzing compensation discrimination and in interpreting regulations related to compensation discrimination.” Indeed, OFCCP noted that “[i]f the [2006] Standards are rescinded, OFCCP will reinstitute the practice of exercising its discretion to develop compensation discrimination investigation procedures in the same manner it develops other investigation procedures. OFCCP will continually refine those procedures to ensure that they are as effective and efficient as possible. OFCCP will develop and issue compensation investigation procedures in the same manner as procedures for investigating other forms of discrimination, for example through the [Federal Contract Compliance Manual], directives and staff guidance materials.”

Presuming that OFCCP does follow through on its stated intention of rescinding the 2006 standards, a period of significant uncertainty will likely follow for contractors, not only due to the removal of the predictable 2006 standards, but also due to OFCCP’s stated intention to develop new standards and procedures over time, rather than implementing any such specified standards at the time of rescission.

Given that OFCCP has acknowledged that it believes the 2006 standards are too rigid, and made it difficult to investigate and enforce discrimination claims, it is apparent that the end result of these changes will be a significant increase in the number of such investigations.

OFCCP’s notice of proposed rescission is available at <http://origin.www.gpo.gov/fdsys/pkg/FR-2011-01-03/pdf/2010-32602.pdf>

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