

Expect OFCCP to Focus More on Pay Equity and Data Collection

By Allen Smith, J.D.

April 23, 2021

Under the Biden administration, the Office of Federal Contract Compliance Programs (OFCCP) likely will have a renewed focus on wage and hour data and pay discrepancies among federal contractors. Hiring discrimination will also be a priority issue.

"Federal contractors employ approximately one-quarter of U.S. workers," said Brian Pedrow, an attorney with Ballard Spahr in Philadelphia. "So the potential reach and impact of OFCCP regulations and enforcement is significant."

The Biden administration's appointment of Jenny Yang, a former chair of the Equal Employment Opportunity Commission (EEOC) and strong advocate for pay equity, as OFCCP director indicated the agency's shift in enforcement direction, said Sarahanne Vaughan, an attorney with Bradley in Birmingham, Ala. "Yang's appointment is an undeniable signal that compensation disparities are on the administration's to-do list," Vaughan said.

However, a September 2020 administrative law judge's decision finding no pattern or practice of discriminatory pay may affect how compensation audits are conducted.

"The judge primarily focused on the OFCCP's inability to compare relevant groups of employees, explain the difference in jobs, identify a discriminatory practice causing the alleged pay disparity and explain away the discriminatory factors that influenced pay," Vaughan said. "In essence, the judge found issue with OFCCP's statistic gathering and analyzing methods. Thus, the new administration is likely to use Yang's expertise to formulate a solid system for gathering and analyzing pay data more reliably."

Notice regulations implemented in the Trump administration compel the OFCCP to provide employers with more information than under past administrations about the OFCCP's methodology and evidence when it has reached a preliminary conclusion that the employer has discriminated.

"When the OFCCP is more transparent with its evidence, I suspect that more government contractors will be willing to engage the OFCCP in productive discussions about remedying and resolving problems, rather than refusing to conciliate the alleged violation, which would send the matter to administrative enforcement," said Alissa Horvitz, an attorney with Roffman Horvitz in McLean, Va. "If the OFCCP has a strong case of discrimination, I suspect it will motivate more employers to settle than litigate."

Steps Employers Should Take to Prevent Pay Discrimination

Employers should evaluate all the factors that influence pay to ensure their systems are nondiscriminatory, said Cara Crotty, an attorney with Constangy, Brooks, Smith & Prophete in Columbia, S.C.

This means reviewing policies and procedures for fairness and unintended consequences in promotional opportunities and job assignments, she said. Employers also should evaluate different components of compensation—such as overtime, bonuses and incentive pay—instead of just base pay rates, she added.

"Pay equity will certainly continue to be a focus of the OFCCP, and more states are beginning to require pay reports or assessments."

David Cohen, president of DCI Consulting in Washington, D.C., predicted that the OFCCP soon will propose a pay data collection tool, as well as pay discrimination regulations.

Yang supported the EEO-1 "component 2" pay reporting mandate for employers, which the EEOC has dropped (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employers-should-review-eeo-1-guidance-before-pay-data-reporting-deadline.aspx).

Employers should be conducting pay equity studies that analyze similarly situated employee groupings and statistical tests that control for the major factors that influence compensation, Cohen said. If statistical differences can't be explained, employers need to remediate and make salary adjustments, he noted.

All contractors "should engage counsel and discuss conducting a privileged pay equity analysis with OFCCP requirements in mind to identify any potential problem areas or where any pay inequities exist," said Holly Lake, an attorney with DLA Piper in Los Angeles. "Employers should work with counsel to address these issues as soon as possible, prior to receiving notice of an OFCCP audit."

Many contractors have incorporated compensation reviews into their annual affirmative action programs, which is the timing the OFCCP endorses, said Cheryl Behymer, an attorney with Fisher Phillips in Columbia, S.C. "This proactive measure allows the employer to determine how best to correct unexplained disparities, if identified."

Preventing Hiring Discrimination

"Although hiring discrimination is not expected to be as high of an OFCCP priority as equal pay, it is still an issue that the Biden administration will pursue," Vaughan said.

She recommended that federal contractors:

- Ensure that anti-discriminatory practices and policies are implemented and updated.
- Strengthen any written hiring policies and criteria to include all relevant factors in hiring decisions.
- Review diversity and inclusion efforts, giving particular attention to the hiring rates for women, minorities, protected veterans and people with disabilities.
- Implement outreach efforts.
- Not use quotas.

Confirm that all necessary records are being maintained, Crotty said.

"I always counsel employers to review their applicant disposition codes to ensure that they can tell the story behind why a person was not hired," she added. Disposition codes are internal explanations for why someone wasn't hired.

"Disposition codes need to capture the different components of the Internet applicant definition (www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/what-you-need-to-know-ofccp-internet-applicant-rule.aspx): Was the person considered; did the person meet the minimum qualifications of the position; and did the person withdraw prior to receiving an offer? It is also essential to know if a candidate received an offer but did not become employed for some reason; those individuals can be counted as 'selections' in the analysis," she said.

If the candidates that meet the Internet applicant definition weren't hired, do the disposition codes explain why they weren't selected? "If the code only states 'hired more qualified candidate,' for example, that does nothing to explain why the rejected candidate was less qualified," Crotty said.

Affirmative Action Obligations

Finally, Horvitz said a compliance challenge for federal contractors is the uncertainty of what the OFCCP intends to do with its affirmative action program verification interface (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/ofccp-proposed-affirmative-action-program-initiative.aspx).

"The proposal seeks to have government contractor employers verify or certify their compliance, but depending on what actually is implemented, it could impose few burdens or become a compliance hurdle," she said.

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