

REGULATORY OVERVIEW:

OFCCP'S NEW "COMPENSATION" REGULATIONS

OFCCP's new **Voluntary Guidelines for Self-Evaluation of Compensation Practices** are now in effect. While the Guidelines are nominally "voluntary," they are voluntary only in a limited sense of that word. Current regulations already mandate that compensation analysis be done with each annual AAP to determine whether any disparities exist that are adverse to protected groups, but the regulations do not specify how that analysis must be performed. The new regulation does not alter the preexisting requirement; instead, it provides various means by which a Contractor may fulfill the preexisting analysis requirement.

The new Guidelines provide that **if** a Contractor certifies that it has performed an analysis in manner described by the new Guidelines and **if** the Contractor also certifies that it has properly remedied any deficiencies that were discovered, OFCCP will not conduct any further compensation analysis (subject only to reserving the right to review the Contractor's methodology to be sure that its analysis was performed in a manner consistent with the new Guidelines). If the Contractor declines to so certify, the OFCCP audit may include an OFCCP-conducted compensation analysis; furthermore, OFCCP would continue to retain the right to insist upon reviewing the Contractor's internally-performed analysis.

The compensation analysis requirement presents employers with a dilemma. If the employer analyzes the data, a plaintiff's attorney may someday demand that the analysis be produced in discovery, with the intent of using the analysis results against the employer. But, failing to conduct a compensation analysis puts an employer in violation of OFCCP regulations.

The new Guidelines do provide one method by which this dilemma may be avoided. A Contractor who wishes to keep its compensation analysis confidential may do so if it carefully follows a specified procedure. This procedure is the "Compliance Certification Alternative." If a Contractor provides a written, signed and notarized statement that it "has performed a compensation self-evaluation with respect to the affirmative action program or establishment at issue, at the direction of counsel, and that counsel has advised the contractor that the compensation self-evaluation and results are subject to the attorney-client privilege and/or the attorney work product doctrine," this certification will be accepted by OFCCP "in lieu of producing the methodology or results of its compensation self-evaluation to OFCCP during a compliance review." In other words, OFCCP will treat the employer's compensation analysis as a document protected by attorney-client privilege, which the employer can later assert if a plaintiff's attorney seeks the same information. Therefore, if a proper certification is produced, OFCCP will accept the certification as proof that the employer has conducted the required analysis, and will waive its right to examine the methodology and results of the Contractor's internal analysis. Instead, OFCCP would simply reserve the right to conduct its own compensation analysis, just as it does at the present time.

This topic obviously is somewhat complicated. Nevertheless, the Compliance Certification Alternative may be useful to many employers. Please contact us if you would like to discuss your compensation analysis obligations further.

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