



Advancing Equal Pay Enforcement

**Rescinding 2006
Compensation Guidance
and Implementing
Directive 307**



Effective 2/28/13

- Rescinded the 2006 pay discrimination enforcement guidance documents known as the “Compensation Standards” and “Voluntary Guidelines”
- Aligning enforcement with existing Title VII standards for pay discrimination
- Improving and expanding compensation investigation procedures and protocols, in a written Compensation Directive (Policy Directive No. 307)

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Parts 60–1 and 60–2

RIN 1250–ZA00

Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Notice of final rescission.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is publishing a final notice rescinding two guidance documents: The Interpreting Nondiscrimination Requirements of Executive Order 11246 with respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-

national origin, religion, and sex. Compensation discrimination is one form of discrimination prohibited by the Executive Order. In particular, federal contractors¹ may not discriminate in “rates of pay or other forms of compensation.” 41 CFR 60–1.4(a)(1). OFCCP enforces this requirement through review and investigation of contractor pay practices, data and other relevant information for potential systemic and individual evidence of discrimination. In addition, contractors must review and monitor their compensation systems to “determine whether there are gender-, race-, or ethnicity-based disparities.”² Contractors must maintain records, including but not limited to “rates of pay or other terms of compensation.”³

OFCCP enforces the Executive Order’s nondiscrimination provisions, including the ban on compensation discrimination, consistent with Title VII. Title VII forbids discrimination in employment, which includes paying employees differently on the basis of race, sex or other protected class membership. Congress intended for courts to read this ban broadly. *Franks v. Bowman Transportation Co.*, 424 U.S.

to spot, like a clear pattern of paying women less than men in the same job, where they are just as qualified. But it can also be complex, like a practice of discriminating against African-American sales workers in handing out territory assignments—so that no matter how well they perform, they can never have the same earnings opportunities as their white counterparts. Title VII addresses all forms of compensation differences, including those that come from channeling a favored group into the better paying entry level jobs with better long-term opportunities, or where glass ceilings or other unfair promotion practices wrongly block advancement of talented workers on the basis of illegal criteria like race or gender. And even where base wages or salaries are fair, discrimination in access to overtime, or higher paying shifts, or bonuses, can add up to unequal take home pay in violation of federal civil rights law.

Further, because there is so much variation in pay practices across industries, employers and types of jobs, investigating compensation discrimination requires considering evidence and data in context, which is the approach that federal courts have

Notice of Rescission

Executive Order 11246

- Contractors may not discriminate in “rates of pay or other forms of compensation”
- Contractors must review and monitor their compensation systems
- Contractors must maintain records including “rates of pay or other terms of compensation”

Compensation Standards and Voluntary Guidelines

- Both issued in 2006
- The Compensation Standards described procedures for OFCCP to follow when issuing a notice of violation for pay discrimination
- The Voluntary Guidelines contained a set of directions that contractors may choose to follow in order to show compliance with the regulatory self-analysis requirement (41 CFR 60-2.17(b)(3))

Issues with 2006 Guidance

Standards and Voluntary Guidelines

- Addressed single type of pay practice
- Used limited evidence
- Used highly specified analytic framework

In contrast, courts say Title VII

- Prohibits multiple forms of pay discrimination
- Allows for the use of various types of evidence
- Does not impose rigid formula for proving discrimination

Key Benefits of Rescission

- Removes barriers to identifying discrimination
- OFCCP will follow the same standard as EEOC, other federal agencies and courts
- OFCCP will enforce pay discrimination based on Title VII principles, the same way it does in hiring and other cases
- Flexibility to address new legal developments, different kinds of industries, workers and pay practices

Key Issues Following Rescission

- 1) Change from SSEG's to Title VII similarly situated
- 2) Regression analysis
- 3) Anecdotal evidence
- 4) Self-evaluation requirements
- 5) Effective Date: Application to new reviews and reviews in process



DIRECTIVE

U.S. DEPARTMENT OF LABOR
Office of Federal Contract Compliance Programs

Number: 307

Date: February 28, 2013

ADM Notice/Compensation

1. **SUBJECT**: Procedures for Reviewing Contractor Compensation Systems and Practices
2. **PURPOSE**: To outline the procedures for reviewing contractor compensation systems and practices during a compliance evaluation.
3. **ORIGINATOR**: Division of Program Operations
4. **BACKGROUND**: OFCCP is issuing this Directive in support of its ongoing policy commitment to address pay discrimination by federal contractors and subcontractors. This Directive specifies the procedures OFCCP field investigators use for reviewing contractor compensation systems and practices. It clarifies and improves OFCCP procedures in further support of the agency's efforts to align pay discrimination enforcement with longstanding principles under Title VII of the Civil Rights Act of 1964 (Title VII).

Policy Directive 307

Compensation Directive

- Policy Directive #307: *Procedures for Reviewing Contractor Compensation Systems and Practices*
- Eliminates barriers to finding discrimination
- Uses case-specific and flexible approach, in accordance with Title VII legal principles
- Investigation process organized by stages

Investigative Approach

- Three key questions in every case:
 - Is there a measurable difference in compensation on the basis of sex, race, or ethnicity?
 - Is the difference in compensation between comparable employees under the contractor's wage or salary system?
 - Is there a legitimate explanation for the difference?

Definition of Compensation

- Compensation: Any payments made to, or on behalf of, an employee as remuneration for employment
- Includes base salary, as well as all other forms of pay such as:
 - Overtime pay
 - Bonuses
 - Commissions

Consider All Relevant Employment Practices

- OFCCP will tailor the approach and tools to be used based on the contractor's compensation practices.
- Differences may be observed with regard to base pay; job assignment or placement; opportunities to receive training, promotions, and other opportunities for advancement; earnings opportunities; and, differences in access to salary increases or add-ons, such as bonuses.

Desk Audit Stage – Preliminary Analysis

- OFCCP will begin desk audit with preliminary analysis of summary compensation data requested in Item 11 of the Scheduling Letter
- Preliminary Analysis helps OFCCP determine:
 - Whether more information is needed;
 - Whether to proceed to an on-site; and
 - How to allocate investigative resources.
- Depending on results of preliminary analysis, OFCCP may request individual employee-level data from contractor.

Desk Audit Stage – Preliminary Analysis

- Quantitative factors such as:
 - The size of any overall average pay differences based on race and gender;
 - The number of job groups or grades where average pay differences exceed a certain threshold; or
 - The number of employees affected by race-or gender-based average pay differences within job groups or grades.

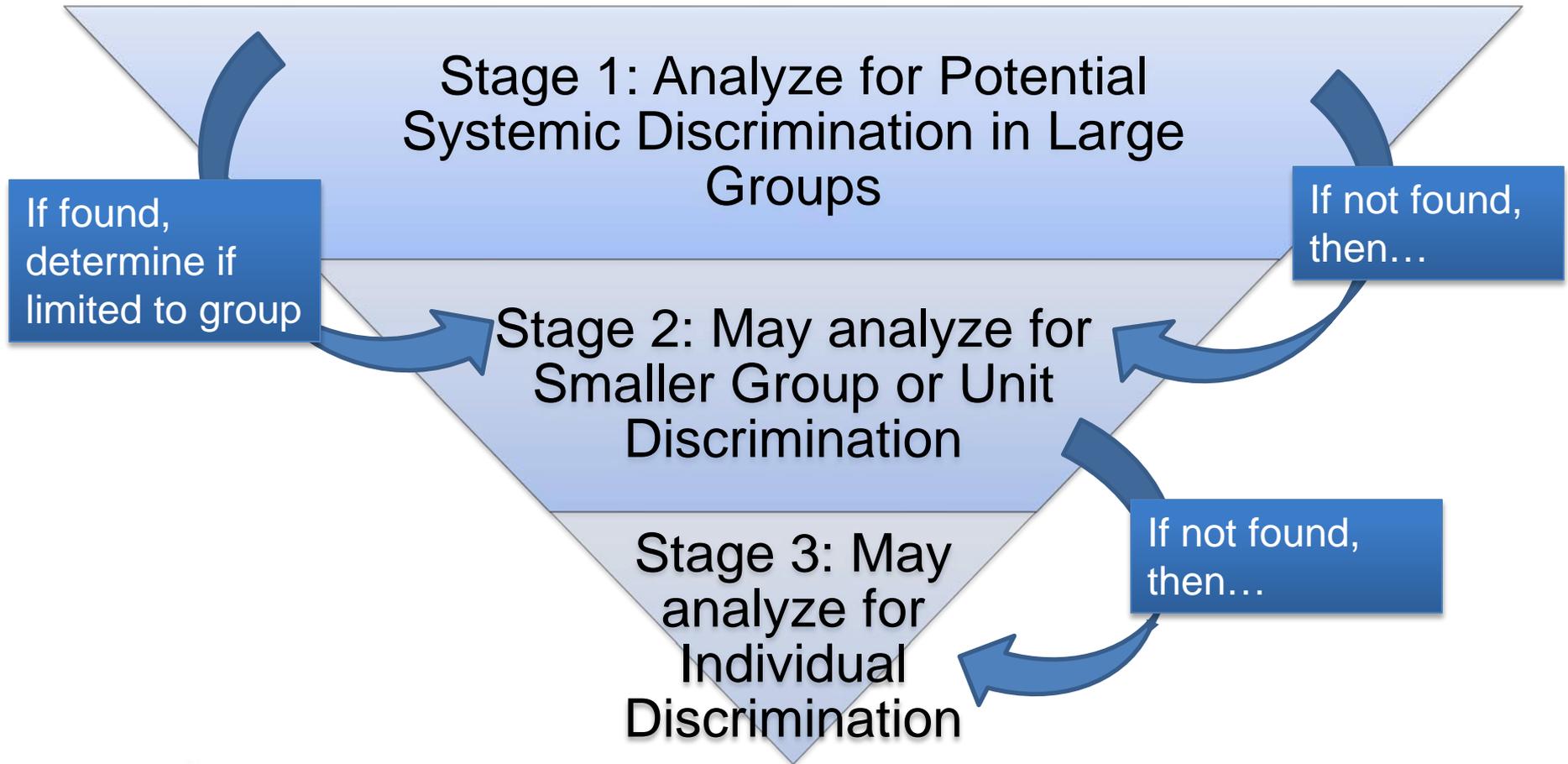
Desk Audit Stage – Preliminary Analysis

- Qualitative factors such as:
 - Compliance history
 - OFCCP or EEOC complaints
 - Anecdotal evidence
 - Potential violations involving other employment practices
 - Data integrity issues

Desk Audit Stage – Individual Employee Level Data

- Examine all data and information provided
- If needed, contact contractor to ask clarifying questions and request further information
- Depending on findings, either proceed to onsite or administratively close the case

Levels of Comp. Analysis



Statistical Analyses

- Case-specific
 - Multiple regression analysis of pay analysis groups as appropriate
- Will not use construct of SSEGs, will instead apply Title VII principles to determine groupings

Moving from SSEGs to Pay Analysis Groups

SSEGs

- Similarly situated always defined the same way regardless of pay practices, issues or evidence
- Typically start with individual SSEGs

Pay Analysis Groups

- Similarly situated defined based on pay practices, issues and evidence
- Typically start with larger pay analysis groups, refine as appropriate

Non-Statistical (Comparative) Analyses

- A comparison of the treatment of similarly situated individuals or small groups of applicants or employees.
- Individual disparate treatment claims require evidence that supports an inference of intentional discrimination

On-Site Review

- Investigate pay policies and practices – both stated and actual
- Identify any additional data or records that may be relevant
- Investigate factors used to determine pay
- Conduct interviews, identify anecdotal evidence

Anecdotal Evidence

- Anecdotal evidence not required going forward
- Anecdotal evidence can be helpful to understand practices or issues revealed by patterns in the data or provide insight into systemic or non-systemic pay issues

Review and Testing of Factors

- Contractors may provide information regarding the factors considered when making compensation decisions.
- OFCCP will review and test factors on a case-by-case basis, and incorporate them into the analysis as appropriate.

Off-Site and Conclusion of Review

- After evaluating all available evidence, CO will take such actions as the findings warrant.
- Findings of compensation discrimination will be addressed along with any other types of discrimination findings (i.e., hiring, terminations, etc.)

Self-Evaluation

- Self-evaluation requirements
 - Follow the regulations
(41 CFR § 60-2.17(b)(3) & (d))
 - Regular, based on race and gender, reported to management
 - No specific method required

Cases Pending on Effective Date

- Directive procedures apply to all OFCCP Supply and Service compliance evaluations scheduled on or after February 28, 2013.
- Any review scheduled, open, or otherwise pending on the effective date of the Rescission will apply the 2006 guidance documents to determine whether to issue a Notice of Violation.

Library

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E-mail

Office of Federal Contract Compliance Programs (OFCCP)

Advancing Equal Pay Enforcement More Effective and Transparent Procedures for Investigating Pay Discrimination

Equal pay is a critical issue for workers and their families, and a cornerstone of OFCCP's equal employment enforcement. The Office of Federal Contract Compliance Programs (OFCCP) has rescinded restrictions on investigating pay discrimination and announced new guidance for employers and other interested stakeholders. This action is intended to protect workers and strengthen OFCCP's ability to identify and remedy different forms of pay discrimination. Specifically, OFCCP is:

- **Rescinding two enforcement guidance documents on pay discrimination from 2006** known as the "Contract Standards" and "Voluntary Guidelines" because they limited OFCCP's ability to conduct full investigations and use enforcement tool at its disposal to combat pay discrimination.
- **Aligning OFCCP's analysis of pay discrimination with the principles used to enforce the main federal employment discrimination -- Title VII of the Civil Rights Act of 1964 --** just like in all other areas where OFCCP reviews contractor compliance under Executive Order 11246 (such as hiring, promotion or termination), and just as other agencies do.
- **Improving and clarifying OFCCP's compensation investigation program**, by providing the procedures, and protocols OFCCP will utilize when conducting compensation discrimination investigations going forward.

Important Links:

- [Notice of Rescission](#)

Resources



Questions?

