



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 activities. The Office of Federal Contract Compliance Programs (OFCCP) has rescinded restrictions on investigating pay discrimination and announced new guidance for employers and other interested stakeholders.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 "Compensation Standards" and "Voluntary Guidelines" because they limited OFCCP's ability to conduct full investigations and use every 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 law against 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 federal agencies do.
- Improving and clarifying OFCCP's compensation investigation program, by providing the procedures, analysis, and protocols OFCCP will utilize when conducting compensation discrimination investigations going forward.

Background

The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces Executive Order 11246, as amended, which requires federal government contractors and subcontractors to ensure equal employment opportunity on the bases of race, color, national origin, religion, and sex through affirmative action and nondiscrimination. Compensation discrimination is one form of employment discrimination prohibited by the Executive Order. OFCCP interprets the Executive Order's nondiscrimination provisions consistent with Title VII, including the ban on compensation discrimination.

On January 3, 2011, OFCCP published a Notice of Proposed Rescission (NPR), proposing to rescind the Compensation Standards and the Voluntary Guidelines in their entirety, and soliciting public

comment. After carefully considering all submitted comments, OFCCP is rescinding both guidance documents effective immediately, and better aligning its enforcement with Title VII legal principles about how to prove discrimination as explained in the Notice of Rescission. Additionally OFCCP is issuing a written Compensation Directive describing its procedures for compensation investigations going forward and implementing the framework set forth in the Notice of Rescission.

Rescission

The 2006 Compensation Standards generally described the procedures OFCCP should use when issuing a notice of violation for pay discrimination. The Voluntary Guidelines contained a set of directions that contractors could choose to follow in order to show compliance. OFCCP is officially withdrawing these two guidance documents in order to improve the agency's ability to enforce the ban on pay discrimination.

Compensation discrimination can take many forms – from paying women less than men for doing the same job, to discriminating against minorities in promotions or opportunities to earn overtime. Even when base salaries and wages are fair, workers can still experience discrimination in other types of pay, like bonuses or commissions. For this reason, courts consistently state in judicial decisions applying Title VII that there is **no single way to prove** compensation discrimination, and **no particular limits** on the kinds of evidence or information that might be relevant to proving discrimination in a particular case. The 2006 guidance documents conflicted with these two key principles of Title VII law. Specifically, OFCCP is rescinding the Compensation Standards and Voluntary Guidelines for the following reasons:

- In contrast to the flexible, fact-based approach that courts usually apply in Title VII cases, the Compensation Standards and Voluntary Guidelines addressed only a single type of pay practice using limited evidence and a highly specified analytic framework. These limits had the potential to overlook legitimate pay discrimination problems. Under the 2006 guidance, OFCCP applied a cookie-cutter approach regardless of the industry, types of jobs, issues presented, characteristics of workers or available data, testing narrowly defined groupings and using only certain kinds of evidence. The rescission will help strengthen enforcement by removing barriers that limited the kinds of evidence and information OFCCP used to evaluate the pay practices of federal contractors.
- The limited approach of the Compensation Standards and the Voluntary Guidelines often prevented OFCCP from detecting evidence of illegal pay discrimination by narrowly defining what could be considered in its investigations. Since the adoption of the Compensation Standards and the Voluntary Guidelines, OFCCP has identified an extremely small number of compensation issues through contractor reviews, in comparison to violations uncovered with respect to other employment practices. Essentially, the Compensation Standards and the Voluntary Guidelines have not proved workable or effective in practice.

- Although seemingly thorough, the Compensation Standards and the Voluntary Guidelines did not actually apply to or explain investigation procedures, and left many critical details undefined or subject to potential exceptions.
- Even though they were supposed to provide contractors a clear, easy-to-use method to review their pay practices for discrimination, contractors rarely used the Voluntary Guidelines to demonstrate compliance.

Benefits of Rescission

- OFCCP will improve equal employment protection for workers by eliminating the barriers imposed by the Compensation Standards and Voluntary Guidelines. For example, OFCCP is clarifying that it will proceed in cases regardless of whether individual workers are aware that they have been discriminated against, which is often the case in pay discrimination. OFCCP will be reviewing all aspects of contractors' compensation practices for indicators of potential discrimination.
- The Rescission offers transparency by explaining how Title VII standards will apply going forward.
- Aligning compensation investigations with Title VII standards will allow OFCCP to utilize a broad, flexible equal pay enforcement approach that can uncover multiple forms of illegal compensation discrimination.
- Tailoring the investigative approach to the facts of each case will help OFCCP uncover instances of compensation discrimination that involve complex and nuanced issues. It will also allow OFCCP to consider the totality of the evidence and data, including how pay practices vary across industries, employers and types of jobs.

Compensation Directive

Along with rescinding the Compensation Standards and Voluntary Guidelines, OFCCP is releasing a Compensation Directive describing the procedures and protocols that the agency will follow when conducting compensation investigations. The Rescission Notice and the Directive replace all existing written internal OFCCP guidance on compensation enforcement. Key elements of the investigative procedures described in the Compensation Directive include the following:

- **ACCESS TO A VARIETY OF INVESTIGATIVE AND ANALYTICAL TOOLS:** Title VII's case-by-case approach to compensation discrimination issues requires the use of a range of investigative and analytical tools. The right approach or combination of tools for a particular case depends upon the underlying facts, available data, and the contractor's compensation system and practices. OFCCP investigators will work with statisticians and attorneys to determine the appropriate analytical methods to use in a particular investigation.

- **INVESTIGATION OF SYSTEMIC, SMALLER UNIT AND INDIVIDUAL DISCRIMINATION:** OFCCP will analyze the data for potential systemic discrimination in larger and smaller groups, and OFCCP may conduct comparative analyses of very small groups or individuals to determine if discrimination has occurred, and if there is evidence sufficient to support an inference that pay differences are due to discrimination. Pursuant to Title VII law, OFCCP may seek a remedy for compensation discrimination regardless of whether individual workers know they are being unfairly underpaid.
- **REVIEW AND TESTING OF FACTORS:** OFCCP will evaluate, on a case-by-case basis, information from the contractor regarding the factors the contractor considered in making compensation decisions. A factor is an element that the contractor offers to explain differences in employee compensation under its compensation system and practices. A factor may be a qualification or skill that the worker brings to the position such as experience, or a job-related element such as tenure in position.

Benefits of Compensation Directive

Implementation of the procedures outlined in the Compensation Directive will improve and expand OFCCP's compensation investigations in the following ways:

- The procedures set forth in the Compensation Directive will allow OFCCP to conduct more rigorous, effective and consistent reviews of employer pay practices, making it possible for OFCCP to better direct its resources for the benefit of workers, contractors, the federal government, contractors, and taxpayers.
- The Compensation Directive's case-specific approach will allow OFCCP to ensure that its investigations are tailored to contractors' actual compensation systems.
- Release of the Compensation Directive increases transparency for workers, the contractor community and other stakeholders.

Training and Support

In order to ensure that the Title VII compensation principles set forth in the Rescission are successfully and consistently implemented in OFCCP compliance evaluations, OFCCP will develop and conduct the following:

- **New policy and enforcement tools** that strengthen OFCCP's ability to identify and remedy compensation discrimination, including the Compensation Directive and a comprehensive training program for field staff to ensure that the new procedures for investigating compensation practices are properly and consistently implemented in accordance with Title VII principles.
- **Technical assistance for contractors** to encourage voluntary compliance and improve self-monitoring of pay practices by contractors for signs of potential discrimination. This will include written FAQs, webinars, and other support.