



**DIRECTIVE**

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

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Number: 307

Date: February 28, 2013

ADM Notice/Compensation

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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).

This Directive is part of a larger assessment of OFCCP's compensation enforcement practices. In 2010, President Obama created the National Equal Pay Task Force, bringing together the Department of Labor (DOL), the Equal Employment Opportunity Commission (EEOC), the Department of Justice, and the Office of Personnel Management to collectively address pay discrimination under their enforcement mandates. The Director of OFCCP, a member of the Task Force, committed OFCCP to review and revise its enforcement guidance and practices to more effectively address compensation discrimination under Executive Order 11246.

This Directive provides clarity and transparency regarding OFCCP practices for all phases of a compliance review. The Directive sets forth in detail procedures for Compliance Officers (COs) to follow in reviewing contractor compensation systems and practices. In keeping with Title VII principles, COs must be able to use a variety of investigative and analytical tools in conducting evaluations. This Directive provides guidance regarding how to apply OFCCP's case-specific approach to addressing all types of compensation discrimination.

5. **POLICY**: Under Executive Order 11246, as amended, and its implementing regulations, contractors may not discriminate in "rates of pay or other forms of compensation,"<sup>1</sup> and must review and monitor their compensation systems to "determine whether there are

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<sup>1</sup> 41 CFR §60-1.4.

gender-, race-, or ethnicity-based disparities.”<sup>2</sup> Contractors must maintain records including but not limited to “rates of pay or other terms of compensation.”<sup>3</sup> During compliance evaluations, OFCCP requests compensation data and analyzes contractors’ compensation systems and practices to determine if discrimination exists and, if so, how to remedy it.

OFCCP enforces Executive Order 11246, including the ban on compensation discrimination, consistent with Title VII’s flexible, fact-specific approach to proof. This involves factual investigation, data and legal analyses which allow OFCCP to identify and remedy all forms of compensation discrimination. COs tailor the compensation investigation and analytical procedures to the facts of the case as appropriate under Title VII. This case-by-case approach to compensation discrimination includes the use of a range of investigative and analytical tools. Statistical analyses, such as multiple regression, and non-statistical analyses, such as the use of comparators or cohort analysis, are applied as feasible and appropriate given the factual questions and the available data and evidence. COs seek anecdotal evidence, but will investigate and remedy compensation discrimination regardless of whether individual workers believe they are being underpaid, or whether OFCCP has any anecdotal evidence.

This case-by-case approach is designed to eliminate unnecessary barriers to OFCCP’s ability to protect workers from discrimination. It ensures OFCCP fully takes into account explanations or responses from contractors, and that OFCCP conducts an analysis tailored to a contractor’s compensation systems and practices. Procedures to facilitate thorough and robust investigations are provided in the sections that follow.

6. **EFFECTIVE DATE:** The investigation procedures established in this Directive apply to all OFCCP reviews scheduled on or after February 28, 2013, and they apply to open reviews to the extent they do not conflict with OFCCP guidance or procedures existing prior to the effective date. Regardless, the 2006 Compensation Standards and Voluntary Guidelines govern determinations regarding the issuance of an NOV for systemic compensation discrimination in any OFCCP review scheduled, opened or otherwise pending on the effective date of this Directive.
7. **DEFINITIONS:** To ensure consistency in implementation, the following terms are defined:
  - **Base pay** – Includes only the designated salary or wages for a position or job title. “Non-base pay compensation” also includes all other forms of compensation such as bonuses, commissions, overtime, and perquisites. (See Compensation.)

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<sup>2</sup> 41 CFR §60-2.17(b)(3); *see also* 41 CFR §60-2.17(d).

<sup>3</sup> 41 CFR §60-1.12.

- **Cohort Analysis** – A comparison of the treatment of similarly situated individuals or small groups of applicants or employees.
- **Comparators** – Similarly situated employees who are outside of the protected class of the individual to whom they are being compared to determine whether a compensation disparity exists.
- **Compensation** – Includes any payments made to, or on behalf of, an employee as remuneration for employment, including but not limited to salary, wages, overtime pay, shift differentials, commissions, bonuses, vacation and holiday pay, retirement and other benefits, stock options and awards, and profit sharing.
- **Control** – In a statistical analysis of compensation, using controls is a way of accounting for potential explanations of pay differences. For example, controlling for education accounts for the effect of education on any differences in pay.
- **Factors** – Elements which are proposed to explain differences in employee compensation under a contractor’s compensation system and practices. Factors may be used as controls in a regression analysis or evaluated in a cohort analysis.
- **Pay Analysis Group** – A group of employees (potentially from multiple job titles, units, categories and/or job groups) who are comparable for purposes of the contractor’s pay practices. Regression analysis may be performed on different types of pay analysis groups. A pay analysis group may be limited to a single job or title, or may include multiple distinct units or categories of workers. A pay analysis group may combine employees in different jobs or groups, with statistical controls to ensure that workers are similarly situated.<sup>4</sup>
- **Similarly Situated Employees** – The determination of which employees are similarly situated is case specific. Relevant factors in determining similarity may include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. Employees are similarly situated where they are comparable on the factors relevant to the investigation, even if they are not comparable on others (see Sections 5 and 6 below).
- **Summary Data** – Compensation data that involves averages or other summaries of worker pay by job title, pay grade, job group, or other category.
- **Systemic Discrimination** – A pattern or practice of discrimination or an identified employment practice with disparate impact. OFCCP defines a systemic discrimination case as meeting one of two criteria: (a) the case addresses a

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<sup>4</sup> Statistical testing applied to practices that impact pay such as job assignment may require a different analytic grouping than tests for within job pay differences.

measurable pattern of discrimination (either based on findings from a regression analysis or based on any other appropriate aggregate analysis of compensation data); or (b) the case addresses an identified practice applicable to multiple employees that results in pay discrimination (such as a practice of steering employees who are members of a protected class toward lower paying jobs at hire). There is no specific numeric threshold used to define a systemic case.

8. **PROCEDURES**: When a contractor is scheduled for a compliance evaluation, OFCCP uses the Scheduling Letter to request data and information about the contractor's compensation system and practices. Upon receipt of the data, OFCCP conducts a desk audit. OFCCP may request and review additional compensation data, and conduct an onsite investigation as well as an offsite review of records and data, before making a final determination regarding compliance.<sup>5</sup> During the desk audit and at subsequent stages of the compliance evaluation, the CO should communicate with the contractor, as appropriate, in order to ask clarifying questions about the materials submitted, interpret codes or categories used in the data, identify any missing or incomplete information, and request additional information as needed. The CO should obtain all such information as early in the process as possible.

**A. Summary of OFCCP Compensation Investigation Procedures**

Below are procedures that the CO follows in reviewing contractor compensation data and information, however it is important to note that the order in which these procedures occur may vary based on the facts and circumstances of each review. At any stage in the process, OFCCP may determine, based on the evidence, that it is appropriate to close the review or may determine that further review is warranted. Generally, the CO:

- Conducts Preliminary Analysis of Summary Data (if necessary or appropriate)
- Conducts an Analysis of Individual Employee-Level Data
- Determines the Approach from a Range of Investigative and Analytical Tools
- Considers All Employment Practices that May Lead to Compensation Disparities
- Develops Pay Analysis Groups
- Investigates Systemic, Small Group and Individual Discrimination

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<sup>5</sup> The Paperwork Reduction Act (PRA), 44 U.S.C. Chapter 35, does not apply to this Notice because it does not involve any collection of information subject to the approval of the Office of Management and Budget. To the extent information is collected during the desk audit, it is covered by OFCCP's Scheduling Letter. To the extent information is collected during an OFCCP investigation, it is exempt from the PRA. 5 CFR 1320.4(a)(2) (The PRA does not apply to information collections during an "administrative action, investigation, or audit involving an agency against specific individuals or entities.")

- Reviews and Tests Factors before Accepting the Factors for Analysis
- Conducts Onsite Investigation, Offsite Analysis, and Refinement of the Model

Contractors have an opportunity to provide clarification of their submissions and to explain their compensation system and practices. The CO conducts a thorough investigation of all potential compensation discrimination issues and makes a compliance determination.

## **B. Applying Case-Specific Investigation Protocols**

### **1. Conduct a Preliminary Analysis of Summary Data (if necessary or appropriate)<sup>6</sup>**

When OFCCP begins a compliance evaluation with summary compensation data, a CO conducts a preliminary analysis to determine whether to proceed further with the desk audit, including requesting and reviewing individual employee-level data as described in Section 2. A CO may also use the preliminary analysis tools described in this section to assess individual data, by first grouping the data by the contractor's pay ranges or job groups, or may proceed directly to section 2 and analyze the complete individual data. This preliminary analysis, standing alone, is not evidence of discrimination. Results of the preliminary analysis may indicate where further review of compensation data is warranted and assist OFCCP in prioritizing investigative resources.

Prior to conducting a preliminary analysis, the CO reviews the data to make sure it has been provided in the requested format. If a contractor submits summary compensation data based on job groups, titles in those job groups should be consistent with the groupings in the Affirmative Action Plan (AAP). Summary compensation data submitted in a format other than by AAP job group, or the contractor's existing pay grade, level or band system, generally is not acceptable for analysis.

In general, the preliminary analysis assesses quantitative and qualitative factors. Quantitative factors may include:

- The size of the overall average pay difference based on race and gender;
- The size of the largest average pay difference within AAP job groups, or the contractor's existing salary band or pay grade system;
- The number of job groups or grades where average pay differences based on race or gender exceed a certain threshold; or

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<sup>6</sup> OFCCP may begin a desk audit with summary compensation data, by pay grades or ranges and by race and gender, at the beginning of a compliance evaluation. When OFCCP receives individual employee-level data at the beginning of a compliance evaluation, a CO may proceed directly to Section 2 or may conduct preliminary analysis of the individual data first.

- The number of employees affected by race-or gender-based average pay differences within job groups or grades.

OFCCP periodically may adjust the size and weight of the factors used for these quantitative comparisons, based on the review of the results of investigations, the results of quality audits, and other factors such as agency resources and priorities.

Qualitative factors may include compliance history, OFCCP or EEOC complaints, anecdotal evidence, potential violations involving other employment practices, or data integrity issues, among others.

Because this preliminary analysis has limited utility for making ultimate determinations of discrimination, OFCCP uses it only to determine whether to continue a compliance evaluation or how to allocate investigative resources. OFCCP does not use preliminary analysis of summary data to limit further compensation data requests or to define the compensation issues OFCCP may pursue in later stages of a compliance evaluation.

After the preliminary analysis, the CO may request that the contractor provide additional information necessary to evaluate compensation issues, including individual compensation data for employees who are covered by the compliance evaluation, other additional data not provided in response to the Scheduling Letter, information regarding the factors used to determine compensation, and information about the contractor's policies and practices related to compensation.

## **2. Conduct an Analysis of Individual Employee-Level Data**

In any case where individual data is provided or requested, the CO uses the data and information in order to understand the contractor's compensation system and practices and to make compliance determinations. The CO may contact the contractor during the initial analysis of the data to ask clarifying questions about the materials submitted, interpret codes or categories used in the data, identify any missing or incomplete information, and request additional information if it is needed.

If complete compensation data and information regarding the contractor's compensation system and practices are not received in response to OFCCP's request, the CO immediately contacts the contractor to secure the information. If the contractor fails to submit requested data or other compensation information in a timely manner, a Show Cause Notice is issued in accordance with OFCCP procedures as specified in the Federal Contract Compliance Manual (FCCM).

Data that the contractor maintains in electronic form must be submitted in a complete, readable and useable electronic form upon request.

After receiving and reviewing the data and information, the CO continues the desk audit applying the investigative framework described below. The CO records all desk audit

findings and pending actions to be taken. The results of the desk audit are used to determine whether the evaluation should continue. If at any point during the process of reviewing data and information, the CO determines either that there is evidence of potential compensation discrimination, or that more data or information is needed to make that determination, OFCCP may proceed to an onsite investigation.<sup>7</sup> Closure at desk audit must be consistent with standard OFCCP desk audit procedures.

### **3. Determine the Approach from a Range of Investigative and Analytical Tools**

Investigation of potential compensation discrimination presents complex and nuanced issues. The choice of the best approach for a case depends upon the underlying facts, the available data, and the contractor's compensation system and practices. As such, OFCCP takes a case-by-case approach to analyzing compensation issues.

At the early phase of an evaluation, a CO may conduct a preliminary analysis as described above. As a compliance evaluation moves from the desk audit to an onsite investigation and a final determination regarding compliance, OFCCP reviews and refines the approach in light of information provided by the contractor or developed through the investigation. All final determinations of compliance are based on a rigorous, appropriate and legally sound analysis of the facts and data.

A variety of tools are available for investigating and analyzing compensation issues. There is no single tool that must be used in every case. The use of a particular tool, or combination of tools, depends on the facts of the case. COs determine, in appropriate consultation with their supervisors, OFCCP statistical analysts, and the Regional Solicitors of Labor (RSOL), which investigative or analytical tools are used. Other national office experts and personnel, and the National Office Solicitor of Labor (NSOL), may also be consulted.

In every case there are three key questions to answer:

- a. Is there a measurable difference in compensation on the basis of sex, race, or ethnicity?<sup>8</sup>
- b. Is the difference in compensation between employees who are comparable under the contractor's wage or salary system?

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<sup>7</sup> This includes a situation where the compensation information provided at the desk audit does not include individual employee-level data and/or the data is not complete, accurate, readable or useable for analysis.

<sup>8</sup> In situations where there is sufficient data to use regression analysis, a measurable difference generally means a statistically significant difference, two or more standard deviations, consistent with Title VII principles. In the situation of disparities in small group and/or individual compensation, a measurable difference and sufficient evidence will be determined in conformance with Title VII principles (see Section 6 below). Regardless, statistical evidence is not required in all compensation cases; other evidence may be used to evaluate potential discrimination in pay.

- c. Is there a legitimate (i.e. nondiscriminatory) explanation for the difference?

Upon finding any compensation disparities (differences), the CO conducts an appropriate factual investigation, and gets assistance with data and legal analyses, to address each of these questions. An investigation may include analysis of workforce data and contractor compensation policies and practices; interviewing personnel and employees; examining payroll and Human Resource Information Systems (HRIS); conducting non-statistical analyses, such as comparative and/or cohort analysis, and statistical analyses, such as regression analysis. Investigations may require consulting with statistical analysts and other experts, and consulting with RSOL and NSOL, as well as examining other relevant information.

#### **4. Consider All Employment Practices that May Lead to Compensation Disparities**

In developing an investigation plan at the desk audit phase, and in applying that plan at each step of the compliance evaluation, the CO should examine all employment practices that have the potential to lead to compensation disparities. This covers examination of the compensation system, including base pay and non-base pay data, and other practices as well.

The CO should examine employee access to opportunities affecting compensation, such as: higher paying positions, job classifications, work assignments, training, preferred or higher paid shift work, and other opportunities. The CO should also examine policies and practices that unfairly limit a group's opportunity to earn higher pay, such as "glass ceiling" issues, and access to overtime hours, pay increases, incentive compensation, and higher commission or desired sales territories. The CO may investigate any observed differences in pay, other earnings or benefits, job assignment/placement, training/advancement opportunities, differences in opportunities to increase compensation, or other unexplained differences.

The CO should 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.

In order to evaluate compensation differences beyond base pay, it may be necessary to make an additional data request regarding the contractor's compensation system and practices or to go onsite.

The CO should consider the nature of the job(s) in question when determining the tools to be used to investigate and analyze the compensation data and information. A commission sales position, for example, is examined differently than an entry-level, hourly rate position. High level professional and managerial positions should be

examined to determine if “glass ceiling” issues exist. (See FCCM – Corporate Management Compliance Evaluations.)

The following table contains examples that illustrate differences in employment practices that may lead to compensation disparities warranting review and investigation for potential discrimination:

<b>Type of Difference</b>	<b>Basis for Comparison of Employees</b>	<b>Examples of Differences</b>
Differences in Salary or Hourly Rate	Similar job, different pay	Hispanic customer service agents are paid less than white employees in the same or similar positions due to highly subjective salary system.
Differences in Job Assignment or Placement	Similar qualifications, different job	Women hired into entry-level grocery store positions are disproportionately assigned to the bakery department. Men are assigned to the meat department where pay and promotion opportunities are better.
Differences in Training or Advancement Opportunities	Similar job, different opportunities to increase skills	Employees may participate in a management training program on a recommendation by a manager. Certain managers are referring only white males resulting in disproportionate participation. Resulting promotions to management positions are disproportionately awarded to white males.
Differences in Earnings Opportunities	Similar job, different earnings	African-American sales workers are disproportionately assigned to territories with less potential.
Differences in Access to Increases and Add-Ons	Similar job, different opportunities to increase pay	Female lawyers who get exactly the same base pay as male counterparts earn less on annual bonuses.

## 5. Develop Pay Analysis Groups

At this stage, the CO has reviewed the data and information submitted by the contractor. The next step in the analysis, if the data allow, is to develop pay analysis groups that are used to test for statistical significance on large groups of employees. The analysis may be based on groups that are larger than individual job titles and AAP job groups. By combining employees into appropriate pay analysis groups, using statistical controls as necessary for title or level, OFCCP is able to more easily identify potential systemic discrimination needing further investigation and potential remedy. Individual or cohort comparisons may be conducted, as warranted, as shown in Section 6. If the data allow, OFCCP analyzes pay disparities based on protected class status that cannot be explained by neutral job-related factors, e.g., identifying potential placement or classification issues for further investigation.

*Analytical Model* – The CO determines the pay analysis groups to be used in the analytical model, consulting as needed with their supervisors, the statistical analysts and RSOL. (COs may make preliminary determinations that are then refined with the assistance of the statistical analysts and RSOL). A pay analysis group is a group of employees (potentially from multiple job titles, units, categories and/or job groups) who are comparable for purposes of the contractor’s pay practices. Regression analysis may be performed on different types of pay analysis groups. A pay analysis group may be limited to a single job or title, or may include multiple distinct units or categories of workers. A pay analysis group may combine employees in different jobs or groups, with statistical controls to ensure that workers are similarly situated. Statistical testing applied to practices that impact pay such as job assignment may require a different analytic grouping than tests for within job pay differences.

OFCCP develops pay analysis groups by considering elements such as: the particular industry, the types of jobs and compensation at issue, the contractor’s actual compensation practices, and available data. Compensation practices may differ by role (e.g., executives, managers, supervisors and individual contributors), by level (with higher-level employees tending to receive additional or alternate forms of compensation), by function (such as sales employees who are paid on commission), by unit (department, division, location, etc.) and/or by job classification (exempt or non-exempt, part-time or full-time, bargaining unit, etc.). This information may be found through a review of the contractor’s compensation policies or training documents, description of its compensation system or practices, compensation data, records and coding, job descriptions, and interviews. COs may consider other facts relevant to determining groups, such as the ability of workers to rotate or transfer among different positions within a business unit, a common hiring or selection process, a common performance review practice or other common identifiable employment practice related to compensation.

Initially, the CO combines jobs into appropriate larger pay analysis groups, which may include multiple job titles or units, that are comparable for purposes of the contractor’s

compensation practices. The combination of job titles or jobs is based on what the CO knows of the contractor's compensation system and its practices. Where a combination of job titles or jobs at multiple levels is used, it may be appropriate to statistically control for title and level within the pay analysis group. The size and definition of a group, and whether to include title or level as a control in the analysis, depends on available data and evidence and the compensation practices being analyzed. Reasonable differences may exist among workers in a pay analysis group as long as these differences are properly accounted for in the statistical analysis to be conducted. OFCCP conducts regression analysis on the pay analysis groups to determine whether statistically significant disparities in compensation exist.

The CO also develops pay analysis groups that evaluate broader pay differences based on protected class status that cannot be explained by neutral job-related factors, e.g., assignment, placement or classification issues. Statistical testing for practices that impact compensation such as job assignment may require a different pay analysis group than tests for within job compensation differences.

The analytical model developed by the team (OFCCP investigators, statistical analysts, and RSOL) is used to initially test large pay analysis groups. As the results of the initial analysis and facts warrant, OFCCP refines the analysis, based on pre- or post-onsite information, and OFCCP may conduct subsequent statistical and/or non-statistical tests of smaller groups or individuals.

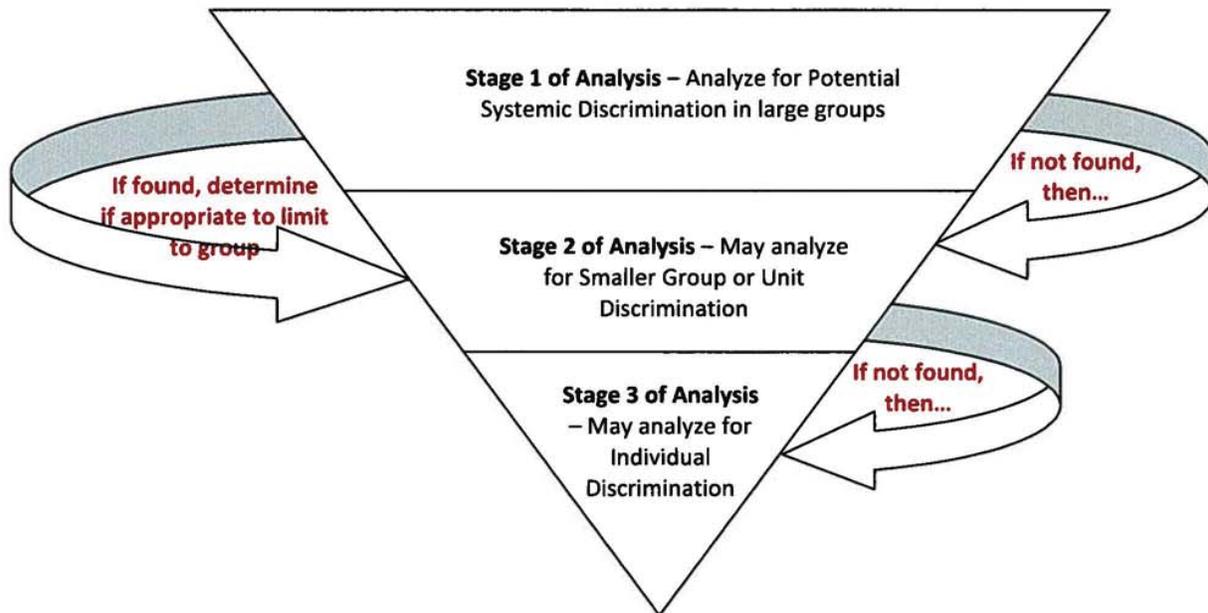
If possible, the CO develops and applies the model to the data at the desk audit phase, using preliminary determinations regarding appropriate pay analysis groups. If the CO needs more data or information to develop the groups, or conduct or refine the analysis, the CO may proceed to an onsite investigation before performing the analysis. If it is not possible to form pay analysis groups or perform a regression analysis at the desk audit phase, the CO also may use preliminary tests or broad indicators of potential compensation issues at the desk audit to identify pay practices or issues needing further review. As a compliance evaluation moves from a desk audit to an onsite investigation and a final determination regarding compliance, COs review and refine the approach, including the determination of the appropriate pay analysis groups, in light of further information provided by the contractor or developed through the investigation.

## **6. Investigate Systemic, Small Group and Individual Discrimination**

The CO investigates possible systemic, small group and individual compensation discrimination as indicated by the initial analysis of the compensation data and information (see illustration below). Pay analysis groups are developed to examine possible systemic issues. Systemic discrimination may be a pattern or practice of discrimination or an identified employment practice with adverse impact. When the CO completes the analysis of larger pay analysis groups, or in cases where the data are inappropriate or insufficient for regression analysis, the CO may examine the data to

address possible compensation discrimination involving specific job titles, particular units or locations.

After analyzing the data for potential discrimination in larger and/or smaller pay analysis groups, the CO may conduct comparative analyses of small groups or individuals to determine if pay disparities exist, and if there is evidence sufficient to support an inference that pay differences are due to discrimination.



The mere fact that there are pay differences between comparators, without any other evidence of pretext or other indicia of possible discrimination, generally is not sufficient to find a violation of E.O. 11246. Individual or small group pay disparities typically are analyzed under the disparate treatment theory of discrimination.

In conducting a small group or individual analysis, the CO starts by determining if there are similarly situated employees who are comparable to the affected small group or individual. The CO then conducts a comparative analysis, or cohort analysis, to examine the treatment of similarly situated individuals or groups of applicants or employees.

The determination of who is similarly situated is case-specific. Who is similarly situated for purposes of an individual analysis or review of a single specific employment decision may be determined based on different criteria than when conducting a systemic discrimination analysis. For purposes of evaluating compensation differences, employees are similarly situated where it is reasonable to expect they should be receiving equivalent compensation absent discrimination. Relevant factors in determining similarity may

include tasks performed, skills, effort, level of responsibility, working conditions, job difficulty, minimum qualifications, and other objective factors. In some cases, employees are similarly situated where they are comparable on some of these factors, even if they are not similar on others. For example, when evaluating a job assignment issue, workers are similarly situated when their qualifications are comparable, but they are assigned to jobs at different levels.

In conducting a comparative analysis, it is also necessary to obtain data and information specific to the individuals or small groups that are being compared. If the contractor has not already provided such information, the CO requests the relevant available information. This information may include applications, personnel files, performance ratings, compensation histories, etc. The CO may determine that an onsite investigation is necessary to fully examine any potential discrimination issue.

#### **7. Review and Test Factors before Accepting the Factors for Analysis**

The CO evaluates information from the contractor regarding the factors the contractor considered in making compensation decisions. As in any investigation, the CO must evaluate whether the factors are implemented fairly, consistently applied, and relevant to the contractor's compensation practices before accepting them as appropriate for inclusion in the analytical model and/or comparative analysis. OFCCP considers all relevant factors offered by the contractor to determine whether these factors, in conjunction with other legitimate factors, if any, actually explain pay, are implemented fairly and consistently applied, and whether they should be incorporated into a statistical analysis, on a case by case basis.

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 education, experience, etc. It may also be an employment element such as position, level or function, tenure in position, performance ratings, etc.

When using factors as controls in a regression analysis, the statistical analyst tests the factors to make certain they are predictive for pay and that the factors are not potentially tainted by discrimination.<sup>9</sup> The statistical analysts and OFCCP investigators work together, and consult with RSOL as needed, to determine what factors to include in the final analytical model. When conducting a comparative analysis, the CO likewise evaluates factors offered by the contractor as to their relevance to compensation and whether they were consistently applied.

In testing the offered factors, the CO first determines if the data are complete and accurate. Second, the CO determines if the factor is relevant to compensation in terms of

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<sup>9</sup> Where statistical testing identifies evidence that a factor results in adverse impact, further investigation may be needed to determine whether it is appropriate to incorporate it into the model.

the contractor's policy and how it was applied. Third, the CO determines whether the factor was consistently applied by the contractor. Fourth, the CO determines whether using the factor presents adverse impact issues.

Where identified employment practices such as performance review systems show disparities, COs should proceed to review for potential evidence regarding whether the practices result in disparate treatment or disparate impact – including inquiring about evidence of validation and/or the existence of best practices to reduce adverse impact.<sup>10</sup>

In addition to analyzing data regarding the offered factors, the CO should review policy statements and other documentation addressing how the factors are considered. When conducting an onsite investigation, the CO should conduct interviews with contractor staff and employees to verify how the factors were applied in making compensation decisions, and document the results consistent with the FCCM and other OFCCP procedures.

#### **8. Conduct Onsite Investigation, Offsite Analysis, and Refinement of the Model**

Upon completing the previous steps, the OFCCP investigators, statistical analysts, and RSOL decide on a preliminary analytical model having considered all available and relevant information regarding the contractor's compensation system and practices. At this stage, the contractor is given an opportunity to timely provide any additional relevant information to be considered. If that additional information adequately resolves or explains the disparities, consistent with the framework set forth above, the CO concludes the investigation. Otherwise, if an onsite has not yet been conducted, the CO determines whether an onsite is needed.<sup>11</sup>

The CO informs the contractor in writing of the onsite visit. The CO identifies and requests any needed data and information consistent with OFCCP procedures. The CO also discusses the need for interviews with contractor staff members and employees. Any information obtained as a result of the onsite visit and interviews is examined to determine whether the analytical model needs to be refined. For example, data and information obtained during interviews confirms that a factor offered by the contractor to explain a disparity in pay was not consistently applied and resulted in a disparity affecting women. The team refines the model based on the finding that the factor is not a legitimate predictor of pay and should not be incorporated in the statistical analysis.

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<sup>10</sup> Relevant questions may include whether rating criteria have been confirmed to be job-related, whether raters are trained and participate in calibration sessions, whether multiple raters are used, whether there is any higher level review of ratings, whether analysis of ratings by race, sex, and ethnicity is done and whether there is an appeals process in place.

<sup>11</sup> The determination of whether an onsite visit will be conducted will be made consistent with the FCCM and other applicable OFCCP procedures (including Directive Number 295, Active Case Enforcement procedures, December 16, 2010).

Refinements to the analytical model and/or determinations of the need to conduct additional comparative analyses are made in accordance with this guidance and Title VII principles. The CO consults with their supervisors, OFCCP statistical analysts and RSOL, as appropriate, before making any refinements to the analytical model to be used. All appropriate analyses are conducted and the findings evaluated.

**C. Concluding the Review and Analyses:**

Upon completion of the compliance evaluation OFCCP determines whether there are findings of compensation discrimination.

Based on complete and thorough factual investigation and data analysis, and appropriate assistance with legal and statistical analysts from RSOL and National Office statisticians, OFCCP takes the action(s) the findings warrant. The CO evaluates all available evidence before making a determination regarding contractor compliance. Generally, because a compliance evaluation also includes the investigation of other types of possible discrimination (e.g., hiring, terminations, promotions) any findings of compensation discrimination are addressed along with the other findings. Action may include closure of the compensation issue if no violations are found, or issuance of a Notice of Violation (NOV), as appropriate. At this stage of the compliance evaluation, the CO documents all findings.

9. **CONFIDENTIALITY OF INFORMATION:** The Freedom of Information Act (FOIA), 5 U.S.C. 552, applies to all information/data submitted pursuant to this Directive. Upon receipt of a FOIA request, OFCCP evaluates all information submitted by contractors pursuant to the public inspection and disclosure provisions of FOIA and the Department of Labor's implementing regulations at 29 CFR Part 70. OFCCP requires that a contractor affected by a FOIA disclosure request is notified in writing and no decision to disclose information is made until the contractor has an opportunity to submit objections to the release of the information. Moreover, OFCCP does not release data obtained during the course of a compliance evaluation until the investigation, and all subsequent proceedings, if any, are complete.

At 41 CFR § 60-1.20(f), the regulation provides in part that if the contractor is concerned with the confidentiality of information such as lists of employee names, reasons for termination, or pay data, then alphabetic or numeric coding or the use of an index of pay and pay ranges, consistent with the ranges assigned to each job group, are acceptable for purposes of the compliance evaluation. Regardless, the contractor must provide full access to all relevant data pursuant to 41 CFR 1.20(a)(1) and § 60-1.43.

10. **INTERPRETATION:** This Directive does not create new legal rights or requirements or change current legal rights or requirements for contractors. Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, OFCCP's regulations at 41

CFR Chapter 60, and applicable case law are the official sources for contractors' compliance responsibilities. Nothing in this Directive is intended to change otherwise applicable laws, regulations or other guidance or to restrict or limit OFCCP's ability to perform compliance reviews, request data, or pursue enforcement of any issue within its jurisdiction. .

**11. FILING INSTRUCTIONS:**

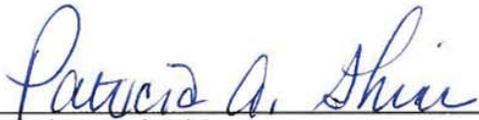
Holders of ADM and LEG Binders: File this Directive in your Administrative Practices Binder.

District and Area Offices EOSs and EOAs: File this Directive behind the tab for ADM Directives in your FCCM Binder.

**12. DISTRIBUTION:** A, B (both hard copy **and** electronically); C (hard copy only).

**13. EXPIRATION DATE:** This Directive remains in effect until OFCCP determines it needs to be revised or rescinded.

**14. SIGNATURE:**



PATRICIA A. SHIU

Director

Office of Federal Contract Compliance Programs