

OFCCP Takes Initial Steps to Require Burdensome Reporting of Compensation Data

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In an Advanced Notice of Proposed Rulemaking (ANPRM) published in the *Federal Register* on August 10, the Office of Federal Contract Compliance Programs (OFCCP) solicits public comments on a proposed requirement that contractors submit extensive compensation data to the agency through a web-based collection tool. The proposed reporting requirement would impose substantial new burdens on contractors at a time when the OFCCP has many other proposals pending that will also considerably increase the compliance burden.¹ For example, OFCCP has proposed revisions to the scheduling letter to request more detailed pay and personnel data in every audit.

The ANPRM explains that the data collection tool under consideration will be used in part by OFCCP to select contractors for intensive compensation audits. The OFCCP requests comments on the following types of issues:

- The specific type of pay data to collect, such as average starting pay, average pay raises, average bonuses, salary, total compensation (including paid leave and retirement and health benefits), W-2 earnings, holiday pay, commissions, shift differentials, and stock options
- The way to organize the data collection, such as by EEO-1 occupational categories, AAP job groups, census occupational codes, job titles, or departments
- Factors that might explain average pay differences, such as average tenure
- Factors that would allow for tests of statistical significance, such as minimum and maximum salary and standard deviation or variance of salary

1. The proposed data collection implements a recommendation of the National Equal Pay Task Force, which published a report in July 2010. See http://www.whitehouse.gov/sites/default/files/rss_viewer/equal_pay_task_force.pdf. The task force report indicated that both the OFCCP and the EEOC would implement new compensation reporting requirements. The EEOC has commissioned a study by the National Academy of Sciences regarding “Measuring and Collecting Pay Information from U.S. Employers by Gender, Race, and National Origin.” See <http://www8.nationalacademies.org/cp/meetingview.aspx?MeetingID=5134&MeetingNo=1>. The National Academy of Sciences is scheduled to issue a report in the fall “with findings and recommendations on what data the EEOC should collect to enhance wage discrimination law enforcement efforts.” In one of the public sessions of the National Academy project, OFCCP Senior Program Advisor Pamela Coukos described this project as part of the “OFCCP Earnings Data Collection Initiative.”

- Questions to capture information necessary to understand the contractor’s pay systems and policies

While the proposed reporting requirement would be burdensome for contractors, perhaps more disquieting are three OFCCP proposals regarding its use of the pay data. First, OFCCP appears to be considering a requirement that contractors submit pay data and be subject to pay audits at the time they are bidding on new federal contracts or subcontracts. As the procurement process seldom would afford OFCCP enough time to conduct a comprehensive pre-award audit, the implication of this requirement is that contract awards could be delayed or scuttled based on the agency’s simplistic evaluation of the aggregate pay data submitted by contractors during the RFP process.

Second, the ANPRM indicates that OFCCP plans to conduct nationwide, cross-establishment compensation audits triggered by the pay data contractors submit. The possibility of nationwide pay audits by OFCCP corresponds with the Secretary of Labor Hilda Solis’s comments to the National Employment Lawyers Association, a major organization of plaintiffs’ lawyers, shortly after the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes et al.*, 139 S. Ct. 2541, 2560–61 (2011). In her speech, Secretary Solis explained that the OFCCP is not bound by Rule 23 class action requirements to seek affected-class relief and that the agency intends to dramatically increase intensive compensation investigations.

Third, the OFCCP has indicated its intent to utilize the compensation data collected to study pay equity issues in certain industries and market sectors—a function far beyond its regulatory authority.

What’s Next

In light of the OFCCP’s aggressive focus on compensation discrimination, federal contractors and subcontractors should consider conducting privileged risk assessments of their pay data in preparation for potential compensation audits.

Please join us for a webinar presentation, **EEOC/OFCCP Systemic Discrimination Investigations and Enforcement Actions After *Wal-Mart Stores, Inc. v. Dukes***. This 75-minute interactive webinar presentation will focus on EEOC/OFCCP investigations and actions after the Supreme Court’s decision in *Wal-Mart Stores, Inc. v. Dukes*. Presented by our attorneys William Doyle, Howard Radzely, and Michael Burkhardt, the webinar will take place on September 28 at 12:00 p.m. ET. To register for the webinar, and for additional information, please visit <https://morganlewisevents1.webex.com/morganlewisevents1/onstage/g.php?t=a&d=668734075>. In addition, Morgan Lewis will be submitting comments in response to the ANPRM and would welcome input regarding these important issues from government contractors and subcontractors that will be affected by the proposed reporting requirements.

If you have any questions or would like more information about the topics covered in this LawFlash, please contact any of the following key partners in our Labor and Employment Practice:

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