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OFCCP MOVES TO UNDO BUSH-ERA CHANGES

By Cara Crotty
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The Office of Federal Contractor Compliance Programs **recently announced** its plans to rescind several procedures perceived as “contractor-friendly” that were put into place during the Bush administration.

On January 3, 2011, the OFCCP formally proposed to rescind two guidance documents addressing compensation discrimination:

*** 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 Executive Order 11246 with respect to Systemic Compensation Discrimination**

These guidance documents were issued by the OFCCP on June 16, 2006, under then-Director Charles James. Among other things, the guidance included standards for grouping employees when investigating for pay disparities, required use of the sophisticated multiple regression analysis, and stated that the OFCCP would not allege pay discrimination unless anecdotal evidence was found to support any statistical evidence of discrimination. In short, the guidance provided contractors with an understanding of how the OFCCP would investigate and enforce the prohibition against compensation discrimination under Executive Order 11246.

The OFCCP now calls this guidance “rigid” and asserts that it “significantly limit[s] OFCCP’s ability to identify compensation discrimination by imposing overly narrow investigation procedures that go beyond what would be required under Title VII principles in litigation.” The agency says that it prefers to tailor its compensation investigations and analytical procedures to the facts of each case due to the complex and nuanced nature of such investigations.

In its proposal to rescind the guidance, the agency says that it will not issue further Federal Register notices setting forth its interpretations of compensation discrimination principles, but “will reinstitute the practice of exercising its discretion to develop compensation discrimination investigation procedures in the same manner it develops other investigation procedures.” *In other words, the contractor community will be left guessing during each compliance review the methods and procedures*

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that individual OFCCP compliance officers and regions are using to evaluate compensation data.

Public comments in response to OFCCP's proposal to rescind these guidelines are due by March 4, 2011.

Active Case Management Procedures Also Abandoned

Also, in what was no surprise to most federal contractors, the OFCCP announced in December 2010 that it was no longer using the active case management procedures instituted during the Bush Administration, which limited on-site reviews to those audits where there were signs of systemic discrimination. The case management procedures, designed to allow the agency to focus its resources where enforcement was more likely to be necessary, had been in place since 2003.

Although the active case management procedures have been "officially" scrapped only recently, it has long been clear to many contractors that under the Obama Administration on-site reviews have been the rule rather than the exception. Of course, with increased funding for the agency, the need to conserve agency resources is not as pressing.

The OFCCP's efforts to reverse these changes -- which were typically viewed as positive by the contractor community -- may increase the agency's ability to target more contractors, but they may also undermine contractor confidence and good will with the OFCCP. We will continue to keep you informed of developments in this area.

If you need assistance with any OFCCP issues, please contact any member of Constangy's **Affirmative Action Practice Group** or the Constangy attorney of your choice.

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