

OFCCP Proposes New Compensation Discrimination Analysis Rules; Offers Guide for Self-Evaluation by Contractors

The Office of Federal Contract Compliance Programs (OFCCP) is proposing new regulations establishing standards for evaluating whether contractors are engaging in systemic discrimination in their compensation systems. In addition, OFCCP is proposing guidelines for contractors to follow in developing a process for self-evaluation of their compensation practices that would meet the standards in the proposed guidelines. The complete text of the proposed regulations and guidelines can be found at www.gerstco.com in the Forum under the 'Other' Category.

These proposals are the first official interpretive guidance offered by OFCCP on systemic compensation discrimination under Executive Order 11246 and the agency's sex discrimination guidelines. Neither the Executive Order nor the sex discrimination regulations provide standards for determining systemic compensation discrimination. Additionally, in these proposals OFCCP is introducing and relying on the use of more formal statistical methodologies for setting standards for systemic discrimination analysis in compensation.

Standards for Systemic Compensation Discrimination

The proposed regulations contain standards that governs how OFCCP would analyze a contractor's compensation practices, particularly how OFCCP would determine whether a contractor has engaged in systemic compensation discrimination. The analysis would involve looking at individuals who are "similarly situated" and determining if there is dissimilar treatment based on race or sex in the compensation system. For purposes of this analysis, OFCCP would consider employees to be similarly situated based on: (1) the similarity of work performed (not necessarily positions in the same pay grade or range), (2) the levels of responsibility, and (3) the skills and qualifications involved in the positions.

Creating this new standard is a radical change from OFCCP's past practice of utilizing preexisting employee groupings, such as pay grades or affirmative action plan (AAP) job groups, for purposes of making pay comparisons. Under this new standard, preexisting groupings will not be automatically determinative of a group of similarly situated individuals for purposes of conducting compensation discrimination analysis. OFCCP's determination of whether employees are similarly situated will be based on an analysis of the actual facts about the work performed, the levels of responsibility, and the similarity of skills and qualifications involved in the work.

After identifying groups of similarly situated individuals, OFCCP would see if there were "statistically significant" disparities, based on race or sex, in compensation between similarly situated individuals. The analysis would consider legitimate factors that can influence compensation, such as education, experience, performance, productivity, etc. The agency would use a "multiple regression analysis" model for analyzing the influence of these factors.

If OFCCP determines that statistically significant disparities exist, they would also look for anecdotal evidence to support the statistical findings. Together, this information could be the basis for the agency issuing a notice of violation indicating that the contractor has engaged in systemic compensation discrimination.

Guidelines for Self-Evaluation of Compensation Practices

Under OFCCP's current regulations for developing AAPs, contractors are required to evaluate their "...compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." (§ 60-2.17(b)(3)). The regulations do not specify how that evaluation must be done. However, the proposed guidelines outline a process, and set standards, for contractors to follow in conducting a self-evaluation of their compensation systems that would meet the requirements of § 60-2.17(b)(3)).

To establish a compensation evaluation process under the proposed guidelines, contractors would: (1) form groups of employees who are similarly situated (employees who perform work that is similar in content, responsibility, and requisite skill and qualifications); (2) form employee groups that are large enough (30 or more employees) for meaningful analysis; (3) annually conduct a statistical analysis of the compensation of the groups, using a multiple regression analysis to take into account legitimate factors that can influence compensation; (4) investigate any statistically significant compensation disparities between men and women, and minorities and non-minorities, and provide remedies where appropriate; and (5) create and retain detailed documentation of the evaluation process and data used in the statistical analyses, and make that information available to OFCCP during a compliance review to show that their process meets the standards in the proposed guidelines.

As an incentive for contractors to implement a self-evaluation system that follows guidelines, the proposal states that OFCCP will consider a contractor to be in compliance with the requirements of § 60-2.17(b)(3) if they implement a compensation evaluation process that meets the standards in proposed guidelines.

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Gerstco Salutes Project Hired

Project Hired is a non-profit organization based in Santa Clara, California, that has been assisting people with disabilities in finding competitive employment since 1978. Clients served represent a diverse spectrum of disability types - from people who are paraplegic to those with "hidden" disabilities or chronic illness.

Why should a company partner with Project Hired? "It's good for business" responds Troy Henry, a Job Developer at Project Hired. "Hiring our clients brings more diversity into the workforce and we provide a great service to companies by providing candidates that are screened and ready to work".

We asked Angela Szymusiak, Senior Manager of Engagement and Diversity at Adobe Systems, why they partner with Project Hired. "Adobe is committed to the goal of everyone having equal opportunity and access to pursue their career goals. Adobe partners with key organizations that share the same vision and are in alignment with our goals as a way to multiply our efforts. We have partnered with Project Hired for a number of years because of the quality of programs and services they provide to the community. The employees we have worked with at Project Hired are very committed to their clients and continue to raise the bar around their technology and services in order to be efficient with their resources as well as innovative."

A significant portion of Project Hired donations are used to provide their clients with the training and support they need to get hired. "We recently helped a company phone screen a deaf candidate, using technology solutions such as instant messaging and a human interpreter," signed Traci Williams, an Employment Specialist and interpreted by Aundrea Love, Employment Specialist and Staff Interpreter.

Another great example occurred last June when Varian Inc., Palo Alto hosted a group of 25 candidates from Project Hired for an overview of the company, a factory tour, interviewing skills workshop, and mock interviews. Although not the original intent, Varian was so impressed with the quality of the candidates that it eventually led to one of them being hired. "Varian saw this event as an excellent community outreach activity and an opportunity to support our company's philosophy of being an Equal Opportunity Employer," said A.J. Emmons, Director of HR for Oncology Systems.

Project Hired also supports companies by dispatching their clients for temporary positions. The positions might be very short in duration or be converted to regular status. In this case Project Hired does not charge a conversion fee like a commercial employment service. They also provide reasonable accommodation including actual equipment if needed to support the client at the temp job site.

Corporate Recognition Breakfast

Project Hired has accomplished a lot but they want to serve more clients and more companies in new industries such as Biotechnology and Insurance. They are going to take some time out next month to host their 20th Recognition Breakfast on April 20, 2005 at 7:30 a.m. at the Doubletree Hotel, 2050 Gateway Place in San Jose. "Attending the breakfast would be a great way to learn more about what we do as well as meet our staff members," said Leslie Williams Hurt, Director of Development.

If you want to learn more about Project Hired or get information about the Recognition Breakfast contact Leslie Williams-Hurt at 408-557-4307 and email: lesliew@projecthired.org

California Mandates Sexual Harassment Prevention Training

In 2004, Governor Arnold Schwarzenegger signed AB1825, which requires California employers to give supervisors two hours of sexual harassment training every two years. The new law applies to companies with 50 or more employees, even if they are not all in California and also includes temporaries and independent contractors. The statute says that failure to provide training is not grounds for liability for harassment under FEHA, but California courts have said that anti-harassment training, complaint processes, and preventative measures can minimize liability. The EEOC and the U.S. Supreme Court also have indicated that providing training in areas of harassment prevention could minimize liability. Employers have until January 1, 2006 to make arrangements to implement AB1825 or they may be mandated to do so by DFEH. More information about the new law is provided in the California Chamber of Commerce [Labor Law Update](#), February 2005 edition. Please contact us at 1-800-700-0937 if you need training resource options.

Test Drive AAPBase 2005 or CENSBase Software – FREE!

Software users can now test drive the new AAPBase 2005 AAP development software and/or CENSBase software for calculating external availability factors using Census 2000 data. To arrange delivery, contact Katie Lockyer at 1-800-700-0937 ext. 210.

Action Oriented Programs & Good Faith Efforts

After your prior year workforce data is analyzed & AAP goals are established for the new year, the next step in your Affirmative Action Plan is to develop an action-oriented program to achieve the established goals. This is a required element of all Affirmative Action Plans per DOL CFR 41 which states:

“Action-oriented programs. The contractor must develop and execute action-oriented programs designed to correct any problem areas identified pursuant to Sec. 60-2.17(b) and to attain established goals and objectives. For these action-oriented programs to be effective, the contractor must ensure that they consist of more than following the same procedures which have previously produced inadequate results. Furthermore, a contractor must demonstrate that it has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.” [41CFR60-2.17(c)].

An important element of the action-oriented program is “good faith efforts.” There are many ways to demonstrate good faith efforts such as establishing a relationship with one or more outreach organizations that support veterans and disabled, female, and minority workers. Many of these organizations are non-profits and operate on donations. Contractors can provide funding, in kind resources or services to support them. Whether you support them directly or not, these organizations can provide you access to a rich source of qualified and available workers.

To help you with your good faith effort planning, Gerstco has published a new 2005 Outreach Organization & Staffing Resource Directory. The Directory is free to Gerstco Customer Connection subscribers at www.gerstco.com in the Forum under the “other” category.

New 2005 Org & Staffing Resources Directory

The new directory provides organizations with contact information in the following categories:

- ✓ African American Workers
- ✓ American Indian Workers
- ✓ Asian American Workers
- ✓ Hispanic/Latino Workers
- ✓ Minorities in Science, Mathematics and Engineering
- ✓ Workers with Disabilities
- ✓ Gays/Lesbians Workers
- ✓ Older Workers
- ✓ Veterans
- ✓ Women
- ✓ Government Resources
- ✓ Professional Organizations
- ✓ Engineering Training Institutions
- ✓ Technicians Training Institutions



Two More AAP Workshops in 2005

Staying current with EEO and AAP requirements, processes, and issues is a tough job, especially if you're doing it on your own. Gerstco offers two different courses to help you learn more: “**AAP Basics**” and “**Practical Approaches to Strategic Implementation**.” These may be taken in series or independently. Because of heavy demand, two more AAP Basics Workshops in May and September have been added to the 2005 training schedule. Please see the updated event calendar in this Newsletter for the complete list of workshops available.

Learning about Affirmative Action

For HR professionals new to affirmative action or for those that need a brush-up course, we offer the AAP Basics Workshop. This two-day workshop teaches participants through a combination of background lectures and works with real data to create a complete, fully compliant affirmative action plan. Templates for the statistical and narrative sections and a lot of other resource material are provided.

Feedback from Recent Workshop Participant

“The materials were great. We walked away with not only examples and hard copies, but soft copies of all the spreadsheets that we can actually use. Very practical.”

The next AAP Basics Workshop is May 12 and 13, 2005. Space is limited so please register early.

What do I do now that my AAP is done?

If you have completed your AAP and are not sure what to do next, the Practical Approaches to Strategic Implementation Workshop will prepare you to plan the next steps. In small groups, participants work on formulating strategies for building business partnerships and articulating a strategic business focus and rationale that can support a strong EEO policy and effective Affirmative Action Program.

Program and workshop materials cover the legal basis for affirmative action requirements, analysis of the AAP components, a review of OFCCP enforcement policy and new initiatives, development and implementation of an action plan, and internal self-monitoring of the plan.

The next Practical Approaches to Strategic Implementation Workshop is April 7 & 8, 2005. Registration is limited to 20 participants. Please register as soon as possible.

For more information or to register online for any of our workshops, please visit www.gerstco.com.

EEOC Discrimination Charge Activity Decreases, While Monetary Benefits for Victims of Discrimination Sets Record

The Equal Employment Opportunity Commission (EEOC) recently reported that the number of charges of discrimination it received declined for the second straight year, while the amount of monetary benefits the agency obtained for victims of discrimination set a new record.

During the government's last fiscal year (October 2003-September 2004), EEOC received 79,432 charges of discrimination against private employers and state and local government entities. In fiscal year (FY) 2002, EEOC received 84,442 charges, and 81,293 charges in FY 2003. The largest number of charges received in FY 2004 was for race discrimination (27,696), followed by sex discrimination (24,249).

Despite the decline in charges received, EEOC obtained a total of \$420 million in financial awards for victims of discrimination in FY 2004, with \$251.7 million from resolutions of charges of discrimination, and \$168.3 million from litigation. This was an increase from FY 2003 when financial awards were \$236.2 million from resolutions of charges of discrimination, and \$148.7 million from litigation, for a total of \$384.9 million.

The number of lawsuits filed by EEOC in FY 2004 increased for the second straight year to 414, from 393 in FY 2003, and 364 in FY 2002.

More detailed information about the agency's charge processing and litigation activity can be found on their website at www.eeoc.gov.

EEOC has enforcement responsibility for Title VII of the Civil Rights Act of 1964, The Americans with Disabilities Act of 1990 (ADA), The Age Discrimination in Employment Act of 1967 (ADEA), and the Equal Pay Act of 1963.

OFCCP Proposes New Rules (Continued from page 1)

Because of the concern about disclosure of the documentation of the compensation self-evaluation process, the proposed guidelines allow contractors the option of certifying that they have complied with the requirements of § 60-2.17(b)(3). In that instance, OFCCP would conduct its own evaluation of the contractor's compensation practices without the benefit of the information about the self-evaluation process or the results of the analysis.

Status

The proposals were published in the *Federal Register* for public comment on November 16, 2004, and the public comment period closed on January 19, 2005. OFCCP is in the process of reviewing the comments that were filed by civil rights groups and organizations representing contractors. No timetable has been announced by OFCCP for issuing the final regulations.

These proposals have wide-ranging implications for contractors who may be audited by OFCCP in the near future. They are well advised to seek legal counsel before gathering and submitting any compensation data to OFCCP in an upcoming audit.

Event Calendar 2005

April 7 & 8	AAP Strategic Implementation Workshop
April 13-16	AAAA Annual Conference – St. Louis MO
May 12 & 13	AAP Basics Workshop
May 19	EEOCC Breakfast Meeting
June 19-22	SHRM Conference – San Diego, CA
August 7-11	Nat'l ILG/SWARM Regional ILG Conference Dallas TX
Sept. 8 & 9	AAP Basics Workshop
Sept. 15	EEOCC Breakfast Meeting
Nov. 17	EEOCC Breakfast Meeting
Dec. 1 & 2	AAP Basics Workshop

For more information about our workshops, contact Katie Lockyer at katie@gerstco.com.

Remember to Use Gerstco's Customer Connection to Securely Send Data Files

A new Gerstco Customer Connection Extranet is now on our website. Users are telling us it is an easy and secure way to exchange data files. Data sent via Gerstco's Extranet is automatically encrypted using Verisign technology. A Document Exchange feature is used to receive electronic AAPs and other project reports.

Subscriptions to the Customer Connection are at no charge to Gerstco customers and \$49.95 for other EEO AAP professionals. Visit www.gerstco.com to subscribe online or learn more about this unique EEO AAP online resource.