

Contractor Pay Equity Pressure Not Just From OFCCP

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By [Jay-Anne B. Casuga](#)

Aug. 5 — Enforcement statistics for the Labor Department's Office of Federal Contract Compliance Programs seem to show that the agency isn't finding much compensation discrimination, but management attorneys and consultants said federal contractors still must prepare themselves for scrutiny of their pay practices.

Job applicants, employees and the government didn't bring more pay bias claims in the past because they didn't have the compensation information needed to initiate such claims, Mickey Silberman, a management attorney with Jackson Lewis in Denver, told attendees Aug. 4 at a National Industry Liaison Group conference in Charlotte, N.C.

But that will now change, said Silberman, who heads the firm's affirmative action and OFCCP defense practice group and is co-head of its pay equity resource group.

"They're going to know it really soon," he said. "There is no 'if.' It's a 'when,' and the when is now."

In addition to undergoing the OFCCP's "deep dive" pay investigations during scheduled compliance reviews and adhering to the agency's pay transparency rule, attorneys said, contractors will soon have to provide summary pay data by sex, race and ethnicity on the EEO-1 form they annually submit to the Equal Employment Opportunity Commission.

They also have to take into consideration equal pay pressure from other sources, including private litigants, the White House, their own "activist" shareholders and some state legislatures, they said.

"OFCCP is but one item on your list," David Fortney, a management attorney with FortneyScott in Washington and a former acting solicitor of labor, said in an Aug. 5 session.

As such, the attorneys urged contractors to begin conducting proactive pay analyses if they aren't doing so already.

“Everybody should buckle their seat belts because this pay roller coaster is not going to go away,” Shafeeqa Giarratani, a management attorney with Norton Rose Fulbright in Austin, Texas, said Aug. 5.

OFCCP’s Pay Enforcement Statistics

The OFCCP conducted 2,602 pay-discrimination-related compliance reviews in fiscal year 2015, according to two speakers who presented agency statistics during an Aug. 3 session. The OFCCP found violations in approximately 17.9 percent of those reviews, resulting in 432 conciliation agreements, 35 financial agreements and one consent decree, said consultant Candee Chambers, vice president of compliance and partnerships for the DirectEmployers Association in Indianapolis, and management attorney John Fox of Fox, Wang & Morgan in San Jose, Calif.

The OFCCP alleged seven pay violations, constituting 0.27 percent of total audits in fiscal 2015, they said. The agency alleged five pay violations in each of the two previous years, Chambers and Fox said.

The OFCCP alleged no systemic discrimination violations in fiscal 2015. Systemic violations can include pay bias allegations. In comparison, the agency alleged 38 systemic violations in FY 2014 and 31 the year before that, they said.

Additionally, the OFCCP in FY 2015 collected approximately \$500,000 in back pay for alleged victims of discrimination based on pay bias allegations, Chambers and Fox said. They said the OFCCP usually collects approximately \$1 million per fiscal year for alleged pay bias victims.

Chambers and Fox said the data was culled from the OFCCP's online enforcement database and online Freedom of Information Act Reading Room as of July 25.

Pay Equity Pressure From Other Sources

Despite the OFCCP’s enforcement statistics on pay bias, attorneys said federal contractors shouldn’t be lulled into complacency and must be vigilant at minimizing their pay discrimination risks.

Pay equity pressures exist outside of government enforcement agencies like the OFCCP and the EEOC, they said.

For example, they said the White House has pushed for companies to sign an “Equal Pay Pledge,” under which signatories pledge to conduct annual pay analyses across their entire workforces.

Silberman said 28 companies, including Amazon.com Inc., Dow Chemical Co. and Johnson & Johnson, have signed the pledge.

Additionally, companies are under pressure from “activist” investors to “achieve pay equality and transparency” by conducting pay equity analyses and publishing the results, he said.

Microsoft Corp. recently announced information on how much black, Hispanic and Asian employees earned for every \$1 earned by white employees, he said.

A number of states have pushed for aggressive pay laws, with California “leading the way” with its California Fair Pay Act, under which employers must explain “entire wage differentials” between substantially similar employees, Silberman said.

Most recently, Massachusetts enacted Aug. 1 a law requiring employers there to pay women the same wages as men for similar work starting in 2018. The law also prohibits employers from requesting applicants’ salary history during hiring.

Fortney said that private litigants also are bringing pay discrimination cases that have resulted in significant monetary consequences for companies.

For example, he cited a \$19.5 million pre-suit settlement reached last month between Qualcomm Inc. and a class of female employees who alleged that the company discriminated against them in pay, promotions and other employment opportunities.

“These are fundamental shifts and they will continue at an accelerated pace,” Fortney said.

Conduct Proactive Pay Analyses Now

The attorneys and consultants all urged contractors to proactively analyze their pay practices.

“You imperil your organization if you do not conduct proactive analysis going forward,” Silberman said.

Joseph Lakis, president of the Equal Employment Advisory Council in Washington, said Aug. 5 that some contractors wait to conduct the analyses until they have all the key pieces of data they think are necessary to explain pay differences.

Lakis said contractors shouldn’t delay the analyses. “Don’t wait until the perfect opportunity to take steps to mitigate risks,” he said.

Contractors can conduct a myriad of pay analyses, from comparing base pay and start rates to merit increases and total compensation, Lakis said. “If you did every single one, you would never be finished,” he said.

Instead, contractors should undertake the analyses that make the most sense for their organizations, he said. “Ask yourself this question: Where is the risk greatest in terms of magnitude and probability of pay discrimination?” he said.

Giarratani of Norton Rose Fulbright added that there are a number of factors that can explain pay differences, such as education and experience. However, many contractors don’t collect or record those factors in their electronic employment databases. “It’s time to start thinking about collecting that data moving forward,” she said.

Silberman suggested that contractors take a “funnel approach” to the analysis by first identifying which employee groups have pay disparities and then explaining those differences with “readily available factors,” such as dates of hire and dates in a particular position.

Contractors should then explain any remaining differences with factors that have to be manually gathered and coded from personnel files, such as prior work experience and education.

If pay differences still exist, contractors next should consider planning on making pay adjustments incrementally, he said.

Silberman also recommended that contractors conduct the analyses under attorney-client privilege to protect them from disclosure during litigation.

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