

BILLING CODE: 4510-45

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR parts 60-1 and 60-2

RIN 1250-ZA00

Interpretive Standards for Systemic Compensation Discrimination and Voluntary
Guidelines for Self-Evaluation of Compensation Practices under Executive Order 11246;
Notice of Proposed Rescission

AGENCY: Office of Federal Contract Compliance Programs, Labor

ACTION: Notice of proposed rescission.

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is proposing to rescind two guidance documents addressing compensation discrimination: Interpreting Nondiscrimination Requirements of Executive Order 11246 with respect to Systemic Compensation Discrimination (Standards) and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with respect to Systemic Compensation Discrimination (Voluntary Guidelines). OFCCP is proposing to rescind the Standards which have limited OFCCP's ability to effectively investigate, analyze and identify compensation discrimination. In so doing, OFCCP will continue to adhere to the principles of Title VII of the Civil Rights Act of 1964, as

amended (Title VII) in investigating compensation discrimination and will reinstitute flexibility in its use of investigative approaches and tools. OFCCP also proposes to establish procedures for investigating compensation discrimination through the traditional means of using its compliance manual, directives and other staff guidance. OFCCP is proposing to rescind the Voluntary Guidelines because they are largely unused by the Federal government contracting community and have not been an effective enforcement strategy.

DATES: Comments must be received on or before (Insert date 60 days after date of publication in the FEDERAL REGISTER).

ADDRESSES: You may submit comments, identified by number 1250-ZNE, by any of the following methods:

- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- Fax: (202) 693-1304 (for comments of 6 pages or fewer).
- Mail: Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room N3422, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Receipt of submissions will not be acknowledged; however, the sender may request confirmation that a submission has been received by telephoning OFCCP at (202) 693-0102 (voice) or (202) 693-1337 (TTY) (these are not toll-free numbers).

All comments received, including any personal information provided, will be available online at <http://www.regulations.gov> and for public inspection during normal business hours at Room C3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Individuals needing assistance to review comments will be provided with appropriate aids such as readers or print magnifiers. Copies of this Notice of Proposed Rescission will be made available in the following formats: large print; Braille; electronic file on computer disk; and audiotape. To schedule an appointment to review the comments and/or to obtain this Notice of Proposed Rescission in an alternate format, contact OFCCP at the telephone numbers or address listed above.

FOR FURTHER INFORMATION CONTACT: Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, N.W., Room N3422, Washington, D.C. 20210. Telephone: (202) 693-0102 (voice) or (202) 693-1337 (TTY).

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Labor's OFCCP enforces Executive Order 11246 which requires Federal Government contractors and subcontractors to provide equal employment opportunity through affirmative action and nondiscrimination based on race, color, national origin, religion, or sex. Compensation discrimination is one form of discrimination prohibited by the Executive Order.

OFCCP enforces contractors' compliance with this obligation primarily by conducting compliance evaluations. (See 41 CFR 60-1.20.) OFCCP's longstanding policy is to follow Title VII principles when conducting analyses of potential discrimination under Executive Order 11246, including compensation discrimination. Compensation discrimination may occur on an individual basis, or systemically, that is, it is widespread in an organization due to discriminatory compensation systems. OFCCP traditionally has established procedures for investigating compensation discrimination, as well as other forms of discrimination, through instructions for its compliance officers contained in the OFCCP Federal Contract Compliance Manual (FCCM), directives and other staff guidance materials.

Identifying and remedying compensation discrimination has been an important part of OFCCP compliance efforts for many years. Concerns about compensation discrimination led OFCCP in Calendar Year (CY) 2000 to begin requiring contractors to submit compensation data requested in the scheduling letter at the outset of a compliance evaluation as a matter of course and as part of the data reported in a new Equal Opportunity Survey, which covered contractors were required to submit to OFCCP. (The Scheduling Letter was approved under the Paperwork Reduction Act OMB NO. 1215-

0072; see 65 FR 68022, 68036 (November 13, 2000) for the notice regarding the Equal Opportunity Survey.) In CY 2000, OFCCP also began requiring contractors to proactively conduct in-depth analyses of their compensation systems to ensure that those systems were not discriminatory. (See 41 CFR 60-2.17(b)(3).)

OFCCP changed its approach to investigating compensation discrimination in 2006. On June 16, 2006, OFCCP published in the Federal Register two final guidance documents related to identifying compensation discrimination under Executive Order 11246 that contained interpretations of OFCCP regulations and Title VII principles: Interpreting Nondiscrimination Requirements of Executive Order 11246 with respect to Systemic Compensation Discrimination (Standards) and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with respect to Systemic Compensation Discrimination (Voluntary Guidelines). (See 71 FR 35124 (June 16, 2006) for the Standards and 71 FR 35114 (June 16, 2006) for the Voluntary Guidelines.) Further, OFCCP rescinded the Equal Opportunity Survey in 2006. (See 71 FR 53032 (September 8, 2006).)

The Standards set forth a new, rigid procedure for investigating and analyzing systemic compensation discrimination cases. Systemic compensation discrimination is defined as discrimination under a pattern or practice of disparate treatment. (See 71 FR at 35140.) The Standards prescribe procedures to be followed by OFCCP compliance officers when conducting investigations of systemic compensation discrimination in all cases, including how to group employees whose compensation is to be compared in a discrimination analysis, requiring anecdotal evidence of compensation discrimination

except in unusual cases, and requiring the use of multiple regression analysis when deciding whether wage differences between groups are discriminatory. These procedures are to be followed regardless of the facts of a particular case. The rigidity of the Standards represents a significant departure from OFCCP's traditional tailoring of compensation investigation and analytical procedures to the facts of the case based on Title VII principles. Investigations of systemic compensation discrimination are complex and nuanced. During the conduct of compliance evaluations, OFCCP has traditionally focused on identifying compensation discrimination through the development of a variety of investigative and analytical tools. The use of a particular tool, or combination of tools, depends upon the facts of a specific case, and includes consulting with labor economists and other experts, as appropriate.

The Standards also significantly limit 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. For example, the Standards state that, except in unusual cases, OFCCP will not issue a notice of violation (NOV) without providing anecdotal evidence to support OFCCP's statistical analysis. But under Title VII, a pattern or practice class-wide disparate treatment case may be proven by statistics. *See, e.g., Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Palmer v. Shultz*, 815 F.2d 84, 90-91 (D.C. Cir. 1987). *Cf. OFCCP v. Greenwood Mills, Inc.*, No. 89-OFC-39, Decision and Order of Remand, slip op. at 14 (Sec'y of Labor Nov. 20, 1995); *OFCCP v. Jacksonville Shipyards*, 89-OFC-1, Decision and Remand Order, slip op. at 5 (Sec'y of Labor May 9, 1995). Moreover, requiring

anecdotal evidence is particularly problematic in compensation cases as employees often are unaware of the compensation received by co-workers and, as a result, anecdotal evidence from victims of pay discrimination may not exist.

The Standard's mandate to use a multiple regression analysis to identify compensation discrimination is also overly narrow and is not required under Title VII principles. While a multiple regression analysis may be a useful tool in identifying compensation discrimination, other statistical or nonstatistical analyses may be better suited, depending on the facts of the case.

In short, we now believe the Standards significantly undermine OFCCP's ability to vigorously investigate and identify compensation discrimination.

The Voluntary Guidelines establish procedures that contractors can elect to use in conducting the self-analysis of their pay practices required by 41 CFR 60-2.17(b)(3). As an incentive to encourage contractors to use the analytical procedures contained in the Voluntary Guidelines, OFCCP would deem a contractor, whose self-evaluation "reasonably meets" the procedures outlined in the Voluntary Guidelines, to be in compliance with section 60-2.17(b)(3) and would coordinate OFCCP's review of the contractor's compensation practices during a compliance evaluation in the manner specified in the Voluntary Guidelines. (See 71 FR at 35122.) In OFCCP's experience since 2006, contractors have rarely utilized the analytical procedures outlined in the

Voluntary Guidelines when analyzing their compensation practices under section 60-2.17(b)(3).

Additionally, the analytical model set forth in the Voluntary Guidelines suffers from many of the same flaws as the investigative procedures prescribed by the Standards. For example, the Voluntary Guidelines established certain rigid numerical thresholds by which the similarly situated employee groupings are to be analyzed. OFCCP believes that for some contractors, these thresholds may be exceedingly difficult to meet.

II. Proposal

OFCCP proposes to rescind the Standards and the Voluntary Guidelines in their entirety. OFCCP believes it is unnecessary to issue new Federal Register notices articulating its interpretations of Title VII principles related to compensation discrimination. OFCCP will continue to follow Title VII principles in investigating and analyzing compensation discrimination and in interpreting regulations related to compensation discrimination. The agency is proposing to normalize its treatment of those cases with other types of OFCCP discrimination investigations. Once rescinded, nothing in the Standards or the Voluntary Guidelines or their preambles could be relied upon as a statement of OFCCP's interpretation of Title VII principles or OFCCP regulations.

If the Standards are rescinded, OFCCP will reinstitute the practice of exercising its discretion to develop compensation discrimination investigation procedures in the same manner it develops other investigation procedures. OFCCP will continually refine those procedures to ensure that they are as effective and efficient as possible. OFCCP will develop and issue compensation investigation procedures in the same manner as procedures for investigating other forms of discrimination, for example through the FCCM, directives and staff guidance materials.

As mentioned above, OFCCP has found that contractors rarely use the analytical procedure suggested in the Voluntary Guidelines for conducting the compensation analyses required by section 60-2.17(b)(3). In the few instances when contractors have

conducted their compensation analysis in the manner suggested in the Voluntary Guidelines, the coordination procedures of the Voluntary Guidelines have not proved to be an efficient method for verifying that the contractor's compensation system is not discriminatory. The agency has concluded that the Voluntary Guidelines have not proved to be either an effective vehicle for providing guidance about how to conduct the analyses required by section 60-2.17(b)(3) or an effective incentive for contractors to conduct the analysis in the manner described in the Voluntary Guidelines.

In the absence of the Voluntary Guidelines, contractors will still be obligated to conduct self-evaluations of compensation practices as required by 41 CFR 60-2.17(b)(3). OFCCP will continue to provide any needed compliance assistance on section 60-2.17(b)(3) through various means, including webinars and the website distribution of Frequently Asked Questions as appropriate, rather than through the issuance of a Federal Register notice.

OFCCP invites any interested party to comment on the proposal to rescind the Standards and the Voluntary Guidelines.

Patricia A. Shiu
Director
Office of Federal Contract Compliance Programs