

## OFCCP: Notice of Proposed Guidelines for Self-Evaluation of Compensation Practices With Executive Order 11246 With Respect to Systemic Compensation Discrimination

After many years of threatening to make statistical compensation analysis a required element of a federal contractor's affirmative action plan (AAP), the Office of Federal Contract Compliance Programs (OFCCP) may finally be making good on their promise. The proposed guidelines will be controversial to say the least, and it is believed that requiring advanced formats such as multiple regression analyses to be conducted on an annual basis will create a significant burden on contractors. For years contractors have used in-house systems to maintain compliance with the OFCCP, but the new requirement will force contractors to collect more data and seek additional help from industry experts in order to maintain compliance.

While it is *not* new information that the OFCCP is hiring statisticians in each region to determine if a large contractor has a pattern of systemic discrimination in their hiring and promotion process, it is new information that the OFCCP is taking a much more aggressive step in requiring ALL contractors to use not only statistical tests when evaluating their compensation structure, but the government is actually seeking that contractors greater than 250 employees use multiple regression analyses annually, and for those contractors not familiar with regression you will learn that it is a significant advancement from a Mean/Median or summary analyses.

**Federal Register, Vol. 69, No. 22, Tuesday, November 16, 2004, Notices.**

**I. Guidelines:** OFCCP will continue to permit contractors to choose their own form of compensation self-evaluation techniques to comply with 41 CFR 60–2.17(b)(3). However, as an incentive for contractors to implement a compensation self-evaluation system that conforms to the general standards outlined in this Notice, OFCCP will deem a contractor in compliance with Section 60–2.17(b)(3) and coordinate its compliance monitoring activities as explained in Section II of this Notice, if the contractor's compensation self-evaluation system meets the following general standards:

A. The self-evaluation is performed by groupings of employees that are similarly situated, referenced hereinafter as "Similarly Situated Employee Groupings," or "SSEGs." Employees may be placed into the same SSEG if they are "similarly situated"; that is, if the work they perform is similar in content, responsibility, and requisite skill and qualifications. Employees may not be grouped in an SSEG for purposes of this Notice unless the work performed, responsibility level, and requisite skill and qualifications involved in their positions are actually similar, regardless of any employer-created designation, such as job title, job classification, pay grade or range, etc. The fact that an employer has grouped employees into a particular pay grade or range does not necessarily mean that these employees are similarly situated; the determining factors are whether the employees are performing similar work, have similar responsibility level, and occupy positions involving similar skills and qualifications.

B. The contractor must make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analysis. In general, SSEGs should contain at least 30 employees overall, and contain five or more incumbents who are members of either of the following pairs: male/female or minority/non-minority. In certain cases, small numbers of employees will not be sufficiently similarly situated to other employees to permit them to be grouped in an SSEG. Such

employees may be eliminated from the statistical evaluation process; however, the contractor is expected to conduct a self-evaluation of pay decisions related to such employees using non-statistical methods. Further, the contractor's statistical analyses must encompass a significant majority of the employees in the particular affirmative action program or workplace. Where the statistical analyses do not encompass at least 80% of the employees in the affirmative action program or workplace, OFCCP will carefully scrutinize the statistical

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# NELI Employment Law Conference Notes - Chicago (Part I)

The Office of Federal Contract Compliance Programs (OFCCP) will be a different agency after the recent U.S. Presidential election. Charles James, Deputy Assistant Secretary of the OFCCP, is likely to move on to another position since George W. Bush has just been re-elected to his second term as President.

At a recent National Employment Law Institute (NELI) conference in Chicago, Illinois, James brought to light some of the changes occurring within the OFCCP and the improvements it needs to make to its audit and audit-selection processes.

The Equal Employment Data System (EEDS), a selection system based on the EEO-1 report, weights contractors from best to worst on utilization analysis.

EEDS found violations of affirmative action regulations 75% of the time and discrimination 15% of the time.

It has been found that EEDS is not the best system for the job because it frequently generates the same targets each time and James is interested in reaching a larger diversity of contractors.

The new selection tool being used by the OFCCP is the Federal Contractors Selection System (FCSS). In this system, size of contract isn't a deciding factor and establishments with sizes around 350–375 or more employees are being considered for statistical significance.

The FCSS targets contractors by using EEO-1 reports, the 2000 Census, and history file. It is likely that there are other factors that the OFCCP uses but chooses not to divulge at this time.

FCSS generated about 3500 targets during the fiscal year. Around 600 of the 3500 targeted establishments will receive an advanced warning letter indicating they may be audited during the

fiscal year.

A contractor's Affirmative Action Plan (AAP) is not going to be the primary determination of discrimination or passing audit. If you received a letter after October 1, 2004, then you are one of 600. The new alert system is intended to allow contractor's time to research any problems they may have and alleviate them before the audit occurs. The efforts made to alleviate problem areas found will receive serious consideration.

It is worth noting that James has recently announced that the first wave of more than 1,700 FCSS letters would be mailed to those contractors suspected to have the most serious problems with either AAP or EEO compliance. The letters are a warning to organizations that they *may* be audited in the coming year.

Another selection system to be

*...see NELI Conference page 4*

## The OFCCP Is Hiring More Experts: NCILG Finds Solutions

The Office of Federal Contract Compliance Programs (OFCCP) recently announced the addition of national and regional statistical experts, as well as test development/validation experts to their team. This change has piqued a lot of interest in the world of federal contracting as evidenced by a recent Northern California Industry Liaison Group (NCILG) conference.

At the November 2004 NCILG conference in San Francisco, California,

the primary goal of the meeting was to provide NCILG members with a sneak-peek at the latest in AAP and related software from vendors/consultants around the nation. Vendors represented at the conference included Biddle Consulting Group, Inc. (BCG), Gerstco, PeopleClick, Berkshire & Associates, Employment Technologies, and Employment Advisory Council.

When Steve Kellerman, Chair of the NCILG, posed an initial inquiry to the group asking what topics the attendees most wanted to hear about in the upcoming year, two of the three responses were that members wanted to hear about the new OFCCP statistical analyses and test development/validation.

While most of the vendors presented their latest AAP software, BCG, who was represented by President, Dan Biddle, Ph.D., and Executive Vice President, Patrick Nooren, Ph.D., was prepared to discuss their newly-released

EEO risk management software tools: the Adverse Impact Toolkit and Test Validation & Analysis Program™ (TVAP™).

The Toolkit is a simple, Excel-based program capable of calculating exact binomials and Fisher's Exact, as well as the Breslow-Day and Mantel-Haenszel statistics necessary for comparisons of stratified rates as well as comparisons to stratified availability data.

TVAP guides users through the entire test development and validation process from Subject-Matter Expert, or SME, panels to cutoff determination and adverse impact analyses of final results: including item analysis, differential-item functioning, and calculation of validity coefficients.

The meeting was an overall success with an invaluable exchange of information between NCILG members and vendors. BCG represents over 30 years of experience in EEO risk management.



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## OFCCP Notice

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analyses and associated non-statistical self-evaluations.

C. On an annual basis, the contractor must perform some type of statistical analysis that evaluates SSEGs (as defined in Section IA of this Notice) and accounts for factors that legitimately affect the compensation of the members of the SSEGs under the contractor's compensation system, such as experience, education, performance, productivity, location, etc. For contractors with 250 or more employees, the statistical analysis must be multiple regression analyses. The contractor must ensure that any factor within the contractor's control that is included in the analysis is not itself subject to discrimination, although such a factor may be included unless there is evidence that the factor actually was subject to discrimination. Correlation between such a factor and a protected characteristic does not automatically disqualify the factor, if the employer has implemented formal standards to constrain subjective decision making. The analysis must include tests of statistical significance that are generally recognized as appropriate in the statistics profession.

D. The contractor must investigate any statistically significant compensation disparities produced by the self-evaluation analyses that it has developed. OFCCP considers an identified disparity to be statistically significant if the significance level of the disparity is two or more standard deviations from a zero disparity level.<sup>1</sup> The contractor must adequately determine whether such statistical disparities are explained by legitimate factors or otherwise are not the product of unlawful discrimination. If the statistical disparities cannot be

explained, the contractor must provide appropriate remedies. The remedies that are appropriate will depend on the time period in which the disparities emerged. For the initial implementation of the compensation self-evaluation system, the contractor may have to make adjustments based on both current disparities and prior disparities. OFCCP uses a two-year window for back pay corrections. For periodic iterations of the self-evaluation system after the initial implementation, the remedy would involve correcting current disparities. Through the sources of information available to OFCCP under Section IE of this Notice, OFCCP will carefully evaluate whether the contractor has properly investigated such disparities and has adequately corrected any disparities that are not explained by legitimate factors.

E. The contractor must contemporaneously create and retain the following documents and data:

(1) Documents necessary to explain and justify its decisions with respect to SSEGs, exclusion of certain employees, factors included in the statistical analyses, and the form of the statistical analyses. Such documents must be retained throughout the period in which OFCCP would deem the contractor's compensation practices in compliance with Executive Order 11246, as described in Section IIB of this Notice;

(2) The data used in the statistical

analyses and the results of the statistical analyses for two years from the date that the statistical analyses are performed;

(3) The data and documents explaining the results of the non-statistical methods that the contractor used to evaluate pay decisions of those employees who were eliminated from the statistical evaluation process, which must be retained throughout the period in which OFCCP would deem the contractor's compensation practices in compliance with Executive Order 11246, as described in Section IIB of this Notice;

(4) Documentation as to any follow-up investigation into statistically significant disparities, the conclusions of such investigation, and any pay adjustments made to remedy such disparities. These documents must be retained for a period of two years from the date that the follow-up investigation is performed.

F. The contractor must make all of the documents and data referenced in Section IE available to OFCCP during a compliance review. OFCCP may also review any personnel records and conduct any employee interviews necessary to determine the accuracy of any representation made by the contractor in such documentation/data.

*Federal Register, Vol. 69, No. 22, Tuesday, November 16, 2004, Notices, pp. 67252-67255, can be found on the BCG website at [www.biddle.com/resources/articles.htm](http://www.biddle.com/resources/articles.htm).* ❖

<sup>1</sup> This significance level roughly translates to a measured absolute disparity that is more than two times the standard error of the estimated value. Kaye, David H. and Freedman, David A. (2000), *Reference Manual on Scientific Evidence Second Edition*, Federal Judicial Center, Washington, DC, p. 124, note 138. Using a two-tailed test, a statistically significant disparity is a disparity with a significance level of 0.05 or less (subject to the consideration of what is a meaningful difference). This criterion means that, e.g., a disparity in the pay between males and females being either positive or negative, would have a less than a 1-in-20 chance of occurrence unrelated to potential discrimination.

### Check out these websites:

[www.biddle.com](http://www.biddle.com) | [www.opac.com](http://www.opac.com) | [www.critical911.com](http://www.critical911.com)  
[www.fireselection.com](http://www.fireselection.com) | [www.uniformguidelines.com](http://www.uniformguidelines.com)

## NELI Conference

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aware of that's coming down the pipeline is the Parallel Selection System, which randomly selects contractors to be audited to keep them on their toes. This system isn't likely to be implemented until possibly 2006.

With the new auditing procedures put in place, a few internal communication issues that exist within the OFCCP need to be reviewed. Currently, the people getting involved in audits are crossing regions. Compliance Officers are crossing wires because many audits are now being done over the Internet. Also, on-site reviews are being done over the Internet, so it's difficult to distinguish a desk audit from an onsite audit.

Approximately 40% of the compliance officers are up for retirement and James, in efforts to remedy the

organizational issues, wants to reduce the number of managers by improving training of compliance officers.

*Other Notes:* Preawards might be removed from the regulations because it has no teeth, but Preawards are the only access there is to universities at this time.

Also notable is the major shift in the agenda of the OFCCP. The current hot topic being investigated is

discrimination within hiring practices.

Michael Sinclair, Director of Statistical Analysis, realizes that selection isn't a single event and that the applicant pool changes over time because the proportion of women and minorities available changes constantly.

*For more information about the National Employment Law Institute, please visit the NELI website at [www.neli.org](http://www.neli.org).* ❄

## New Release of OPAC Office Skills Testing Software Due For Release

The latest version of Biddle Consulting Group, Inc.'s office-skills testing software, OPAC 8.0, is being prepared for release.

The software contains new basic Microsoft Word and Excel tests that will complement the spreadsheet, editing and formatting, and intermediate Word and Excel tests already offered in OPAC.

The test documents, questions, and instructions in all of OPAC's new tests are given instantly, on the computer screen, during the test eliminating the need for printed instructions and documentation. This helps to streamline and standardize the test administration process, thereby increasing testing fairness and reliability.

We invite you to contact Biddle Consulting Group, Inc. at (800) 999-0438 if you would like more information about this latest version of OPAC. ❄

## Tough Enforcement, Outreach Efforts Protect More Workers: Department of Labor Announces 31% Increase in Financial Remedies Recovered for Victims of Discrimination

Results released today by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) show that the agency's success in enforcing anti-discrimination laws among federal contractors benefited more than 3 million workers. More than 6,500 investigations the agency conducted this year covered more workers than any year since 1991 and yielded \$34,567,070 in financial remedies for 10,729 victims of unlawful discrimination – a 31% increase over the previous fiscal year.

"The Bush Administration's commitment to combating systemic discrimination in the workplace is exemplified by the OFCCP's achievements on behalf of victims of discrimination" said U.S. Secretary of Labor Elaine L. Chao. "The quality of investigations has improved and the 31 percent increase in financial remedies for workers in the last fiscal year is a great achievement."

OFCCP recovered nearly \$18 million for 6,150 women in FY 2004. OFCCP also conducted 50 Corporate Management Reviews, often called "Glass Ceiling Audits," which ensure that women do not face discriminatory

barriers to advancement into management and executive positions.

"We continue to focus on rooting out and remedying systemic discrimination, which means we focus our resources on employers who demonstrate a pattern of discrimination or on cases that involve the largest number of workers," explained OFFCP chief Charles James. "Our record shows that the strategy is working to create workplaces free of discrimination."

OFCCP obtained more than \$11.7 million in financial remedies for nearly 3,000 workers through cases litigated by the Office of the Solicitor. Among these cases was a \$5.5 million compensation discrimination settlement with Wachovia, one of the largest settlements on behalf of workers in OFCCP's history. In addition, the Solicitor's Office filed three new cases this year that could yield up to \$6.7 million in remedies.

OFCCP enforces laws that prohibit federal contractors and subcontractors from discriminating in employment based on race, gender, color, religion, national origin, disability or covered veteran status. For additional information, please visit the Department of Labor website at [www.dol.gov](http://www.dol.gov). ❄

## 2004-2005 Events Calendar

### *EEO/AAP Training*

**: December 9, 2004 :**  
*Webinar*  
 “Definition of an Applicant”  
 presented by:  
 BCG & SonicRecruit  
**11 a.m. PST / 2 p.m. EST**  
 Cost: FREE

**: January 18-19, 2005 :**  
*Affirmative Action Plan*  
*Methodology & Software Training*  
**Rancho Cordova, CA**  
 (Sacramento Area)  
 8:30 a.m. - 4:30 p.m.  
 Cost: \$990

**: January 27, 2005 :**  
*Webinar*  
 “Understanding OFCCP’s Proposed  
 Guidelines to Compensation  
 Analyses: A practical approach”  
**11 a.m. PST / 2 p.m. EST**  
 Cost: FREE

For more information on any of the conferences, training workshops, or other Biddle Consulting Group, Inc. events listed, please call BCG toll-free at (800) 999-0438 or e-mail your questions to [staff@biddle.com](mailto:staff@biddle.com)

## test validation study participants needed

Firefighter Selection, Inc. (FSI) is pleased to announce a new division specializing in law enforcement selection test development and recruitment. Public Safety Testing Solutions, Inc. (PST Solutions) will provide entry-level written tests to measure those critical skills necessary for successful law enforcement job performance.

Development of the study guide test is currently underway and we are asking for assistance from agencies across the U.S.

**FREE Validation Study (\$15,000 Value) if your agency is selected**

**To participate in the validation study or for more information, please call Stacy Bell at 916.266.0907 ext. 245**



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