



What to Expect in 2016

OFCCP, EEOC and Employment Law “Hot Topics”

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About the Firm

- Represents management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation
- More than 750 attorneys in 55 locations nationwide
- Current caseload of over 6,500 litigations and approximately 415 class actions
- Founding member of L&E Global



About Our OFCCP Practice Group and Government Contractor Industry Group

- Our Affirmative Action & OFCCP Defense team of approximately 40 lawyers, statisticians and data analysts prepares over 2,500 affirmative action plans (“AAPs”) annually
- Since 2013, we have defended over 400 OFCCP audits, with a 99.5% success rate. As a law firm, we offer strategic thinking, sophisticated legal representation and attorney-client privilege protections
- Our Government Contractor Industry Group counsels employers about the growing obligations unique to government contractors and provides best practices for efficient and effective compliance

About Mickey Silberman

MICKEY SILBERMAN is the Chair of the firm's Affirmative Action & OFCCP Practice, and Co-Chair of our Government Contractor Industry Group. He specializes in government contractor compliance and OFCCP defense. He is recognized as a national expert in those areas.

Mickey directs the defense of hundreds of OFCCP discrimination investigations throughout the country. He also spends much of his time conducting proactive analyses of clients' pay systems and other employment processes.

Lawyer's Disclaimer

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New Tools, New Rules . . .

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A source for insights, news and strategy on affirmative action, EEO and OFCCP compliance

What's Coming Soon?

- OFCCP proposed revised scheduling letter
 - Comment period closed December 28, 2015
- No new scheduling letters until finalized?
- No new wave of CSALs until then?
- SWARM Region has “finished” all scheduling letters from 2015
- Lots of time for “deep dive” into open audits...

2016 Is Here...What Can We Expect?

- What's Happening Now
 - Applicant/Hiring Adverse Impact Claims
 - The Rules are Changing
 - “Total Comp” Investigations During Audits
 - Comp Manager Interviews
 - OFCCP Extensive Requests for Pay and Related Data

OFCCP Deep Dive: Hiring Adverse Impact

- OFCCP focusing on new and different areas of applicant and hiring adverse impact
- These areas include:
 - Inexorable Zero
 - Expressions of Interest
 - Sub-Minority Analyses
 - Year-Over-Year Underutilization

Adverse Impact Pop Quiz

Analysis	Rate for Females	Rate for Males	Standard Deviation	Shortfall
1. Female v. Male	0/37 .00	6/250 .02	0.95	0
2. Female v. Male	4/65 .06	20/80 .25	3.04	6
3. Female v. Male	12/86 .14	4/100 .04	-2.41	4
4. Female v. Male	3/130 .02	2/10 .20	2.91	1

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“Applicant” Definition

What About Expressions of Interest?

Analysis	Rate for Females	Rate for Males	Standard Deviation	Shortfall
“Applicant”	2/60 .03	10/100 .10	1.55	2
Including All Expressions of Interest	2/260 .01	10/300 .03	2.09	3

Specific Race Analysis

Analysis	Rate for Group on Left	Rate for Group on Right	Standard Deviation	Shortfall
Minority v. Non-Minority	9/100 .09	1/100 .01	-2.60	4
Hispanic v. Black	8/20 .40	1/80 .01	5.47	6
Hispanic v. White	8/20 .40	1/100 .01	6.05	6
Hispanic v. Black + White	8/20 .40	2/180 .01	7.57	7

Year Over Year Underutilization

Adverse Impact Analysis

Analysis	Rate for Females	Rate for Males	Standard Deviation	Shortfall
1. Female v. Male	2/16 .13	11/230 .05	-1.33	0

Last Year's Utilization

Representation	Availability	Goal
<u>Female</u> 5%	<u>Female</u> 23%	<u>Female</u> 23%

Year Over Year Underutilization

Total Placements: 2

	Female	Male
New Hires	2	0

This Year's Utilization

Representation	Availability	Goal
<u>Female</u> 11%	<u>Female</u> 23%	<u>Female</u> 23%

More Hot Button Topics

- Staffing Agencies
 - Collecting & maintaining demographics?
 - Include in analyses?
 - EEOC's subpoena power to solicit data from third parties
- Increased focus on testing & validation
- 6 years of applicant data or more?
 - Frito-Lay case – any precedential power?

Key Takeaways

- Analyzing applicant and hire adverse impact no longer simply about “2 standard devs”
- Must look at other “red flags” including:
 - Inexorable Zeroes
 - Reverse Discrimination
 - Small Shortfalls
 - Expressions of Interest
 - Sub-Minority Analyses
 - Year-Over-Year Underutilization
 - Testing & Validation

OK, Let's Talk About Pay

What's Happening Now?

- California Fair Pay Act
- New York Achieve Pay Equity Act
- Growing trends in other states
- New Pay Transparency Rule
- Equal Pay Report – what's happening?
- OFCCP Scheduling Letter – Item 19
- Compensation Manager Interviews

Pay in Audits Today

The New Scheduling Letter's Item 19:

From Base Comp to Total Comp

Item 19

Detailed Pay Data On Total Comp

- Pay Data under the Old Letter:
 - “Item 11” of the Scheduling Letter
 - Summary base pay grouped as employer chose
- OFCCP had very few systemic pay cases
- This has all changed . . .

Item 19 Requires

- For ***each*** employee:
 - Base Salary/Wage Rate
 - Overtime
 - Bonuses
 - Commissions
 - Merit Increase
 - Incentive Pay
 - Locality Pay
 - Date of Hire
 - Hours Worked
 - Job Title
 - EEO-1
 - Job Group

New Item 19 Submission

Empl ID #	Job Title	Race	Gender	JG	Base Pay	DOH	Bonus	Merit Increase	Comm.	OT	Incentive Comp
87	Business Manager	1	M	2A	\$100,000	1/1/09	\$22,000	\$3,000	-	-	-
94	Business Manager	1	F	2A	\$100,000	4/1/02	\$6,000	\$3,000	-	-	-
80	Business Manager	3	F	2A	\$90,000	5/1/15	\$3,000	-	-	-	-
41	Sales Associate	1	M	4A	\$40,000	6/1/06	\$5,000	\$800	\$68,765	-	-
52	Sales Associate	2	M	4A	\$40,000	8/1/07	\$5,000	\$800	\$66,124	-	-
59	Sales Associate	4	F	4A	\$40,000	2/1/03	\$5,000	\$800	\$26,452	-	-
49	Sales Associate	1	F	4A	\$32,000	5/1/14	\$3,000	\$400	\$22,653	-	-
67	Sales Associate	3	F	4A	\$32,000	3/1/15	-	-	\$2,385	-	-
98	Driver	5	M	7A	\$62,400	8/1/01	\$800	\$1,040	-	\$14,040	\$9,000
58	Driver	1	F	7A	\$54,800	9/1/06	\$800	\$1,040	-	\$780	\$2,500

Comp Manager Interview - The Hidden Danger

- Thoroughly Prepare – conduct mock interview(s)
 - Identify and discuss factors affecting pay - Note: not necessarily the default of “pay for performance”
 - Offer advantageous groupings so OFCCP gets there on its own
 - Minimize discretionary nature, maximize group decisions
- Treat it like a formal interview/deposition
 - Get Comp Mgr comfortable to say “I don’t know” and “our comp system doesn’t work that way”
 - Less is more – Yes and no Qs should get yes or no answers – see next slide

Recent Compensation Request – Southeast Region

Compliance Officer Haile Hirpa spoke with you and [REDACTED] and conducted an interview to discuss the variables that affect compensation and the information that [REDACTED] has available to provide to OFCCP to help us better understand your compensation practices. Based on that conversation, for the next phase of our investigation, we are requesting that you provide the following information, for the employee workforce (non-bargaining unit employees), as of the specific date used for the salary analysis included in the Affirmative Action Plan.

1. Employee ID number;
2. First and last name;
3. Gender;
4. Race/Ethnicity;
5. EEO-1 category;
6. Job Group;
7. Annual base salary rate for full-time employees;
8. Annual base salary rate or hourly wage part-time and reduced scheduled employees;
9. Total number of hours worked by full-time employees, part-time employees paid by hourly wage and reduced schedule employees;
10. Hire Date;
11. Time in Company;
12. Job Title;
13. Job Title Code;
14. Job Title Code Key;
15. Time in Position;
16. Salary Grade;
17. Salary Grade Entry Date;
18. Time in Grade;

Recent Compensation Request

19. Department;
20. Division Code;
21. Division Code Key
22. District Code,
23. District Code Key
24. Organizational Unit;
25. Work Location Code;
26. Work Location Key;
27. Bonus Pay (including profit sharing pay);
28. Bonus Pay Eligibility, Y/N;
29. Other compensation such as commission pay, consulting bonus, allowances, distributions, draws, origination credit, referral credit, supervision credit, productivity pay, shift differential pay, deferred pay (i.e. 401-K, retirement, etc.), non-deferred compensation (stock based pay, etc.), fringe benefits pay (i.e. holiday pay) and any other form of compensation. Report each allowance in separate data column and also add adjacent columns noting each employee's eligibility of each type of other pay with Y/N;
30. Total earnings for current data and as of December 31, 2013 and December 31, 2014 (reported in Box 5 of Form W-2) or income (reported on Schedule K-1);
31. Supplemental pay based on Project;
32. Supplemental pay based on Project eligibility (Y/N);
33. Results of three (3) last performance evaluations (in separate data columns for 2012, 2013, and 2014);
34. Part time vs. full-time status;
35. Exempt vs. Non-exempt Status;
36. Starting salary;
37. Highest Level of Education;
38. Specialty Degree (Y/N);
39. Specific skills and competencies that influence pay as applicable;

Recent Compensation Request

- 40. Certifications/License;
- 41. Please describe the market-based compensation system and provide the date of any salary adjustments made since March 1, 2012 based on the market system along with the employees affected. This can be done with a column in excel indicating those employees affected and the date of the salary adjustment made;
- 42. Prior relevant experience outside the company in years, if available;
- 43. Prior relevant experience within in years;
- 44. Prior relevant experience with affiliates in years, if available;
- 45. Job Family;
- 46. Job Family Levels/ Line of business;
- 47. Wage Code;
- 48. Wage Code key
- 49. Prior Salary;
- 50. Merit increase;
- 51. Merit increase eligibility , Y/N;
- 52. ESOP amount;
- 53. ESOP eligibility, Y/N
- 54. Overtime, straight time;

Recent Compensation Request

- 55. Overtime, straight time eligibility, Y/N;
- 56. Overtime, double;
- 57. Overtime double eligibility, Y/N;
- 58. Overtime premium;
- 59. Overtime premium eligibility, Y/N;
- 60. MIP Bonus;
- 61. MIP Bonus eligibility, Y/N;
- 62. PMIP payment;
- 63. PMIP payment eligible, Y/N;
- 64. BDIP payment;
- 65. BDIP payment eligibility, Y/N;
- 66. Retention bonus;
- 67. Retention bonus eligibility, Y/N;
- 68. Sign on payment;
- 69. Sign on payment eligibility, Y/N;
- 70. Spot Award;
- 71. Spot Award eligibility, Y/N;
- 72. Shift Differential;
- 73. Shift Differential payment eligibility, Y/N;
- 74. Internal equity;
- 75. External Industry Market value; and
- 76. H1B Visa, Y/N.

We also request the following information (not to be included in database with items 1-76 above):

- 77. Please describe the unit performance factor and how it affects an individual bonus;

Recent Compensation Request

78. Please describe the personal performance factor and how it affects an individual bonus;
79. Please provide documentation detailing actual performance goals to be achieved for payout (Company level, unit level, individual level);
80. How are individual goals set and approved?
81. How is individual goal performance evaluated, reviewed, and approved?
82. How is the final award determined, reviewed, and approved? (including any formulas for unit performance factor and personal performance factor);
83. What is the official company Plan Name of the compensation system at [REDACTED] during the review periods?
84. Please provide a copy of any formal Plan Document as approved by the Board of Directors;
85. Please provide all documentation on the minimum non-zero award amount for meeting minimum performance goals in the company;
86. Please provide all documentation on the maximum award amount for meeting maximum performance goals in the company;
87. Please provide any information and documentation on how any adjustments that might be made to the award (or have been made), e.g., proration for time in plan;
88. Please provide a list of any recent mergers or acquisitions and an indication of which employees came from such mergers or acquisitions;

Recent Compensation Request

89. Please provide any documentation on legacy incentive programs;
90. Please provide any documentation on self-audit during the prior AAP year (2014);
91. Please provide any documentation on H1B employees related to pay; and
92. Please provide any documentation explaining, overtime (straight time), overtime (double), overtime (premium), bonus MIP, BDIP payment, and PMIP payment.
93. Please include in your submission copies of any written compensation guidelines and policies used as of March 1, 2012 to explain the compensation system as well as the performance evaluation system.

We also request a data dictionary or legend defining all fields included in the data. For example, please provide a full explanation of all codes such as Department Codes, Unit Codes, etc. Provide any relevant compensation policies (e.g., compensation philosophy, salary bands, incentive/bonus policy, and/or ESOP plans). We also request copies of the latest self-audit/pay equity studies and salary surveys.

These items are critical pieces of data that OFCCP needs to evaluate further the compensation differences identified during the desk audit. Please submit the data electronically in Microsoft excel format. At this stage of the investigation, OFCCP's goal is to better understand this functional unit's compensation practices. Therefore, if any of the items requested above are not readily available, please contact us to discuss the specifics of the situation so that the best available and informative data is provided in a timely manner. OFCCP also encourages you to submit any additional information, data, or analyses that you believe are appropriate for OFCCP to consider in determining whether to investigate further. OFCCP will take information, data, and analyses into account when making determination as to whether further investigation is warranted.

Privileged & Proactive Pay Analyses

- In audits, OFCCP is asking for your proactive pay analyses and self audits, including those prepared by third-parties
- Must take steps in every pay analysis to establish privilege to protect the analyses from disclosure
- *Are non-attorney statisticians doing your pay analyses?*
 - If so, work with attorney to “cloak” the analyses in privilege

The Sliding Scale of Privilege

Not Privileged

Argument for Privilege

Privileged



No Attorney Involvement

In-House Counsel (on surface)

In-House Counsel (substance)

Outside Counsel (on surface)

Outside Counsel (substance)

Key Takeaways

- Do privileged proactive EEO pay analyses
 - **Clearly** establish privilege
 - **Must** analyze beyond base pay
 - Bonuses, commissions, overtime, etc.
- Thoroughly prep for comp manager interviews
- Consider whether California Fair Pay Act, NY or other new state pay laws impact your organization

What's Coming Soon?

- Fair Pay & Safe Workplaces – EO 13673
- Paid Sick Leave – EO 13706
- “Ban the Box” – Proposed Legislation
- Human Trafficking – New Rule Implementing EO 13627
- Cyber Security Reporting – DoD Interim Rule

Questions?

Thank You!



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