



December 4, 2020

VIA EMAIL: Leen.Craig@dol.gov

Craig E. Leen
Director
Office of Federal Contractor
Compliance Programs
U. S. Department of Labor
Frances Perkins Building,
200 Constitution Ave., NW
Washington, DC 20210

Re: Request from The Institute for Workplace Equality for Clarification on Using Employer Compensation Groupings

Dear Director Leen,

First, we want to thank you for your participation and partnership with The Institute for Workplace Equality over the last several years. While we may not always have agreed with each other, you always welcomed our input and gave it due consideration. In return, you have provided a level of transparency that was both novel and most welcome. We wish you good luck and much success in your next challenge and hope we can work together again.

But while we have you, we want to bring an issue to your attention that we strongly recommend you consider addressing before the change in administration. In the last few months, a number of our members have encountered during audits what we consider a major deviation from the National Office's guidance with respect to pay equity analysis. As you well know, Directive 2018-05 states the following:

OFCCP's objective is to use PAGs that mirror a contractor's compensation system. If a contractor provides its compensation hierarchy and job structure in the submission to the Itemized Listing, OFCCP will attempt to design its analysis based on that structure. Nevertheless, this assumes that the structure provided is reasonable, that OFCCP can verify the structure as reflected in the contractor compensation policies, if necessary, and that the analytical groupings are of sufficient size to conduct a meaningful systemic statistical analysis.

Information about the contractor's compensation hierarchy and job structure provides the distinct pay systems, functions, and workforce organization necessary for OFCCP to develop meaningful PAGs and to statistically control for pay-related structural differences within PAGs. For example, an IT contractor may base its job structure on job family or job function, and OFCCP may further control for the next level of functional hierarchy. A manufacturing contractor may use AAP job group as its foundational groupings, and OFCCP may further control for lead or technical specialization.

Notwithstanding this guidance, contractors that have provided to OFCCP in recent audits their proposed Similarly Situated Employee Groups (SSEGs) and "compensation hierarchy and job structure in the submission of its Itemized Listing," are met with responses in many Regions and Districts with comments such as "that is not the structure we prefer to use in our analysis," and ignore the contractor's groupings without any consideration of its reasonableness, in contradiction to the explicit direction provided by Directive 2018-05.

We therefore request OFCCP issue further written guidance to agency enforcement personnel and contractors that the following structures are *per se* reasonable so long as they are verified and are of a sufficient size:

- The proposed groupings are consistent with the contractor's compensation system and structure and how it is administered.
- The SSEGs contain employees that are performing similar work, have similar responsibility level, and occupy positions involving similar skills and qualifications.
- The structure is based on groupings of sufficient size that cover at a minimum 70% of the employees in an AAP establishment in a regression analysis or other professionally accepted statistical method.
- The contractor must make a reasonable attempt to produce SSEGs that are large enough for meaningful statistical analyses. The 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.

If a contractor puts forward groupings that comport with the above-mentioned standards it should be the general practice of OFCCP to accept the groupings. If OFCCP rejects the SSEGs submitted with the Item 19 data, OFCCP will notify the contractor in writing and explain why and allow the contractor an opportunity to respond.

Thank you for your time and consideration. We look forward to your response and will keep our members updated on these matters.

Mr. Craig E. Leen
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Respectfully,

The Institute for Workplace Equality

A handwritten signature in black ink, appearing to be 'D. Cohen'.

David B. Cohen

A handwritten signature in black ink, appearing to be 'D. S. Fortney'.

David S. Fortney

A handwritten signature in blue ink, appearing to be 'Mickey Silberman'.

Mickey Silberman