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## Attorneys Recommend Against Using New OFCCP Self-Evaluation Standards

Except in “exceptional circumstances,” federal contractors should avoid doing the compensation self-analysis outlined by the Office of Federal Contract Compliance Programs in June, two management attorneys told participants in a Webinar Aug. 1.

If a preliminary review of compensation reveals unexplained race- or gender-based disparities, self-evaluation may be warranted, said Alissa A. Horvitz of Littler Mendelson P.C.’s Washington, D.C., office.

Employers would be better off preparing strategic responses to OFCCP’s initial request for information (paragraph 11) data, she said. “The grouping is key.”

Most contractors can use legitimate pay groups that get them past OFCCP’s trigger test, Horvitz and Joshua S. Roffman, also in Littler’s D.C. office, said. Item 11 of the scheduling letter asks for annualized compensation data by salary range, rate, grade, or level showing the number of employees by race and gender and total compensation by race and gender.

OFCCP analyzes this data by calculating the average compensation

of females, males, minorities, and nonminorities. If there is an average difference of more than 2 percent that affects more than 30 percent of minorities and females and the percent of females or minorities affected is more than three times the percentage of males or nonminorities affected, OFCCP will then ask for 12 additional data items.

These items are a unique employee ID, race, gender, job title, location, annualized salary, grade/band/pay division, time at the company, time in job, exempt/nonexempt status, part-time/full-time status, and previous experience. Some regional offices are also asking for performance ratings. “OFCCP may be testing whether this is a tainted variable,” Roffman said.

OFCCP analyzes this second set of data using a cluster regression analysis. If this evaluation continues to show possible systemic discrimination, OFCCP will then move on to developing “similarly situated employee groups” (SSEGs) and performing multiple regression analysis. It “will probably take months until you get to this point,” Roffman said. “You don’t need to jump the gun” to do multiple regression analysis when you get the

scheduling letter.

### Risks in Performing Self-Analysis.

There is no “safe, privileged protection for self-evaluation in litigation,” Horvitz said. “‘Fixes’ to compensation problems could themselves create legal claims brought by individuals whose compensation was not adjusted,” warning that employers should not make pay adjustments solely for women and minorities.

To minimize risks, all compensation analyses should be conducted through counsel, either in-house or outside, Roffman recommended. Actual analyses should not be disseminated beyond the legal department, with all communication regarding the analyses limited to a small group of individuals.

“We’re worried that this is the next area the plaintiff’s bar is going to focus on,” he said. There is a “good chance” any analyses performed will be discoverable, he added.

There is no such thing as a “100 percent privileged analysis,” Horvitz warned. “Something is going to get requested by the government or a plaintiff in a lawsuit.”