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ALJ DELIVERS SUMMARY JUDGMENT IN FAVOR OF CONTRACTOR REGARDING THE USE OF SUBGROUP AGGREGATION

INSIDE THIS ISSUE

- 1 ALG delivers summary judgment in favor of contractor regarding the use of subgroup aggregation
- 2 To group or not to group: How to create valid and supportable Pay Equity Groups
- 3 Potpourri
- 4 Subscriptions...

In early August a Department of Labor Administrative Law Judge ruled against the OFCCP in a case where the agency tried to proceed against *OFCCP vs VF Jeanswear Ltd. Partnership*, a North Carolina clothing manufacturer's employee referral program had a disparate impact on an aggregated group of "non-Asian" job applicants for certain entry-level positions.

The ruling, by ALJ Kenneth A. Krantz was handed down on August 5, 2013. The interesting point with respect to this ruling is that OFCCP, for all intents and purposes, believed that VF was showing preference for Asians versus all other protected groups. The significant point is that a consultant who was hired by OFCCP testified that he saw no evidence of "disparate treatment" toward the applicants, which requires proof of motive. Instead, the consultant testified that there was evidence of "disparate impact," which requires no proof of motive. The consultant, who was a labor economist, compared 182 Asian applicants to 367 non-Asian applicants and testified that 87 Asians as compared to 86 non-Asians were selected for interview, representing a shortfall of 29.6 non-Asians.

The consultant's conclusions, therefore were:

- Applicants referred by employees were given priority in selection for interviews
- Asian employees were much more likely to use the referral system
- Asian employees made the most referrals and
- Asian employees were highly likely to refer Asian applicants when making referrals.

Interestingly, the OFCCP did not request that the consultant disaggregate the non-Asian groups which, in Krantz's words, resulted in "one group that was over-represented (Hispanics), one group that was under-represented (Whites) and one group that was closely proportional to the regional percentage (Blacks)." Citing both implementation regulations for Executive Order 11246 and the Uniform Guidelines, Krantz noted that *employers are prohibited from using employee selection procedures with a disparate impact on a "race" or "ethnic group," but also, that the non-Asian category "is neither a race nor an ethnic group, either by regulatory definition or as used in common parlance."*

TO GROUP OR NOT TO GROUP: HOW TO CREATE VALID AND SUPPORTABLE PAY EQUITY GROUPS

It is likely that every federal contractor has become quite familiar with the OFCCP Compensation Directive 307 that was released in early 2013. In this directive, the OFCCP has thrown down the gauntlet and (more or less) states how it intends to approach ensuring that federal contractors implement their compensation systems in a fair and unbiased manner.

While the OFCCP significantly expands their flexibility in terms of how they may approach a compensation analysis, a lot remains the same. For instance, valid statistical tests such as independent samples t-tests and multiple regression continue to be the gold standard in terms of legal defensibility.

One of the significant changes, however, is the emphasis on grouping employees into what are being called "Pay Equity Groups". Whereas the most traditional approach to conducting compensation analyses has been to focus at the Job Title level, the OFCCP is suggesting that it may not accept such analyses.

Why? Because as the OFCCP and every federal contractor and consultant knows, if the analysis is conducted at the Job Title level, in many cases a significant proportion of the workforce is invisible to such statistical analyses.

This is because when contractors analyze their pay by job title (which is likely to represent the single more valid unit of analysis because the employees being compared are at the same level, performing the same job, and meet similar minimum qualifications) many of a contractor's job titles have too few employees to permit a valid statistical analysis. Thus the contractor is forced to rely solely on a non-statistical cohort analysis. Depending on the number of jobs that fall into this category, such an analysis could be a very involved ordeal. In addition, focusing on such discrete units can actually mask a larger trend of systematic or organization-wide pay discrimination.

So, the challenge is this: How should an employer approach identifying the best unit of analysis that ensures that a) only similarly situated employees are grouped together; b) ensure large enough Pay Analysis Groups so that a significant proportion of the workforce is included in the analysis; and c) what if that grouping differs from that which the OFCCP chooses to use?

While the answers to the latter two questions can be complete because the answer is clearly dependent on what may frequently be considered political/policy rather than scientific issues. Therefore, we will address the first question.

It is fundamental to any statistical analysis that the groups being compared must be as similar as possible in order to filter out, or control for, unimportant or confounding factors. Therefore, the employer is left several options. First, focus on the Job Title regardless of what the OFCCP says if you can defend that this is the only legitimate way to identify similarly situated employees. Second, create larger aggregate groups of jobs based on factors that you know will ensure "approximately" similarly situated groups of employees. Finally, conduct a comprehensive study that allows for the collection of relevant data to empirically create valid pay analysis groups.

The first option, focusing on the Job Title is very chancy--especially if it leaves a large number of the workforce out of the analysis. The OFCCP specifically says that they will not accept this and may not accept a Job Title-based analysis. The third option, empirically deriving Pay Analysis Groups, is probably the most scientifically sound approach but it represents a very large commitment of time and resources to do correctly and is thus probably not the way to go.

Therefore, the method most likely to pass OFCCP scrutiny is likely to be that of combining different jobs using one of more variables in attempt to ensure "roughly" similar groups. One method might be to create groups based on EEO Category and Pay Grade. In this way, groups are created based on their function and level. There are other combinations of factors that may also be acceptable. The key is to identify the grouping factors that make the most sense for your particular organization.

[continued on page 4]

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POTPOURRI

■ Labor Department sues US Security Associates for refusing to comply with federal investigation of employment practices

USDOL has filed lawsuits to require US Security Associates to submit documents detailing the company's affirmative action plan. The company did not comply but instead filed a complaint with the Office of Administrative Law Judges seeking declaratory relief from the scheduled reviews. In a previous case, the Judge ruled that such compliance is "the price of doing business as a federal contractor."

<http://www.dol.gov/opa/edoa/press/ofccp/ofccp20130030.htm>*

■ Final Veterans & Disabled Regulatory Changes Sent to OMB During National ILG Conference

While Director of the OFCCP Patricia Shiu was telling National ILG Conference attendees that final regulations for veterans and disabled would be published sometime soon, her agency was sending them to the Office of Management and Budget (OMB) to get approval for publishing them in the Federal Register. It is unknown when OMB will complete its review nor how long contractors will be given to implement them once they are published as final.

■ Calculating Back Pay as a Part of Make-Whole Relief for victims of employment discrimination

OFCCP provides guidance on calculating back-pay as a part of make-whole relief. The announcement explains two models.

http://www.dol.gov/ofccp/regs/compliance/directives/directive_310_508c.pdf.*

* If clicking the link does not work, please copy the link into your browser and click enter.



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TO GROUP OR NOT TO GROUP: HOW TO CREATE VALID AND SUPPORTABLE "PAY ANALYSIS GROUPS"

The second important factor to consider when creating groups--and the one critical to conducting a valid analysis that neither incorrectly suggests pay disparities nor hides disparities that actually exist--is to identify all the legitimate controlling variables that will account for subtle differences in the jobs that have been grouped. For example, can pay differ based on line of business? Is pay partly established under contract with specific clients? These kinds of factors can help account for differences that are important between two jobs of the same name but which may be compensated differently.

Once you have controlled for the factors that represent differences or "errors" that naturally will occur based on variation between jobs that you have combined, the next step is to ensure that you identify and include in your compensation analysis all the variables you can that will control for differences in pay within Pay Analysis Groups. Those are typically Job Tenure, Seniority, Education, Job Performance, Geographic Location (if that influences employee pay), Previous Job-Related Experience, etc.

Ensuring groups are as similar as possible to start with, then controlling for factors which may make them different, and then controlling for factors that account for legitimate differences in pay will go a long way toward ensuring compliance when the OFCCP comes knocking.

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