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Gender Discrimination and Your Workforce: Compliance Considerations for 2016

Planning for gender equity in compensation and all employment decisions is critical for every employer, and is worth discussing with your professional advisors as the law changes. Starting in 2017, employers with more than 100 employees who submit EEO-1 reports will be required to electronically submit additional data to be used by the Office of Federal Contract Compliance Programs (OFCCP) and the Equal Employment Opportunity Commission (EEOC) to assess and investigate claims of discrimination. Although employers will not be required to collect any data they would not otherwise collect in the normal course of business, they will be required to report the following new information regarding their employees:

- total actual earnings, which includes but is not limited to overtime, severance pay, shift differentials, and bonuses
- hours worked

Both the OFCCP and the EEOC will be developing a tool to perform an initial pay equity analysis that allows their investigators to look at actual pay as compared to aggregate industry data and/or relevant geographic data. Employers opting not to conduct their own pay equity analysis may find themselves on the defensive when the EEOC and/or OFCCP come knocking. Written comments regarding the revision of the EEO-1 Report can be submitted to the EEOC online [here](#) until April 1, 2016, at 11:59 p.m.

For federal contractors, time is of the essence, as compensation is a major focus area for the OFCCP. Your human resources department may want to review compliance efforts and conduct a pay equity review/audit (ideally under the protection of attorney-client privilege) to identify and address pay inequities before the OFCCP arrives (or your next lawsuit). If your company contracts with the federal government, you may want to consider the following while planning for 2016:

- Are applicants steered into jobs based on gender?
- Are gender stereotypes affecting hiring?
- Are you paying employees equal pay for equal work?
- What do your numbers and statistics show?
- Does your compensation philosophy match your numbers and statistics?

Employers who have obvious demarcations along gender lines in their workforce should be aware that the OFCCP is taking gender equity in the workplace seriously. Even employers who are not

currently subject to the OFCCP's jurisdiction are encouraged to consider these issues because, as noted above, the EEOC is also concerned with systematic gender discrimination. Additionally, some states, including California and New York, have recently established further protections to ensure gender equity in the workplace. Whether females are steered into certain jobs or males are paid more, every employer may be well served to prepare to defend itself in the event that such allegations are made. Having objective data showing that a compliance program is in place can be compelling if an employer's compensation practices are challenged. Failing to take compliance efforts seriously could have serious financial consequences. Having a plan for compliance is the first step in assessing and curbing liability and limiting exposure.

THE OFCCP IS ACTIVELY FIGHTING AGAINST GENDER STEREOTYPES

In *Perez v. AmeriQual Foods*, Case No. 2016-OFC-2 (Dec. 8, 2015), the OFCCP brought a complaint against a federal contractor with more than \$500 million worth of contracts over a five-year period, alleging that it systemically discriminated against men seeking entry-level production jobs. AmeriQual Foods provides, packages, assembles, and distributes food products to the U.S. Department of Defense as well as other agencies and food companies. The OFCCP specifically alleged that the contractor based assignments on gender stereotypes by assigning women to "light-duty" jobs, such as table inspector jobs, and assigning men to labor-intensive work, such as loader and utility positions. The OFCCP also found that the majority of hiring occurred in these "light-duty" type of jobs. The OFCCP is specifically seeking back wages and job offers on behalf of 27 men who applied for employment with the contractor. Among the various issues uncovered, the OFCCP noted that the contractor had created and/or was creating after-the-fact reasons for not hiring certain individuals, many of whom did not match the dispositions provided in the original applicant flow records presented to the OFCCP.

Similarly, in October 2015, in connection with an OFCCP investigation, Home Depot agreed to pay \$83,400 to 46 women allegedly subjected to gender discrimination at its Pomona, California, store. The OFCCP alleged that women were funneled into cashier jobs while the men were given higher-paying sales jobs. The OFCCP also found that management routinely channeled or placed equally or more qualified females into cashier positions while placing male hires in sales positions, which afforded them more promotion opportunities.

Furthermore, as a reminder, in September 2015, the OFCCP issued its final rule implementing Executive Order 13665, issued by President Obama in 2014, to promote pay transparency and openness. The final rule that took effect on January 11, 2016, among other things, requires employers to review and update their employee handbooks to include a provision addressing pay transparency for both employees and applicants and to ensure that none of the employer's formal or informal policies prohibit or tend to restrict employees or applicants from discussing or disclosing their compensation or the compensation of others. While this rule does not provide employees with a private right of action against employers, it does allow the OFCCP to investigate individuals' pay transparency complaints and to bring enforcement actions.

For more information or if you have questions about how the issues raised in this alert affect your policies, practices, or other compliance efforts, please contact one of the following lawyers in the firm's [Labor, Employment, Benefits + Immigration Group](#).

[Britt-Marie K. Cole-Johnson](#) | [Alice E. DeTora](#) | [Rachel V. Kushel](#)

[Sandra Marin](#) | [Susan N. Masters](#)

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