

# AFFIRMATIVE ACTION UPDATE

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## STRATEGIC CONSIDERATIONS IN COMPLYING WITH THE OFCCP'S NEW 503/VEVRAA REGULATIONS

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Recent changes to the Section 503 and VEVRAA regulations, along with the new itemized listing for OFCCP compliance reviews, require consideration of a number of strategic matters affecting how contractors choose to position themselves before and after receiving a scheduling letter. Some of the key considerations include the creation and retention of records; the provision of those records to the OFCCP; and the structure of job groups in current AAPs. These considerations are set forth in more detail below.

### COMPENSATION DATA

Item 19 of the Scheduling Letter requiring the provision of compensation data is substantially expanded from the prior version. Item 19 now requires submission of “employee level” (e.g. individualized) compensation data. This data includes:

- Employee ID or name
- Gender
- Race/ethnicity
- Hire date
- Job title
- EEO-1 category
- Job Group
- Compensation

Based on the scope of the data, there are limited options available to the OFCCP for conducting a preliminary analysis of compensation. Obviously, the most critical matter is the grouping of employees for comparative purposes. Looking at the items requested, there are only two (2) options for grouping employees. These are: 1) EEO-1 category, or 2) AAP job group. Neither of these are an appropriate grouping of similarly situated individuals for the purpose of analyzing compensation. Using either of these two groupings, there is almost a 100% certainty there will be “measurable” differences in compensation between males/females and/or minorities/non-minorities.

If/when this occurs, there will be a request for additional data. As to what additional data may be requested, we can look at the “optional” data set forth in the scheduling letter. The optional data includes:

- Education
- Past experience
- Location
- Performance
- Level/band/range/grade

While location and level/band/range/grade are likely to be readily available in electronic format, education, past experience and performance data may not. Furthermore, while this data may be in a record somewhere, accessing the records will likely entail a time-consuming and costly manual review of paper files.

There are also other records that a contractor may want to use/provide when explaining differences in compensation such as:

- Salary prior to employment
- Prior relevant experience
- Special factors such as knowledge, client contacts, certifications
- Market factors
- Competing job offers
- Special adjustments such as matching a new job offer to retain a key employee

In most instances, information on prior salary, prior relevant experience, market factors, competing job offers, etc. is not usually collected in electronic format. If available, gathering this data will likely entail a manual review of paper files.

Given the likelihood of a request for and/or the need to provide this data, contractors should decide in advance what will be their strategy for responding to an OFCCP data request for information not captured and/or retained in their HRIS system.

Options include:

1. For new hires, start to collect and retain this data going forward.
2. For current employees, start to build this data set by implementing a schedule for a manual file review to find, collect, and retain this data.
3. Conduct an employee survey of current employees for the purpose of obtaining this data.
4. Do nothing, and respond only if required as the result of a data request during an OFCCP compliance review and then implement option 2 or 3, depending on resources.
5. Do nothing, and in the event of an OFCCP data request, tell the Agency that the data is not readily available and instead, invite the OFCCP to review all the personnel files and pull the data themselves.
6. Do nothing, and in the event of an OFCCP data request, tell the Agency that the data is not available and so the company cannot respond.

Option 1 is simply a necessity. Option 2 gives more time to build a database without an artificial time limit. Option 3 will take less time and resources, but may raise questions as to why the contractor is collecting the data. Option 4 requires no time or resources if the contractor is not selected for a compliance review. However, if selected, there is an artificial time limit set by OFCCP in which to collect the data. Option 5 requires no time and resources on the part of the contractor, but it gives the Agency unfettered access to the contractor's data, and allows the Agency to draw its own likely inaccurate conclusions about the contractor's compensation practices. Option 6 requires no time or effort but means that the contractor is essentially allowing the Agency to draw any conclusion it wants in the absence of perhaps explanatory legitimate, non-discriminatory rationales.

There are likely other alternatives or variations on the above, but these options represent the most common alternatives available to contractors regarding a response to the OFCCP. We recommend that contractors look at implementing either Options 1 and 2, or 1 and 3.

At the end of the day, given the new approach to looking at compensation, contractors simply have to consider what they want to do if/when they receive a request and how they will go about implementing their strategy to respond.

## **JOB GROUPS**

As discussed above, the OFCCP's request for the mandatory eight (8) employee-level data points provides the Agency with limited alternatives for conducting preliminary data analysis of compensation. The two probable groupings are EEO-1 category or AAP job group. Even if the preliminary analysis is based on EEO-1 category and there is a follow-up request for the optional data, a secondary level of review using some form of mini-regression will likely drill down to a deeper level where AAP job group becomes the grouping for comparing compensation.

Up to this point, the creation of job groups by contractors has been driven primarily with an eye towards determining utilization and conducting adverse impact analysis. The introduction of using job groups for the purposes of compensation analysis creates an entirely new dynamic to the formation of job groups.

Let's consider the way job groups have been historically developed. The regulations define a job group as:

### **§60-2.12 Job Group Analysis.**

(b) In the job group analysis, jobs at the establishment with similar content, wage rates, and opportunities, must be combined to form job groups. Similarity of content refers to the duties and responsibilities of the job titles which make up the job group. Similarity of opportunities refers to training, transfers, promotions, pay, mobility, and other career enhancement opportunities offered by the jobs within the job group.

In reality, these are fairly nebulous criteria and contractors have essentially unfettered discretion in the formation of job groups. Typically, the starting-off place is looking at EEO-1 categories. Depending on the total number of employees in the AAP, EEO-1 categories may constitute perfectly acceptable and appropriate job groups.

However, there may be situations where contractors want to look at alternative groupings of jobs. For example, if there are a large number of individuals in the First/Mid Level Officials & Managers EEO-1 category, it may be appropriate to divide the category by level of responsibility or grade so that there are multiple job groups such as:

- Directors
- Sr. Managers
- Managers
- Supervisors

In the alternative, the macro group could be broken down using the salary grades that are found in the job titles contained in the First/Mid Level Officials & Managers EEO-1 category.

For the Professionals EEO-1 category, a functional breakdown may make sense such as:

- Professionals-Technical (Engineers and IT)
- Professionals-Administrative (Finance, HR, Supply Chain, etc.)

For hourly jobs (Craftworkers, Operatives and Laborers), it may be appropriate to break the groups down between those jobs which are filled primarily from the outside (the street) and those filled primarily from within (current employees).

While this breakdown of the EEO-1 categories into more discrete groupings may make sense for the purpose of analyzing utilization, it may not make sense in terms of a grouping for compensation purposes. For example, for a group of Professionals-Administrative, depending on the number of individuals in the group, there may be a large number of Finance, HR, Legal, and Supply Chain personnel. It is likely that the market data for Finance would be different than that for HR which would in turn be different than that for Legal, and so forth.

Within each function, there could be a substantial spread between the grades/pay levels associated with the jobs in each function where there are senior finance professionals at a much higher pay grade than those less senior.

The same considerations may be found when looking at those hourly jobs that are essentially entry-level from those that are filled primarily by promotion or lateral movement from within.

For example, a contractor could have 100 employees in the “Professionals” EEO category. Of these:

- 40 employees may be Professionals-Technical
  - 30 are Engineers
  - 10 are in IT
- 60 employees are Professionals-Administrative
  - 30 are in Finance
  - 15 in HR
  - 10 in Supply Chain
  - 5 in Legal

Of the 30 Engineers and Finance professionals, the Engineers are spread between pay grades 8 – 12 and the Finance professionals between grades 6 – 11.

Using the example above, and taking into account that the OFCCP is most likely going to be using job groups for the purpose of grouping employees to compare compensation, does it make strategic sense to be in essence saying to the Agency:

“We have a job group of professionals who are all similarly situated and so are an appropriate grouping for the purpose of comparing compensation?”

The answer to that is obviously, **“NO!”**

Considering the example above, how about Professionals-Technical and Professionals-Administrative? The answer is still probably **“NO!”** We would not want to be in the position that we’re suggesting to the Agency that Finance jobs are comparable to Legal jobs for compensation purposes.

Continuing down this path, then the next question is whether Finance and Engineering jobs in the upper pay grades are comparable to the jobs in the lower pay grades. Taking the question of whether jobs are similarly situated out to its logical conclusion, the initial group of 100 professionals could very easily be broken down into eight (8) or more job groups.

Does this make strategic sense? Absolutely! The more contractors are on record taking the position that these are the jobs with “...similar content, wage rates, and opportunities...,” the easier it will be to resist OFCCP efforts to aggregate data together.

Going to the most granular level possible when developing job groups will likely have major positive outcomes in terms of reducing the likelihood of there being measurable compensation (and utilization) differentials. It should also have a positive outcome on reducing potential showings of adverse impact in personnel activity.

We have now established that going to more granular job groups makes sense. The question then becomes whether there is any downside to doing so? The answer, unfortunately, is “yes.”

Going granular is simply going to require more work and resources. First, there will need to be an evaluation of the job groups currently in place to determine whether a granular approach makes sense. If it is determined that it does, new groups will have to be created. Then, recordkeeping systems such as HRIS systems will have to be updated to conform to the new groups. Contractors must then actually collect records according to the new job groups. AAPs will have to be modified to conform to the new groups, and finally, adverse impact analyses will have to occur based on the new groups.

At the end of the day, how does a contractor decide whether a more granular approach to job groups makes sense? The answer is the old adage, “It depends on your tolerance for risk.” Fewer job groups with larger employee populations, while less work, are also likely to have the highest risk. The flip side is that the lower risk option is going to be more work. There is no “right” answer. Additional factors to be considered, other than the level of risk, include the resources available to implement a more granular approach. Even if a lower risk approach is desired, if the resources are not available to make it work, the practical limitations may simply force the creation of the job groups.

## **SUMMARY**

A harsh reality of the new VEVRAA/503 regs is the increase in work, effort and cost required to comply, and to effectively self-audit compensation and selection decisions. Not surprisingly, the clarity of the regs leaves much to be desired. However, due to the OFCCP's single-minded march to finding discrimination by whatever means possible, the contractor community cannot ignore the fact that making strategic decisions as to what data will be collected, how it will be organized, and how it will be provided is more important now than at any other time in the past.

In spite of the challenges presented by the Agency's actions, the fact remains that there is no obligation on the part of the contractor community to throw itself on its collective sword or to make it easy for the OFCCP to find it "guilty." Contractors must now simply be asking themselves about what they are willing to do, what they are capable of doing, and what their tolerance is for risk.

There are no set right answers, and the path for every contractor will be different. At the end of the day, you will have to decide on what path is best for your organization. Those that choose a path early in the process will undoubtedly be better prepared than those who wait until the OFCCP is knocking on the front door.

If there are any questions or comments concerning anything contained above, they can be directed to this office by calling us at 440-564-7987 or sending an email to [dbb@dbbrown.com](mailto:dbb@dbbrown.com). The discussion of this matter is for the clients and friends of Douglas B. Brown & Associates, LLC and does not represent nor is intended as a substitute for professional legal advice.