



# Pay Equity: Recent Developments and What to Expect for 2021

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SFBA Chapter (CLE Webcast and Lunch Delivery)

# Presenters

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# EEOC's Use of EEO-1 Component 2 Pay Data Collection

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# EEO-1 Component 2 Pay Data: How Did We Get Here?

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- In 2016, the Obama Administration announced a proposed revision to the Employer Information Report (EEO-1) to include the reporting of pay data by race, sex and ethnicity.
- However, in August 2017, the Trump Administration halted the implementation of this new rule.
- Several advocacy organizations brought an action to end the stay and reinstate the revised EEO-1 reporting requirements and collection of Component 2 data.
- Following a federal court ruling, the U.S. Equal Employment Opportunity Commission (EEOC) was ordered to and did collect pay data for 2017 and 2018.
- In March 2020, the EEOC formally announced it would discontinue its efforts to collect Component 2 pay data with EEO-1 reports for future years.



# EEOC's Expectation for Use of Component 2 Pay Data

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- In announcing the new requirement, former EEOC Chair [Jenny R. Yang\\*](#) explained that the collection of pay data was meant to “assist employers in evaluating their pay practices to prevent pay discrimination and strengthen enforcement of our federal anti-discrimination laws.”
- “Component 2 data would support EEOC data analysis at the early stages of an investigation, using [statistical tests](#) to identify significant disparities in reported pay. [EEOC enforcement staff](#) who conduct these analyses [would use them](#), in the larger context of other available economic data and information, to evaluate whether and how [to investigate the allegations of discrimination in more depth](#).”

[July 14, 2016, Notice in the Federal Register, p. 45489, emphasis added.]

# Reality for EEOC's Use of Component 2 Pay Data

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- The EEOC ultimately reversed course, explaining that the “unproven utility” of the pay data collection is “far outweighed by the burden imposed on employers that must comply with the reporting obligation.”
- EEOC had to hire a consultant, NORC, to manage the entire process
- EEOC's Chief Data Officer and Director of the Office of Enterprise Data and Analytics (OEDA), Dr. Samuel (Chris) Haffer, certified:

That even if a contractor did collect Component 2 data by September 30, the proposed expedited timeline also “**raises significant issues with data validity and data reliability.**” The EEOC has not conducted a true pilot study of the Component 2 data collection measures, instrument, or processes, and there are “issues.” Dr. Haffer warned that there exists a “**significant risk that employers would not be reporting comparable data that can be used by the government or others in meaningful comparisons or analyses.**”

# What Will the EEOC Do with the Pay Data Already Collected?

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- As a general matter, EEO-1 data is used “for a variety of purposes including enforcement, self-assessment by employers, and research.”
- In July 2020, the EEOC announced that it unanimously voted to fund an independent statistical assessment of the quality and utility of the pay data collected from employers in 2017 and 2018 to determine how to best utilize the data and to guide any potential future pay data collections.
- The study is being conducted by the Committee on National Statistics (CNSTAT) of the National Academies of Sciences, Engineering, and Medicine.
- According to the EEOC, the study will “examine the fitness for use of the data, including the utility of pay bands in measuring pay disparities and potential statistical and analytically appropriate uses of the data.”
- A panel of subject matter experts in statistical and computational methods, survey research, economic, social, demographic and other related fields will issue a final report, which will undergo an independent review by the National Academies before its public release.
- The CNSTAT study began on July 1, 2020, and is expected to be complete by December 31, 2021.

# What Will the OFCCP Do with the Pay Data Already Collected?

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## Will OFCCP request, accept, or use EEO-1 Component 2 data?

OFCCP has reviewed the parameters of the form EEO-1 Component 2 (aggregated employee pay and hours worked) data collection and has determined that it does not find the data necessary to accomplish its mission to ensure that federal contractors and subcontractors are not engaged in unlawful pay discrimination.

The data are not collected at a level of detail that would enable OFCCP to make comparisons among similarly situated employees, as required by the Title VII standards that OFCCP applies in administering and enforcing Executive Order 11246. Given these limitations of the EEO-1 Component 2 data, and the substantial amount of human capital and technical capacity it would require for OFCCP to analyze the data, incorporating EEO-1 Component 2 data into its program is not a prudent use of agency resources. Accordingly, OFCCP will not receive EEO-1 Component 2 data from contractors. OFCCP already receives up-to-date, employee-level pay data from contractors that are selected for compliance evaluations, and it will continue to do so. OFCCP will also continue to receive EEO-1 Component 1 data (number of employees by job category, and by sex, race, and ethnicity) from contractors for purposes of reviewing their compliance with Executive Order 11246 and its implementing regulations, including the reporting requirements at [41 CFR 60-1.7](#).



# California's Pay Data Reporting Obligations

SB 973



# California Leads the Way to Pay Data Reporting

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- Effectively Mirrors EEO-1 Component 2 reporting requirement
- SB-973 signed by Gov. Newsome on 9/30/20 in direct response to EEOC's decision to stop collecting pay data
- **Effective January 1, 2021**
- Private employers with 100 or more employees must submit annual “pay data report” to the Department of Fair Employment and Housing (“DFEH”) – first report by no later than **March 31, 2021**
- Public Policy: Redress Gender Pay Gap by Transparency



# What's Included in the California Annual Pay Data Report?

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- Covered employers must collect aggregate W-2 earnings and report the number of employees by **race, sex and ethnicity** in each of the twelve pay bands (spanning from \$19,239 and under to \$208,000 and over) for the following ten broad job categories:
  - Executive or senior-level officials and managers
  - First or mid-level officials and managers
  - Professionals
  - Technicians
  - Sales workers
  - Administrative support workers
  - Craft workers
  - Operatives
  - Laborers and helpers
  - Service workers
- Earnings are calculated using total earnings in Box 1 of W-2.
- Employers must also report total hours worked by each employee within a given pay band during the reporting year.
- All reports must be submitted in a searchable and sortable format.

# What Will the DFEH Do with the Pay Data Collected?

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- The stated purpose of the data collection is to “identify wage patterns and allow for targeted enforcement of equal pay or discrimination laws.”
- During an August 11, 2020 hearing, the Assembly Committee on Appropriations suggested the data would “provide insight into hiring or promotion practices that perpetuate ongoing pay disparities in the workplace.”
- The DFEH will oversee the collection of pay data and maintain pay data reports for at least 10 years.
- The DFEH is responsible “to receive, investigate, conciliate, mediate, and prosecute complaints.”
- The DFEH will share pay data reports with the Division of Labor Standards Enforcement (“DLSE”), which is the agency tasked with enforcing the California Equal Pay Act, to coordinate enforcement.
- The DFEH has authority to seek an order requiring non-reporting employers to comply and to recover the costs associated with seeking the order for compliance.

# Concerns with California's Pay Data Reporting Law

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- Critics say the collection of W-2 earnings will unnecessarily open the door to increased scrutiny and investigations because there is no context to explain legitimate non-discriminatory reasons for pay disparities.
- While employers have the opportunity to provide “clarifying remarks” in the report, that is insufficient to remedy concerns, including:
  - Overly broad aggregation of jobs into artificial pay groupings without considering whether the employees perform “substantially similar” work.
  - W-2 earnings may include taxable compensation earned in prior years, and the report may not account for earnings differences that arise from employment changes during the year.
  - The law does not take into account eligibility for overtime, commissions, bonuses, and other benefits may not be the same for all jobs in the same job category.

# Common Questions

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- Do I count employees outside of CA to meet the 100 employee threshold for having to file a report?
  - Yes. However, if you have no employees in California you do not need to file a report.
- How do I handle employees that telework?
  - Employees assigned to CA establishments and/or working within California **must** be included in the report. You *may* also include other employees located outside of CA.
- Can I provide clarifying remarks to better understand the data being submitted?
  - Yes, employers have that option in the report.



# Unanswered Questions

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- How will DFEH analyze data and fix grouping issues of “substantially similar” jobs?
  - Note: In court filings EEOC acknowledged data collected had significant reliability issues.
- How do I handle the fact that my organization has been through a merger, acquisition or spinoff?
  - DFEH will be issuing additional guidance to address this and other issues.
- Can I provide clarifying remarks to better understand the data being submitted?
  - Yes, employers have that option in the report –however, may not be sufficient to truly account for legitimate, non-discriminatory differences in pay.
- **BE ON THE LOOKOUT: DFEH TO ISSUE REGULATIONS IMPLEMENTING SB-973**

# How is the CA Reporting Different from the EEO-1 Component 2?

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- California recognizes 3 genders: female, male and non-binary.
  - Employers need to report employees' sex according to these three categories. DFEH requires employers to report non-binary employees in the same manner as male and female employees. Employee self-identification is the preferred method of identifying sex.
- Can you use templates developed for the EEO-1/Cmp. 2?
  - No – while very similar there are enough differences in the CA requirements that the DFEH requires use of the DFEH template or fillable form to create and submit reports.
- Unlike the EEO-1/Component 2, CA requires employers to include time during which any employee was on any type of paid time off when calculating hours worked.
  - Note: the DFEH also has a more complicated requirement for calculating hours worked for exempt employees.

# Are You Ready to Comply with California's Pay Data Reporting Requirements?

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- The pay data report due on March 31, 2021, will be based on 2020 pay data of W-2 earnings and hours worked for all employees.
- Employers will count employees by looking at a “snapshot” pay period taken from the end of any pay period of the employer’s choosing between October 1 and December 31 and must account for all employees who were active as of that snapshot pay period.
- Employers should consider conducting a privileged pay equity audit to proactively identify any pay disparities and determine if legitimate non-discriminatory business reasons for any discrepancies exist, or if remedial measures are warranted, prior to collecting and reporting pay data to California.
- DFEH will issue a User Guide and Report Template by 2/1/2021.
- DFEH’s pay data submission portal will be available by 2/15/2021.
- **Resource:** <https://www.dfeh.ca.gov/paydatareporting/faqs/>

# A New Trend in State Pay Data Reporting Laws?

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- New York
  - 2021-22 Session: S453 - A1988
  - Requires DOL to create annual pay data report for private employers with 100 plus employees
- Rhode Island
  - 2019 Session: Senate Bill No 172
  - Annual pay data reporting to DOL for employers with 100 plus employees



# Colorado's New Equal Pay Law





# Colorado Equal Pay for Equal Work Act

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**The Equal Pay for Equal Work Act (SB 19-085) (“EPEWA”), signed by Governor Jared Polis on May 22, 2019, became law in Colorado on January 1, 2021**

- Prohibits Colorado employers from discriminating on the basis of sex or sex in combination with another protected status by paying employees of different sexes differently for substantially similar work
- Prevents employers from seeking the wage rate history of job applicants or relying on a prior wage rate to determine a current wage rate
- Prohibits discriminating or retaliating against a job applicant for failing to disclose their wage rate history

# Colorado Equal Pay for Equal Work Act

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- Makes it illegal for employers to prohibit employees from disclosing their wage information.
- Requires employers to announce to all employees' employment advancement opportunities (promotions) and job openings and the pay range for the job openings (including rate of compensation; general description of any bonuses, commissions or other compensation; and general description of at least the nature all benefits).
- Requires employers to maintain records of job descriptions and wage rate histories for each employee while employed and for two years after employment ends.

# Colorado Equal Pay for Equal Work Act

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Exceptions to the prohibition against a wage differential between sexes if the employer can show the wage differential is not based on wage history and is based on one or more of the following factors, so long as the factors are reasonably applied and account for the entire wage rate differential:

- A seniority system
- A merit system
- A system that measures earnings by production quantity or quality
- The geographic location where the work is performed
- Education, training or experience if they're reasonably related to the work in question
- Travel, if the travel is a regular and necessary condition of the work performed

# The Equal Pay Transparency Rules

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- The Colorado Department of Labor and Employment issued proposed Equal Pay Transparency Rules (EPT Rules) that provide additional guidance for complying with the EPEWA, which were adopted November 10, 2020 and took effect January 1, 2021. 7 CCR 1103-13.
- The EPT Rules provide additional direction regarding:
  - Job posting requirements
  - Promotion opportunities
  - Notice requirements
- Colorado Department of Labor and Employment also issues Interpretive Notice & Formal Opinions

# Employee Remedies

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- Employees alleging a violation of the Colorado EPEWA may file a complaint with the Colorado Department of Labor and Employment or may file a private civil lawsuit
- Employees can recover:
  - Back wages
  - Liquidated damages
  - Attorneys' fees
- In addition, employers who fail to comply with the new law can be subject to penalties



# Employer “Safe Harbor” Provisions

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- Employers who can demonstrate that the act or omission giving rise to a violation of the EPEWA was in good faith and that they had reasonable grounds for believing they were in compliance with the law will not be subject to a liquidated damages award.
- Specifically, the EPEWA provides that “a thorough and comprehensive pay audit” of an employer’s workforce conducted within the two prior years, “with the specific goal of identifying and remedying unlawful pay disparities,” can be considered in determining whether an employer acted in good faith.



# OFCCP Update

Compensation Review of  
Federal Contractors



# Federal Contractors: Nondiscrimination Clause

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- “The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: Employment, upgrading, demotion, or transfer, recruitment or recruitment advertising; layoff or termination; **rates of pay or other forms of compensation**; and selection for training, including apprenticeship.”

## 41 CFR § 60-1.4(a)(1)

# Federal Contractors: Additional Required Elements of Affirmative Action Program (Periodic Self-Audit)

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- Identification of problem areas. The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. **At a minimum, the contractor must evaluate:**

\* \* \* \* \*

- (3) **Compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.**

**41 CFR § 60-2.17(b)**

# Enforcement Agency: OFCCP

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- Broad authority in prohibiting race, color, religion, sex, sexual orientation, gender identity, national origin, disability and protected veteran status discrimination
  - Compliance reviews (audits)
  - Investigate complaints
- **Jenny Yang is rumored to be Biden's candidate for OFCCP Director**
  - Her lead in the EEOC's initiative in collecting pay data, experience in modernizing the EEOC's data analysis capabilities and focus on systemic discrimination translates to pay equity focus at OFCCP



# OFCCP Compliance Reviews (Audits)



## Standard Establishment Review

- On-site if issues identified during desk audit

- Highest risk: hiring and compensation



## Corporate Management Compliance Evaluation

- Begins with Standard Establishment Review + “glass-ceiling”
- Automatic on-site at HQ



## Section 503 Focused Review

- Automatic on-site at HQ
- Emphasis on compliance re: Individual with Disabilities



## VEVRAA Focused Review

- Automatic on-site at HQ
- Emphasis on compliance re: Protected Veterans



# OFCCP Compliance Reviews (Audits)



## **Compliance Checks**

- No on-site
- Minimum review of AAPs and other records



## **FAAP Review**

For contractors with agency-approved Functional Affirmative Action Programming (FAAP); designed by operating groups rather than by location



## **Accommodation Focused**

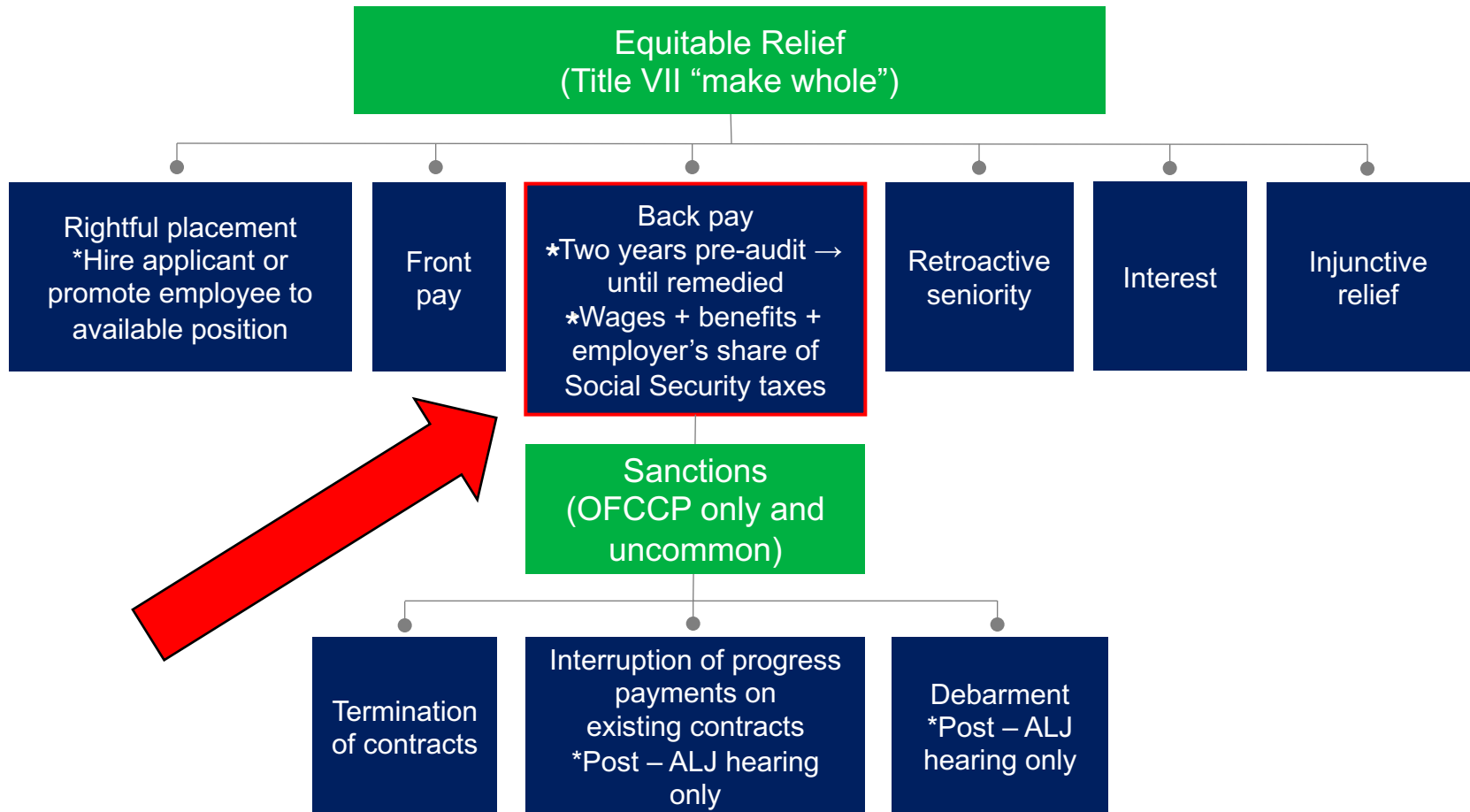
- New for FY21
- Addressing disability and religious accommodations



## **Promotions Focused**

- New for FY21
- Examine contractors' promotions practices, including intersection of race and gender

# Available OFCCP Remedies for Material Violations\*



*\*These are agency-based sanctions. Private causes of civil action (with additional remedies) are also possible.*

# OFCCP – Monetary Relief Obtained FY20 = \$35.6M

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## News Release

### U.S. DEPARTMENT OF LABOR ANNOUNCES BEST YEAR FOR COMPLIANCE ASSISTANCE BY OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

**WASHINGTON, DC** – The U.S. Department of Labor today announced that the Office of Federal Contract Compliance Programs (OFCCP) had the best year for compliance assistance and the second highest year for monetary settlements for fiscal year (FY) 2020.

OFCCP is dedicated to its important mission of ensuring equal employment opportunity and nondiscrimination in employment for the approximately 25 percent of the American workforce employed by federal contractors. The agency had its most productive period in history during the Trump Administration. In FY 2019, OFCCP set the record for recoveries at \$40.6 million, almost double any other year since the agency's inception in 1965. OFCCP continued this level of productivity in FY 2020 during the pandemic, with recoveries of \$35.6 million, the second highest year in history. ~~From FY 2017 through FY 2020, the agency recovered approximately \$117 million in remedies for protected class members.~~ As a point of comparison, the recoveries in this four-year period exceed the recoveries in the previous nine-year period of FY 2008-2016 combined. These monetary amounts are primarily remedies for race and sex discrimination in employment, predominantly in hiring and compensation.

# OFCCP's Progression of Compensation Analyses

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## **2006 – Compensation Standards and Voluntary Guidelines**

Four factors:

1. Similarity of Work
2. Levels of Responsibility
3. Skills Needed for Job
4. Qualifications for Job

## **OFCCP Directive 2018-05**

Rescinded Directive 307

Purports to provide transparency into the OFCCP's approach to compensation evaluations including the use of statistical and other evidence, pay analysis groupings (PAGs) and statistical modeling



## **OFCCP Directive 2013-03 (“Directive 307”)**

Rescinded 2006 Guidelines

More open-ended analysis:

- Uses a range of analytical tools
- Developed pay analysis groups (PAGs) on case-by-case basis of employees “comparable for purpose of the contractor’s pay practices”

# Recent Case Law: *OFCCP v. Oracle America, Inc.* (September 22, 2020)

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- **ALJ recommended that the OFCCP dismiss its claims against Oracle.**
  - OFCCP claimed pay data showed thousands of female, Black and Asian workers underpaid \$400M as compared to white peers dating back to 2013.
  - ALJ noted that the "raw disparities" that formed the basis of the OFCCP's case were "concerning," but concluded that the agency ultimately failed to show that any illegal discrimination occurred or that Oracle's top executives and human resources staff discriminated against minority workers **"on a systematic basis."**
    - "The statistical evidence offered does not support an inference that Oracle is discriminating, or that there are disparities to be explained by either a pattern or practice of discrimination or a policy or practice of relying on prior pay."
    - Although "anecdotal" accounts of workers' negative or perceived unfair experiences provided, ALJ concluded that those accounts "did not bring the statistics to life" to indicate the existence of "widespread discrimination."
    - OFCCP's analysis of Oracle's pay data failed to account for "major nondiscriminatory factors" that could have played a role in any pay disparities, and that the agency instead reached its conclusions by "making powerful, but unwarranted assumptions."

# Recent Case Law: *OFCCP v. Analogic Corp.* (March 22, 2019)

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- **ALJ recommended that the OFCCP dismiss its claims against Analogic.**
  - ALJ found that Analogic's experts' statistical techniques in performing multiple regression analyses was more commonly accepted than the OFCCP's Oaxaca-Blinder method, including agreeing with Analogic's control factors and conducting separate analyses by job titles rather than pooling, and time period analyzed.
  - ALJ also held that the OFCCP didn't prove that Analogic had a policy that led to its paying female assembly workers less than their male colleagues or that it even underpaid women at all.
    - Evidence that male managers mistreated female assemblers was "weak and unpersuasive."
    - The OFCCP failed to identify a "facially neutral employment policy or practice" that caused the purported pay disparity and that Analogic "successfully challenged the methodology and findings of OFCCP's statistical evidence."
    - "OFCCP's statistical analysis, without any persuasive anecdotal evidence, was insufficient to establish intentional discrimination."

# OFCCP: Does Not Appeal and Dismisses Claim

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**WASHINGTON, DC** – Office of Federal Contract Compliance Programs (OFCCP) Director Craig Leen issued the following statement regarding updates between OFCCP and Oracle America:

“After nearly four years of litigation and investing extensive resources, the Department of Labor has determined not to appeal the 278-page Recommended Decision and Order of the Administrative Law Judge in *OFCCP v. Oracle America*.

“The ALJ held a nine-day trial and based much of his opinion on credibility findings and a lack of supporting qualitative evidence. The Solicitor of Labor and I have decided not to pursue the case further because we believe the likelihood of prevailing on appeal is low and because OFCCP no longer evaluates compensation in the manner rejected by the ALJ in this case. Instead, OFCCP will learn from the decision in an effort to continue improving the efficacy of its critically important compensation program.”

“In conjunction with the Department’s decision not to appeal, Oracle has agreed to dismiss *Oracle America, Inc. v. U.S. Department of Labor*, a civil action in the U.S. District Court for the District of Columbia that challenged OFCCP’s enforcement authority.

“OFCCP will also administratively close the pending audits for Oracle establishments started before the *OFCCP v. Oracle America* case but will continue other existing audits.”

**Agency:** Office of Federal Contract Compliance Programs

**Date:** December 3, 2020

**Release Number:** 20-2228-NAT



# Impact of the *OFCCP v. Oracle* Decision

- **Key Takeaways From the Decision:**

- Just observing statistical differences in pay should not be a presumption of discrimination
- Just because there was correlation between prior pay and starting salary does not prove disparate impact
- Classic Battle of the Experts

- **What Does That Mean for Audits?**

- Using a qualified expert who can stand up if you are challenged is key
- Your cohort review is critical to demonstrate no systemic practice



A close-up, slightly blurred image of a US dollar bill, showing the profile of George Washington and the intricate patterns of the currency. The image is positioned on the left side of the slide, partially overlapping the green background.

# The Impact of Recent Events on Pay Equity

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# 2020: Why are Pay Equity Audits Even More Important?

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- **EEOC is Reviewing Utility of Collected Pay Data Inc. for Enforcement**
  - July 2020: *EEOC announces a study to evaluate how to best utilize collected data, **and any future pay data collections***
  - October 2020: EEOC Comm. Charlotte Burrows comments at the NYU Conference on Labor-Pay Equity and Issues of Inequality at Work that collecting and analyzing pay data by race and gender could combat gender and pay disparities
- **Employers Continue to Face Internal Complaints and Lawsuits**
- **New and Progressive State Laws**
  - California Takes the Lead with Pay Data Collection
- **Activist Shareholders Continue to Push for Pay Gap Disclosures**
- **Concerns about Impact of COVID-19 on Gender Pay**
- **Global Focus on Racial Justice/DEI Heightens Pressure to Insure and Declare Equitable Pay on the Basis of Race and Gender**
  - ERGs pushing for data
  - External and Internal pressure for public disclosure of pay data

# Public Disclosure of Pay Equity Study Results

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- **2020: Pressure for transparency on internal D&I metrics and data**
  - Opposition Statements to Shareholder Proposals
  - Arjuna Capital's Gender Pay Scorecards
  - Demonstrate Social Corporate Responsibility to Customers/E'ees
- **Risk: Waiver of Privilege of Audit Methodology and Results**
  - *Moussouris v. Microsoft*:
    - 2016: Public Statement that for every \$1 earned by men, women earn 99.8 cents, Blacks earn \$1.03 for every Caucasian, etc.
    - Court ordered had to produce data/methodology for final study (2017 Opinion)
  - *Ellis v. Google*:
    - 2016: Public Statement that for every \$1 earned by men, women earn 99.8 cents, Blacks earn \$1.03 for every Caucasian, etc.
    - Court ordered had to produce data/methodology for final study (2017 Opinion)
  - *OFCCP v. Oracle*:
    - OFFCP motion to compel internal privileged pay audit denied because Oracle had not attempted to rely on audit for advantageous purpose in the litigation (2019 Opinion)
  - **TAKEAWAY: Carefully Construct Privilege Control Group/Preserve Privilege**

# Practical Tips

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- Employee DEI surveys should not be a proxy for pay equity audits
- Involve legal at the onset of any pay equity audit to preserve privilege
  - That should also apply to internal complaints of pay/promotion inequity
- Do not overpromise or set quotas
- Be sure leadership is committed to remediate, if necessary, before the audit starts
- Audit in anticipation of heightened reporting obligations







# The 2020 Election: What Does It Mean for Pay Equity?

# “The Biden Agenda for Women”

(Source: Biden Campaign Website)



- **First Bullet: Equal Pay**
  - Repeated references to prioritize closing wage gaps and ending paycheck discrimination
- **Reinstate EEOC pay data collection and pay transparency efforts\***
- **Expand Enforcement Activity\***
  - Increased Funding for EEOC, OFCCP, Justice Civil Rights Division
  - Reduce barriers for class actions, shift burden to employers to prove job-related reasons/business necessity
  - Increase penalties for discrimination
- **Federal Ban on use of salary history to set wages/hiring decisions**
- **WH Council on Women and Girls and Council on Gender Equality** to address, among other issues, equal pay
- **Paycheck Fairness Act** to eliminate the “factor other than sex” defense and protect against retaliation for discussing pay and require pay data reporting\*

*\*In [The Biden Plan to Build Back Better by Advancing Racial Equality Across the American Economy](#)*

- **Will Federal Action Bring Relief from Patchwork of State Laws?**



# Presidential Candidate Kamala Harris' Pay Equity Platform

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- Congressional Mandate, or Executive Order, Requiring an “Equal Pay Certification” to Be Eligible to Bid on Federal Contracts Valued at more than \$500,000
- Certification would likely be the result of successfully passing a pay audit



# Forecast: The EEOC Under the Biden Administration

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**Currently all five Commissioner seats are filled**



**Janet Dhillon (R)**

Chair

Term Ends: July 1, 2022



**Keith E. Sonderling (R)**

Vice Chair

Term Ends: July 1, 2024



**Jocelyn Samuels (R)**

Commissioner

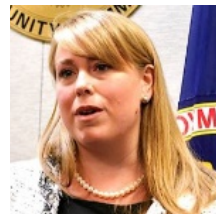
Term Ends: July 1, 2021



**Charlotte A. Burrows (D)**

Commissioner

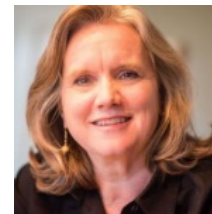
Term Ends: July 1, 2023



**Andrea R. Lucas (R)**

Commissioner

Term Ends: July 1, 2025



**Sharon Fast Gustafson (R)**

General Counsel

Term Ends: 2023

# States Ability to Access EEO-1 Component 2 Data

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- **October 30, 2020: CA, MD and MN Sue the EEOC to Force Access to Pay Data Collected by EEO-2s.**
  - Prior to April 2019, the EEOC shared all EEO-1 Data with the States for Companies Operating in those States.
  - April 2019 EEOC disabled access to EEO-1 data without notice to the States.
  - March 2020: EEOC announces will only share data related to specific pending charges under investigation by the States.
  - **Key Question:** Does the EEOC have the discretion to determine whether to share or is it mandated to share under Title VII?
- **EEOC Chair Janet Dhillon's Term Ends July 1, 2022.**
  - President Biden can appoint a Chair, obtain a 3-2 majority of Commissioners, and they can reverse the access rule without years of litigation.

# Anticipated Changes in EEOC Litigation Focus

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- **Renewed Emphasis on Systemic Litigation Including Pay Claims Given Current EEOC's Pullback on Litigation**
  - March 2020: EEOC Resolution removing authority from GC to Republican-controlled Commissioners to decide on whether to commence or intervene in systemic litigation
  - October 2020: EEOC released proposed rulemaking intended to make the conciliation (settlement) process more successful
  - Since 2018 claims have dropped:
    - Systemic Claims:
      - 2018: 37
      - 2019: 17
    - Total Filings:
      - 2018: 217
      - 2019: 149
      - By late 2020: 101



# Update: Trump Executive Order 13950

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# Executive Order 13950: Combating Race and Sex Stereotyping

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- September 22, 2020: President Trump issues EO to “to combat offensive and anti-American race and sex stereotyping and scapegoating.” The EO also prohibits federal contractors from inculcating such views in their diversity and inclusion trainings; the EO began to apply to federal contracts entered into on or after November 21, 2020. Contractors found in violation of EO may be canceled, terminated, suspended or declared ineligible for additional government contracts.
- October 7, 2020: The OFCCP issued nine related FAQs, including information on how to file a complaint that alleges unlawful training programs via its new hotline or previously available complaint process.
- October 21, 2020: The OFCCP published its Request for Information in the Federal Register seeking comments, information, and materials from the public relating to workplace trainings that involve race or sex stereotyping or scapegoating.

# Executive Order 13950: Legal and Other Challenges

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- October 15, 2020: The U.S. Chamber of Commerce and a group of more than 150 business organizations sent a letter to the President opposing EO and requesting that it be withdrawn.
- October 29, 2020: Class action filed in the District of Columbia by the NAACP challenging the constitutionality of EO 13950 as violating the First and Fifth Amendments (*National Urban League et al. v. Trump et al.*, No. 1:20-cv-03121).
- November 2, 2020: A group of nonprofit community organizations and consultants serving the LGBT community filed a similar federal complaint in the Northern District of California (*Santa Cruz Lesbian and Gay Cmty. Ctr., et al. v. Trump*, N.D. Cal., No. 5:20-cv-07741).
- December 22, 2020: The U.S. District Court for the Northern District of California issued a nationwide preliminary injunction banning the enforcement of Sections 4 (federal contractors) and 5 (federal grants).



# Latest OFCCP Response and Forecast

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- **In late December, the OFCCP Director Craig Leen publicly reported:**
  - Recently announced focused reviews on D&I training are canceled (previously intended to begin in 2021).
  - Investigations into the approximately 200 EO 13950 complaints are halted (and will presumably be dismissed and administratively closed unless another basis for investigation exists).
- **Anticipated that EO 13950 will be fully rescinded by President Biden on or soon after inauguration day.**

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