OFCCP Enforcement Efforts on Sex Discrimination in Compensation

Sex discrimination in compensation is traditionally understood within a pay equity framework. Quite simply, “Are women paid the same as men in similarly situated jobs after controlling for legitimate explanatory factors?” In application, pay differences that cannot be accounted for by reasonable explanatory factors (e.g., tenure, performance) is evidence of sex discrimination in compensation and violation of federal laws (Civil Rights Act 1964 Title VII, Equal Pay Act). Federal enforcement agencies (Equal Employment Opportunity Commission and Office of Federal Contract Compliance Programs; EEOC and OFCCP, respectively) and private plaintiffs have traditionally applied linear regression methods when investigating for pay discrimination. Overall, the process and methods for pay discrimination investigations within this traditional framework are well established and understood.

However, with the introduction of OFCCP’s Directive 307\textsuperscript{1}, pay discrimination enforcement investigations have formally taken a decidedly complicated turn for employers. Unfortunately, most employers, practitioners, and analysts are simply unprepared for the following reasons:

- Traditional defense-oriented strategies of “slicing and dicing” data may lose a majority of its effectiveness through two proposed methods: (a) statistical aggregation and (b) cohort analysis of small groups.
- Traditional defense-oriented strategy to overload regression models with meaningless and nonsignificant explanatory factors to lower statistical power will be checked and reduced.
- A new theory of pay discrimination is articulated. In this new theoretical framework, full compliance within the traditional pay equity framework provides no assurance that Title VII pay discrimination charges cannot be successfully established.
Needless to say, practitioners need to fa-
miliarize themselves and fully understand
Directive 307 to better steer their clients
away from charges of sex discrimination in
compensation.

**Directive 307: Important Concepts for
Practitioners**

Directive 307 is marvelously dense and
subtle in its complexity, and unpacking all
its details is simply beyond the scope of
this article. For that reason, the goal here
is to introduce important concepts from
Directive 307 and to highlight the increase
in risk exposure that companies need to
accept going forward.

Section 8 in Directive 307 details eight es-
ential elements of the OFCCP’s approach
to compensation analysis. Practitioners
and analysts who are tasked to keep their
clients within compliance should focus on
the following four steps:

- **Develops pay analysis groups**
- **Investigates systemic, small group and
  individual discrimination**
- **Reviews and tests factors before ac-
  cepting the factors for analysis**
- **Considers all employment practices that
  may lead to compensation disparities**

The first three items fall within a traditional
framework of pay discrimination, while the
last is an entirely new theoretical framework
of pay discrimination. Each will be treated
separately in two sections: (a) traditional
and (b) new theories of pay discrimination.

**Traditional Theories of Pay Discrimination**

Traditionally, pay discrimination investiga-
tions are focused on differences in average
pay between men and women within a
similarly situated job grouping, for exam-
ple job title. At its core, these pay equity
analyses apply regression methods to eval-
uate whether observed differences in pay
between men and women are statistically
meaningful after legitimate explanatory
factors are controlled for (e.g., tenure and
performance). As the regression-based
adjusted mean difference in pay approaches
zero, evidence of pay discrimination is
equally reduced.

**Develops pay analysis groups.** In an effort
to reduce or eliminate statistically signifi-
cant pay disparity, a common defense-ori-
ented strategy is to “slice and dice” the
data until the sample size under evaluation
are too small to have meaningful statistical
power. Prior to Directive 307, this strategy
has largely proven to be very successful in
limiting the OFCCP’s ability to obtain find-
ings of pay discrimination.

In Directive 307, the OFCCP has articulated
a counter response to the slice-and-dice
strategy.

- **Step 1:** the OFCCP will develop Pay
  Analysis Groups (PAG), which are sim-
  ply groups of related jobs.
- **Step 2:** the OFCCP will analyze the
  PAG in one regression analysis but sta-
  tistically control for jobs (e.g. dummy
coding).
By applying this strategy, the OFCCP can minimize the effects of sliced and diced data while controlling for differences among jobs.

*Investigates systemic, small group and individual discrimination.* Oftentimes, data are sliced too thinly to construct analyzable PAGs. In such instances, the OFCCP is not without options. By applying an Equal Pay Act framework to investigating for pay discrimination, the OFCCP can obtain meaningful conclusions even if there were only one women and one man in the analyses.

In the OFCCP compliance community, this method is often referred to as “Cohort Analysis” or more colloquially, “eye-ball regression.” In application, cohort analysis is simply a qualitative comparison of pay between men and women after taking into account individual attributes (e.g. tenure, performance).

*Reviews and tests factors before accepting the factors for analysis.* Another common defense-oriented strategy to reduce or eliminate statistically significant pay disparity is to overload the regression model with explanatory factors. With the addition of each explanatory factor, 1 df is removed, and statistical power is reduced. Because most job titles are rarely above 50 employees, the additive effects can be significant in reducing statistical power. Rather than allowing a defense attorney, consultant, or analyst unchecked freedom to overspecify a regression model with meaningless explanatory factors, Directive 307 requires proof that an explanatory factor is meaningful and significantly related to pay before it is accepted as a factor for analysis.

*Traditional theory summary.* Within the traditional pay discrimination framework, the OFCCP has been challenged to demonstrate meaningful success. Through Directive 307, OFCCP has made it clear that it recognizes, understands, and can respond to the typical defense strategies employed in pay discrimination investigations. Although it may appear modest in scope, these three elements in Directive 307 will have significant and meaningful impact in application.

*New Theory of Pay Discrimination*  
In addition to addressing and mitigating some of the challenges that OFCCP experiences within the traditional pay discrimination framework, Directive 307 takes a significant step forward in expanding the scope of pay discrimination investigation. Directive 307 introduces a new theoretical framework, where it is possible for pay discrimination to be established even if there is 100% pay parity in the traditional sense. By borrowing from “funneling” theory, which is normally applied in adverse treatment in selection matters, the OFCCP has developed a compelling new theory of pay discrimination. This new theory is commonly referred to as “steering,” which “considers all employment practices that may lead to compensation disparities.”

Although traditional pay discrimination analyses are focused on differences in average pay between men and women within similarly situated jobs, steering is focused on employees’ access to opportunities that affect pay (e.g. job placement, project assignment, training). Steering is a major shift and advancement in pay discrimination theory.
Since its introduction, the OFCCP has enjoyed considerable success in applying steering theory to obtaining conciliation agreements for pay discrimination (e.g. Central Parking System of Louisiana Inc, G&K Services Co, Hillshire Brands Co., Fort Meyer Construction). So far, the OFCCP has primarily focused on the steering of individuals belonging to traditionally advantaged groups (whites/men) for consideration in higher paid positions, whereas individuals from traditionally disadvantaged groups (minorities/women) are steered to and considered for lower paid positions.

This strategy will have significant impact on pay discrimination because from our experience most companies will exhibit the following:

- Men and White employees tend to be in higher paying positions.
- Women and minority employees tend to be in lower paying position.

Arguably, there may be legitimate reasons for this asymmetrical distribution, but it is important to take note that, regardless of the merits of the explanations, the cards are naturally stacked in favor of the OFCCP’s enforcement investigation.

Given the flexibility of this new theoretical framework, the OFCCP is certainly exploring and extending the boundary conditions for the application of steering theory. For example, training is not typically associated with pay discrimination. However, when training impacts employees’ promotability, which affects pay, access to training becomes a potential source of pay discrimination. To complicate this, even open, generous, and neutral training access policies can result in adverse impact in pay.

For one company we worked with, training was 100% open to everyone. With such an open policy, no one would suspect that the company was liable for sex discrimination in training access or pay. Adding to this perception of openness and fairness was the fact that the training courses were offered by a local community college. The unfortunate twist, however, was that the community college, in an attempt to make its courses more accessible for working professionals, only offered them in the evenings. Consequently, women’s participation was significantly lower than men’s. Although our analyses found that promotion rates for women were not significantly different than men’s, after controlling for promotability (trained/not trained), we could not safely conclude for this client that they were 100% Title VII compliant in a steering theory framework.

Taken together, it is not an overstatement to suggest that steering theory significantly expands a company’s risk and liability exposure in many significant ways. Whereas traditional pay discrimination investigations were primarily focused on compensation and payroll data, steering theory-based investigations require a thorough evaluation of all personnel decisions that impact employees’ access to opportunities that affect pay. With a blended training in personnel decision making and statistics, I-O psychologists are particularly well-suited for these types of investigations.
Conclusions

Prior to Directive 307, the OFCCP has had mixed success with enforcement actions related to sex discrimination in compensation. Due to the inherent complexity of compensation, the OFCCP always initiated an investigation from a disadvantaged position. Compounding this was the extremely well-developed and sophisticated defense strategies that companies could marshal to their advantage.

Directive 307 was developed to reduce, if not downright eliminate, some of the advantages that defense-oriented attorneys and consultants have enjoyed in the past. In addition, Directive 307 has introduced a new and very important theory of pay discrimination: steering. Taken together, it is clear that pay discrimination investigations will be more complex and complicated than in the past. For this reason, it is very important for analysts and consultants to fully understand Directive 307 and to get ahead before an investigation is ever initiated.

Sex discrimination in compensation has received considerable federal enforcement attention in recent years. This should come as no surprise as this has been one among many key problems that President Obama has committed himself to addressing. As one of the biggest employers, the federal government holds the greatest potential to reducing sex discrimination in compensation. OFCCP’s Directive 307 will play a significant part in that effort.

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