

## THOUGHT LEADERSHIP

LEGAL UPDATES

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## Services

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## OFCCP Targets Compensation: Are You Ready?

In June 2011, the Office of Federal Contract Compliance Programs (OFCCP) settled a pay discrimination lawsuit against AstraZeneca, one of the largest pharmaceutical companies. The settlement is notable not just for the salary adjustments AstraZeneca agreed to make, but more for the wide-ranging, prospective action to which AstraZeneca agreed. In discussing the settlement, OFCCP Director Patricia Shiu highlighted the steps the OFCCP is taking to aggressively combat pay discrimination. More recently, on July 1, 2011, Secretary of Labor Hilda Solis spoke about the OFCCP's efforts to end pay discrimination as one of three key enforcement efforts by the agency and on August 10, 2011, it began the formal rulemaking process to develop a tool to gather compensation data from federal contractors. We recommend a close look at your compensation practices now, to avoid future problems with the OFCCP as well as with private plaintiffs.

In early June 2011, AstraZeneca agreed to pay \$250,000 to 124 women in order to settle a lawsuit claiming pay discrimination against female sales specialists at its Philadelphia business center. The OFCCP claimed the female sales specialists had been paid, on average, \$1,700 less than male sales specialists. AstraZeneca agreed not only to provide back pay for the women covered by the lawsuit, but agreed to work prospectively to with the OFCCP to conduct statistical analyses of pay for hundreds of employees in 13 states and the District of Columbia, and to make salary adjustments as needed. A copy of the Consent Decree can be accessed [here](#).

In commenting on the AstraZeneca settlement, OFCCP Director Shiu highlighted three problems that needed to be addressed to help close the pay gap: (1) a better way to collect good data from employers, "to identify and root out discrimination"; (2) better regulations regarding pay secrecy, which would allow women to talk openly about their salaries; and (3) education of workers

and employers about their rights and obligations. Director Shiu stated the agency would address these issues by proposing a new data collection tool for compensation and new regulations, and by "aggressively going after employers who discriminate."

In July 2011, Secretary of Labor Solis spoke at an employment lawyers' convention, focusing on the OFCCP's enforcement efforts to end pay discrimination, among a few other goals. Concerning efforts to end pay discrimination, Secretary Solis highlighted that the OFCCP is "dramatically" shifting its enforcement priorities. She noted that in 2010, 14 percent of the OFCCP's investigations involved compensation and she anticipated that the percentage would increase in 2011 to between 20 and 40 percent of all investigations.

The OFCCP has begun the process outlined by Director Shiu, and highlighted by Secretary Solis. In January 2011, the OFCCP announced its proposed rescission of its 2006 Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Pay Practices, which provided a roadmap for employers to follow as they assessed their compensation practices. With the rescission of these standards, the OFCCP may use whatever analysis it deems appropriate in compensation cases. One of the more troubling developments for employers is the use of a test known as the 2 percent or \$2,000 difference as the trigger to request detailed compensation information. Essentially, if the OFCCP finds a difference in salaries within a pay division of as little as \$2,000, or 2 percent, it will then request multiple categories of data so it can conduct a detailed statistical analysis of pay. Needless to say, the low threshold of \$2,000 or 2 percent difference test will result in a significant burden on employers.

Last week, the OFCCP issued an advance notice of proposed rulemaking (ANPRM), beginning the formal process of developing the new data collection tool mentioned previously by Director Shiu. In issuing the ANPRM, Director Shiu made it clear that the focus on pay discrimination is not limited to just gender, as it "continues to plague women and people of color in the workforce." The stated purpose of the proposed tool is primarily as a screening device to allow the OFCCP to target possible compensation discrimination more effectively. The tool would also provide the OFCCP with information about industry-wide compensation practices. Federal contractors could also use the tool as a means of self-assessment, "used periodically to evaluate the effects of their employee compensation decisions." The OFCCP invites the public to submit comments relating to the scope, content and format of the data collection tool. A copy of the ANPRM is available [here](#).

The OFCCP's aggressive stance on pay disparities is compounded by private plaintiffs attacking discriminatory compensation. For example, in early June 2011, a female employee with more than 20 years of tenure sued Merrill Lynch over its supplemental compensation policy, claiming it not only unlawfully denies overtime pay but also constitutes pay discrimination against female workers. For a copy of the complaint, [click here](#).

## What This Means to You

If you have not recently conducted a serious self-evaluation of your compensation practices, now is the time. We recommend the self-evaluation be conducted at the direction of and in coordination with your legal counsel to shield the analysis by the attorney-client privilege. The self-evaluation is not necessarily conducted for the purpose of making salary adjustments (though that may be a consequence) but more to provide an understanding of the factors that inform compensation decisions, and to ensure you would be prepared to defend claims of compensation discrimination.

## Contact Info

For additional information and assistance, please contact your Husch Blackwell attorney or Molly Kurt at 816.983.8229.

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