

# MANAGEMENT UPDATE

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## Does “Hidden Bias” Lurk in Your Workplace?

Many employers today proudly describe themselves as “equal opportunity employers” and provide extensive diversity and antidiscrimination training for managers and supervisors to eliminate the potential for discriminatory decision making.

Nevertheless, a number of recent studies suggest that managers and supervisors frequently allow unlawful bias to unduly influence their decisions – even though they may not even realize it. Consider, for example, a recent study conducted jointly by the University of Chicago and the Massachusetts Institute of Technology. Researchers sent out 5,000 resumes in response to approximately 1,300 job ads placed in Chicago and Boston newspapers. By randomly assigning stereotypically African American and white names to resumes with substantially similar qualifications, the study examined the influence of race on the potential applicant pool. Resumes with stereotypically white names received callbacks for interviews fifty percent more often than resumes with stereotypically African American names, despite having substantially similar qualifications.

A similar study examined the influence of gender on selections for positions with major symphony orchestras throughout the United States. The study compared auditions conducted where the judges could see the musicians to blind auditions where the musicians performed behind a screen. When using blind auditions, the number of women selected for the orchestra increased by nearly thirty-three percent.

These studies – as well as several others conducted in recent years – suggest that decision makers may indeed harbor “unconscious biases” based on race, gender, and ethnicity that unduly influence their employment-related decisions with regard to women or minorities. Implicit bias not only subjects employers to potential discrimination claims, it can also undermine employee morale, decrease productivity, and ultimately increase employee turnover.

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## Voluntary Guidelines for Self-Evaluation of Compensation Practices

Contractors covered by Executive Order 11246 are required to adopt some form of compensation self-evaluation. When the Office of Federal Contract Compliance (OFCCP) issued standards interpreting Executive Order 11246 with respect to systemic compensation discrimination, it also issued voluntary Self Evaluation Guidelines, which contractors can use to gauge their compliance with the OFCCP's requirements.

While contractors are not required to adopt the self-evaluation system set forth in the Voluntary Compliance Guidelines, those who do so will be deemed to be in compliance with the self-evaluation requirement. Additionally, the OFCCP will coordinate its compliance monitoring activities if the contractor's compensation self-evaluation program meets the Voluntary Compliance Guideline requirements.

Generally, to meet the Voluntary Compliance Guidelines, the self-evaluation program must meet the following requirements:

1. The program must group employees who are similarly situated (Similarly Situated Employee Groupings or SSEG). Employees may be placed in the same SSEG if they perform similar work and occupy positions that are similar in responsibility level and require similar skills and qualifications.
2. The contractor must make a reasonable effort to create SSEGs that are large enough for meaningful statistical analysis, but must only include those employees who are actually similarly situated. In general SSEGs should contain at least thirty employees overall and at least five or more individuals who are minority or female.
3. On an annual basis, the contractor must perform some type of statistical analysis that evaluates SSEGs and accounts for factors that legitimately affect the compensation of the members of the SSEGs under the contractor's compensation system, such as experience, education, performance, productivity, location, etc.
4. The contractor must investigate any statistically significant compensation disparities identified by the self-evaluation analyses and must take steps to remedy the disparities if the contractor determines that the disparities cannot be explained by legitimate factors.
5. The contractor must contemporaneously create and retain certain documents and data, including, but not limited to, documents supporting its decisions regarding which employees to include in SSEGs, factors included in the statistical analysis and the form of the statistical analyses. The contractor must make these documents and data available to the OFCCP during a compliance review.

If the OFCCP determines that the contractor's self-evaluation program meets the Voluntary Compliance Guidelines, the OFCCP will consider the contractor's compensation practices to be in compliance with Executive Order 11246.

Additionally, the OFCCP will permit a contractor to certify that it has performed a compensation self-evaluation requirement at the direction of counsel, and that counsel has advised the contractor that the self-evaluation and results are subject to the attorney/client privilege and/or the work product doctrine. However, contractors that use the compliance certification alternative are not entitled to the compliance coordination incentive provided to those who comply with the voluntary self-evaluation guidelines. •

# OFCCP Issues Formal Standards Regarding Systemic Compensation Discrimination

The federal Office of Contract Compliance (OFCCP) recently issued formal standards interpreting Executive Order 11246 with respect to systemic compensation discrimination. These guidelines formalize the proposed guidelines the OFCCP issued in November 2004. The OFCCP has also issued voluntary Self Evaluation Guidelines, which contractors can use to gauge their compliance with OFCCP's requirements.

“The new standards reject the pay grade theory as a method of determining whether systemic discrimination in violation of Executive Order 11246 exists.”

The analysis required by the interpretive standards has two major characteristics. First, the determination of employees who are “similarly situated” for purposes of comparing contractor pay decisions will focus on the similarity of the work performed, the levels of responsibility, and the skills and qualifications involved in the positions. In determining whether employees are similarly situated under the standards, actual facts regarding employees' work activities, responsibility, and skills and qualifications are determinative.

Second, the analysis relies on a statistical technique known as multiple regression analysis. According to the standards, systemic discrimination exists when there are statistically significant compensation disparities between similarly situated employees, after considering legitimate factors that influence compensation, such as education, experience, performance, productivity and location. This determination must be based on a multiple regression analysis. A compensation disparity is statistically significant if it is significant at a level of two or more standard deviations, based on measures of statistical significance that are generally accepted in the statistics profession.

## ***Pay Grade Information/Cluster Regression As Indicators of Potential Discrimination***

The new standards reject the pay grade theory as a method of determining whether systemic discrimination in violation of Executive Order 11246 exists. However, the preamble to the standards states that the agency may continue to use pay grade information or other information when evaluating contractors to determine whether to conduct a comprehensive investigation into the contractor's pay practices.

The OFCCP has traditionally used a three-tiered approach, which includes both pay grade information and individual employee information, in evaluating contractors and determining whether to conduct a comprehensive investigation into the contractor's pay practices. The agency states that it intends to continue this tiered-review approach and has recently implemented additional components, such as a “cluster regression” analysis, that enable it to further focus compensation investigations on workplaces where there are significant indicators of potential discrimination.

The cluster regression involves employee-specific information requested following the desk audit. The OFCCP acknowledges that the cluster regression analysis, which groups employees by job titles and, if the job title does not contain at least thirty employees and at least five comparator groups, by compensation, does not meet Title VII standards for grouping similarly situated employees. Accordingly, cluster regression will be used only as an indicator of potential systemic discrimination; it is not a sufficient basis to issue a Notice of Violation. If the cluster regression indicates significant disparities, OFCCP conducts a comprehensive evaluation of the pertinent compensation practices, at which point the final interpretive standards govern OFCCP's investigation activity and determinations. •



## Eleventh Circuit Clarifies Information Required in Release of Age Discrimination Claims

The Eleventh U.S. Circuit Court of Appeals has clarified the scope of information employers must provide to employees who are terminated as part of a reduction in force, if the employer seeks a release of Age Discrimination in Employment Act (ADEA) claims from the discharged employees. See *Burlison v. McDonald's Corp.* The Older Workers Benefits Protection Act (OWBPA) requires employers to provide certain information to employees who are asked to waive potential ADEA claims. Essentially, these employees must be provided with the ages and job titles of employees selected for discharge and those not selected. Congress established this provision to enable employees who are asked to release ADEA claims to compare the ages of employees who were discharged with those who were not.

However, the language of the statute does not define the scope of this information – such as whether employers must provide information about affected employees on a company-wide basis, within a specific business division or physical facility or based on the relevant decisionmaker.

In *Burlison*, the court held that the employer must provide age and job title information for employees in the same “decisional unit” as the discharged employees. In defining decisional unit, the court relied on EEOC’s definition: the “portion of the employer’s organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver.”

Here, although the restructuring occurred throughout the employer’s organization, the discharged employees worked in three regions, which were combined to form one region. They were considered for work only in the newly formed region. Accordingly, the court held that the appropriate decisional unit consisted of the employees from the three regions that were eliminated. Because the employer provided the necessary information with regard to these employees, the court held that the releases were valid and dismissed the discharged employees’ ADEA claims. •

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### ***Preventive Measures: Reducing The Impact of Unconscious Bias***

Employers need to take their current antidiscrimination policies even further by implementing preventive measures to reduce the potential impact of unconscious bias in decision making. By its very nature, unconscious bias presents certain problems from a prevention standpoint. Based on “unconscious reflex reactions” or covert feelings and attitudes, it can be difficult for employers to point to specific acts or policies embodying these biases. Nevertheless, employers can take certain steps that may reduce the likelihood that a decision is influenced by covert bias or stereotyping.

Initially, employers should audit their internal decision-making processes to determine potential vulnerability to unconscious bias in eight key areas of the employment career path: (1) recruitment; (2) hiring; (3) compensation; (4) training; (5) performance evaluations; (6) promotions; (7) discipline; and (8) terminations. (Such an audit should be conducted with the advice and at the direction of counsel to help ensure the results are privileged and not subject to disclosure.) The audit should also analyze the corporate structure to identify the potential for systemic bias in the availability of workplace opportunities. Finally, the audit should also analyze current employment practices and procedures to identify potential disadvantages or differential treatment (evidenced by statistical anomaly) with regard to women, minorities, or any other discrete employee group.

To reduce the impact of bias in recruiting and hiring, employers should take steps to ensure that such decisions are made with as much practical and objective information as possible regarding the potential candidates. The more information at the decision maker’s disposal, the less likely the decision will be influenced by unconscious bias. In that regard, employers should:

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- Establish objective hiring standards and criteria for each position for which the company is seeking applications. Hiring standards and criteria should identify the specific minimum and maximum qualifications, experience, and skills necessary to effectively perform the particular job.
- Set up a “blind applicant” review system where the names and addresses of applicants are removed before circulating a resume to determine whether an applicant should be interviewed or otherwise advance to the next step in the hiring process.
- Use multiple interviewers with diverse backgrounds and different perspectives to ensure that individual decisions are more legally defensible and the impact of any biases held by individuals or groups is minimized; and
- Implement more “structured” interviews where all candidates are asked the same questions regardless of demographic characteristics or appearance. A more structured interview process lessens the likelihood of snap judgments based on superficial criteria.

To reduce unconscious bias in the performance evaluation process, employers should analyze the specific duties, functions, and competencies relevant to each position and create objective, job-related qualifications and job descriptions for each position. In this regard, employers should identify the skills, experience, and qualifications necessary to perform the specific job-related responsibilities and functions. In addition, employers should implement a multi-rater evaluation system and methodologies for reviewing performance such as 360-degree evaluations or a performance review task force combining operations and human resources input. A multi-rater or multi-tier review system will make it less likely any individual or group's biases will have an undue influence on the evaluation.

With regard to job assignments and promotions, employers can reduce the impact of unconscious bias by establishing specific criteria for each position – for example, identify the skills, experience, and qualifications necessary to be considered, and establish specific criteria for advancement and/or promotion. Furthermore, employers should establish an internal job posting system so that all employees have knowledge of potential job and career advancement opportunities. The posting system should clearly indicate the necessary skills, experience, and qualifications for the position and also describe the procedures employees must follow to be considered.

Finally, employers can reduce the impact of unconscious bias in discipline and discharge decisions by training managers and supervisors about the risks of bias and stereotypes and how to ensure that their discipline and discharge decisions are based on objective facts after a thorough investigation of employee misconduct or rule violations. Employers should then monitor discipline and discharge decisions to ensure that similar situations are handled in a similar manner and that decision makers are accountable for any discrepancies. Moreover, employers can use a checks and balances system, in which discipline and discharge decisions are made by more than one person and then subject to an impartial review prior to implementation.

While the measures described in this article are by no means all-inclusive, they provide a sound starting point for employers to address the issue of unconscious bias. Because “unconscious bias” involves a person's internal feelings and attitudes, however, it may be impossible for employers to completely eliminate the potential influence of such bias on decision making. Nevertheless, implementing the measures described above may limit the potential influence of unconscious bias and provide a basis for employers to defend against discrimination claims relying on the unconscious bias theory.

For further information regarding unconscious bias or for assistance with implementing preventive measures to reduce its potential influence, please contact the Ford and Harrison attorney with whom you usually work or the authors of this article, John Bowen, [jbowen@fordharrison.com](mailto:jbowen@fordharrison.com), 612-486-1703, or Jeremy Sosna, [jsosna@fordharrison.com](mailto:jsosna@fordharrison.com), 612-486-1704, partners in our Minneapolis office. •

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