

## OFCCP comes calling

If you've forgotten OFCCP, they haven't forgotten banking

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In the alphabet soup of regulatory agencies that banks should be aware of, the OFCCP has a relatively low profile. That may be changing, as this unit of the U.S. Department of Labor—officially, the Office of Federal Contract Compliance Programs—flexes its muscles and commits to a 20% increase in enforcement activities in 2011.

Banks with more than 50 employees are subject to Executive Order 11246 which requires that federal contractors establish and maintain affirmative action plans for women and minorities, and undertake workforce reporting and other obligations. Banks with more than 50 employees are deemed “federal contractors” because of their federally insured status, the sale of U.S. bonds, and other products and services that link banks inextricably with the federal government. Executive Order 11246 is enforced by OFCCP.

E.O. 11246 was issued by President Jimmy Carter, so it’s been around for a long time. While the annual preparation of an affirmative action plan (AAP) requires careful workforce recordkeeping and some pretty complex number-crunching, many bank HR professionals have absorbed this burden into their routine, or have identified resources (like my firm, Employment Law Compliance) that can help. Over the last decade, very few banks have had their AAPs subjected to the scrutiny of an OFCCP compliance review. However, this is no time to become complacent. Last fall, OFCCP Secretary Patricia Shiu announced a 20% increase in compliance reviews, and, within the last month, she has made two additional moves, signaling how the bite of stepped-up enforcement will be felt.

### No more Mr. Nice Guy

In a directive posted on the agency’s website on Dec. 8, 2010, the office rescinded Bush-era case management standards. These standards allowed OFCCP investigators to close a compliance review after a brief “desk audit” (review of submitted documents) if the contractor’s AAP and other employment data revealed no signs of “systemic discrimination.” Now, contractors, including banks, can expect OFCCP investigators to pursue the review beyond a desk audit to an onsite investigation including employee interviews, focusing intense scrutiny on all aspects of affirmative action and equal employment opportunity compliance.

A notice published in the Federal Register on Jan. 3 proposes to rescind other Bush-era standards. In 2006, the OFCCP issued guidelines for contractors to conduct voluntary self-evaluations of pay practices, including standards for determining whether systemic compensation discrimination was present. Now the OFCCP says the voluntary guidelines have been “largely unused” and have not been “an effective enforcement strategy.” Instead, the office is establishing new procedures for investigating compensation discrimination through “traditional means.” In other words, banks will no longer be able to self-police pay disparities between white males, and women and minorities doing the same job. The OFCCP will collect compensation data and draw its own conclusions.

What should a bank do?

• First, make sure the bank’s affirmative action plan is complete, current, and available for review, should the OFCCP request it. If you have more than 50 employees and don’t have a current AAP, get one!

• Also make sure that the bank is in compliance with all AAP/EEO reporting and notice requirements. Get help from your employment counsel or other experts if you don’t know what these are.

• Perhaps most importantly, given the focus of these latest moves by the OFCCP, make sure you have adequately documented, legitimate, non-discriminatory reasons for any pay disparities between employees doing substantially the same job. Trying to develop supporting evidence for pay decisions after time has passed is often difficult, if not impossible. While a manager may believe decisions were based on individual employment performance, or market factors operating at the time, unless that reason can be objectively supported, for example, by comparing loan production figures for employees with different pay rates, you risk a finding of discrimination, if the OFCCP comes to call.

#### About the author:

Marian Exall (marian.exall@gmail.com) is an employment lawyer and HR professional with 25 years' experience advising banks and other employers on compliance issues. She is a principal and co-founder of Employment Law Compliance, Inc. which provides HR compliance solutions to banks exclusively through the American Bankers' Association. She is a frequent speaker and writer on human resources compliance in the banking industry, including in ABA Banking Journal, on ABA Telephone Briefings and at national and state bankers' association conferences.

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New ABABJ.com blogger to speak at Feb. 23 ABA HR telephone briefing

President Obama's ambitious agenda of employment law reform was derailed by healthcare reform and the economy. Now Congress is deadlocked. Does this mean no new HR compliance challenges? No such luck! The focus now shifts to federal agencies and their newly aggressive attitude to enforcement and rulemaking around existing employment laws. On Feb. 23, blogger Marian Exall of "The Human Element" blog joins attorney Steven Greene and ABA's Cris Naser for a two-hour telephone briefing, "HR Compliance Challenges Continue Growing."

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