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Debra A. Carr
Director, Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Avenue, NW, Room N3422
Washington, DC 20210

Re: RIN 1250-ZNE
Comments in Support of OFCCP's Notice of Proposed Rescission of
2006 Guidance Documents on Compensation Discrimination

Dear Ms. Carr:

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL.
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Laura W. Murphy
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

On behalf of the American Civil Liberties Union (ACLU), over half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to support the Office of Federal Contract Compliance Programs' proposed rescission of two 2006 guidance documents regarding compensation discrimination. *See* 76 Fed. Reg. 62 (Jan. 3, 2011). We strongly support the rescission as an important step towards addressing the serious problem of pay discrimination in the workplace.

Pay discrimination continues to be a severe problem nationally. Far too often, women and minorities earn less than their coworkers for doing the same job. Unlawful pay disparities are harmful to employees, their families, and the economy as a whole.

OFCCP's mission, to ensure that federal contractors do not discriminate in the workplace, is crucial to combating this injustice. The agency is charged with enforcing Executive Order 11246, which requires that federal government contractors and subcontractors ensure equal opportunity in the workplace. OFCCP's role in preventing compensation discrimination by federal contractors is critical in preventing employers from using taxpayer money to subsidize discrimination.

Fulfilling this important duty requires that OFCCP have the ability to investigate, analyze, and address compensation discrimination wherever it occurs. Guidance documents should provide OFCCP with the tools it needs to accomplish this task as efficiently and effectively as possible. Unfortunately, two guidance documents issued in 2006, known as the Interpretive Standards

and the Voluntary Guidelines, put substantial restrictions on the agency's toolbox. As a result, OFCCP now seeks to rescind both those documents.

Rescission of the Interpretive Standards and Voluntary Guidelines will restore the flexibility OFCCP needs to adequately investigate, analyze, and remedy instances of compensation discrimination. With this enhanced discretion, OFCCP will have a broader range of techniques at its disposal, allowing the agency to more faithfully follow the principles of Title VII of the Civil Rights Act of 1964. For this reason, we strongly support rescission of both the Interpretive Standards and the Voluntary Guidelines.

I. Introduction

Federal contractors and subcontractors have an obligation to not discriminate in the workplace under Executive Order 11246. OFCCP is charged with keeping these employers in compliance. To this end, the agency conducts compliance evaluations to identify and remedy compensation discrimination based on race, color, national origin, religion, or sex. The agency investigates both systemic discrimination and cases in which discrimination occurs on an individual basis.

In order to fulfill its mission to ensure nondiscrimination, OFCCP implemented two new requirements for covered contractors in 2000. First, employers were required to submit compensation data to OFCCP, both at the beginning of a compliance evaluation and also in a new Equal Opportunity Survey. Second, they were required to conduct their own in-depth analyses of their compensation systems to assure they were not discriminatory. *See* 65 Fed. Reg. 68022, 68036 (Nov. 13, 2000) and 41 CFR 60-2.17(b)(3). Adhering to these new requirements, the agency employed a flexible and fact-specific approach to investigating, guided by the principles of Title VII.

However, this changed in 2006, when OFCCP reinterpreted Executive Order 11246 and Title VII in its new guidance documents: (1) Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination (Interpretive Standards) and (2) Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 (Voluntary Guidelines). *See* 71 Fed. Reg. 35124 (June 16, 2006) and 71 Fed. Reg. 35114 (June 16, 2006).

The Interpretive Standards strictly limit the procedures available to OFCCP, requiring the agency to use a specific type of evidence and mode of analysis to investigate all instances of possible pay discrimination, regardless of the facts of the case. The Voluntary Guidelines set out procedures for contractors to conduct their own analyses of their compensation practices, and provided incentives for contractors to use these new procedures. However, these analytical procedures are overly rigid and, as a result, underused by covered contractors.

OFCCP now proposes to rescind both the Interpretive Standards and the Voluntary Guidelines, to restore the agency's discretion to investigate compensation discrimination claims as efficiently and effectively as possible. *See* 76 Fed. Reg. 62 (Jan. 3, 2011).

II. Rescission of The Interpretive Standards

The ACLU supports rescission of the Interpretive Standards because they have reduced OFCCP's ability to effectively investigate and remedy systemic compensation discrimination, and investigations would be better governed by a more flexible approach, consistent with Title VII principles.

Pay discrimination can take many forms. When OFCCP seeks to remedy this often complicated type of discrimination, it should have the ability to adapt to potential variables, and come up with the best possible method of approaching a particular case. The 2006 Interpretive Standards seriously constrain OFCCP's ability to do this.

Specifically, the Interpretive Standards mandate that OFCCP must provide anecdotal evidence of pay discrimination to support its statistical analysis, in all but unusual cases. Without this anecdotal evidence, OFCCP may not issue a notice of violation (NOV) to allege systemic discrimination. This is problematic for a number of reasons. This requirement runs contrary to the requirements of Title VII in pattern or practice disparate impact cases, which can be proven by statistics alone when anecdotal evidence is unavailable. Requiring anecdotal evidence places an enormous burden on employees to provide information to which they are unlikely to have access. Workers who may be victims of systemic wage discrimination often have little information about how their coworkers are compensated, and therefore very little anecdotal evidence to provide.

Similarly limiting to OFCCP's investigative approach is that the Interpretive Standards require the use of a multiple regression analysis in pay discrimination cases. Regression analysis is only one method of analysis that can be utilized in discrimination cases. While the use of regression analysis is a common tool in employment discrimination cases generally, the Interpretive Standards mandates its use only in wage cases. There is no reason that pay discrimination should be handled differently. While regression analyses can be useful, it is not necessarily the best approach in every case. Rather, OFCCP should have the discretion to determine what type of investigative tool or analysis best fits the facts of a particular case. This will result in much more efficient use of limited resources for investigation.

Because these Interpretive Standards have only made it more difficult for OFCCP to gather and analyze evidence in conducting investigations, the ACLU strongly supports rescission.

III. Rescission of the Voluntary Guidelines

The ACLU also supports rescission of the Voluntary Guidelines because they are overly rigid and do not promote effective analytical procedures for contractors to conduct self-evaluations of their pay systems.

The Voluntary Guidelines contain a set of recommended analytical procedures that covered contractors may choose to employ. Those recommended procedures are not ideal for handling all types of systemic compensation cases, and are often ineffective in determining when a compensation system is discriminatory.

In particular, the Guidelines established new criteria for contractors to use in grouping “similarly situated employees” - employees who perform similar work, with similar skills, qualifications, and responsibility levels. In all but rare cases, OFCCP requires that employee groupings must include at least 30 employees each and at least 5 from each comparison group (i.e. females/males or minorities/non-minorities). These specific numerical thresholds for similarly situated employees can be very hard to meet, and place unnecessary constraints on the analytical process.

This rigid model for examining pay disparities simply does not apply properly to all instances of systemic compensation discrimination and, as a result, has been largely ineffective at identifying discriminatory pay systems. OFCCP does not propose to replace the Voluntary Guidelines. Rather, it will provide compliance assistance as needed, via webinars and other various means. Such flexibility will give OFCCP more opportunities to provide better compliance assistance for contractors on how to conduct their analyses.

Because the Voluntary Guidelines are an ineffective method of ensuring compliance with the contractor self-evaluation requirement, we fully support rescission.

IV. Conclusion

ACLU strongly supports OFCCP’s proposed rescission of both the Interpretive Standards and the Voluntary Guidelines, and we appreciate this opportunity to submit comments on this important issue. Please contact Deborah J. Vagins, Senior Legislative Counsel at dvagins@dcaclu.org or (202)715-0816 with any questions.

Sincerely,



Laura W. Murphy
Director



Deborah J. Vagins
Senior Legislative Counsel