



# OFCCP AUDITS – CHANGING RULES AND CHANGING STRATEGIES FOR SUCCESS

PRESENTER:  
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# About Mickey Silberman

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Mickey Silberman is the founder of and a Shareholder with Silberman Law PC. For more than 25 years, Mickey has represented management in all areas of employment law, specializing in systemic EEO, affirmative action, OFCCP compliance and audit defense, pay equity, and diversity & inclusion.

Mickey has overseen the preparation of thousands of affirmative action plans and he has directed the defense of thousands of OFCCP compliance evaluations and systemic discrimination investigations. This high volume of audit defense keeps him on the “cutting edge” of OFCCP’s evolving enforcement trends. He often is asked to step in to defend audits and investigations “gone wrong” and has a strong track record in those audits. In fact, in the last 1,000 audits Mickey has defended, he has obtained Letters of Compliance - the best possible audit outcome - in more than 99% of the audits.

In addition, Mickey is recognized as a national expert in the areas of pay equity and systemic pay discrimination. Mickey designs and directs the preparation of pay analyses both on a proactive basis and also in response to OFCCP and EEOC pay investigations. He regularly defends employers against claims of systemic pay discrimination.



# Lawyer's Disclaimer

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# So, What Shall We Talk About?

- OFCCP record-setting monetary recovery in 2019, more to come in 2020
  - Continues to come from *pay* and *hiring* systemic discrimination findings
  - Can we “crack the code” regarding OFCCP’s entry-point in many of those investigations
- The new compliance review scheduling letter
- Affirmative action placement goals for whites – wait, what?!!
- With proposed rule, OFCCP seeks to find systemic discrimination based solely on statistical “red flags”
- But, most important, we need to talk about your job groups



# OFCCP's Big Numbers

- **FY2019 Recovery**
  - OFCCP recovered over \$41M – a record for the Agency
- **FY2020 Projection**
  - Director Craig Leen announced he expects similar results for 2020
- **Types of settlement agreements**
  - Early Resolution Conciliation Agreements (ERCAs)
    - Approximately 30 ERCAs in FY2019
  - Director Leen projects 50 ERCAs by end of FY2020
- What is the common entry point for many of these “deep dive” investigations?

# Your Job Groups Are OFCCP's Entry Point

- The “job group” has a long and interesting history
  - OFCCP regulations from the 1970s mandate employers create job groups by combining jobs with similar **content**, **wage** and **opportunity**
  - Job groups designed to increase “sample” size to yield meaningful systemic trends
  - When first mandated by OFCCP – and for a few decades after – job groups were used exclusively to conduct utilization analyses and set affirmative action placement goals
  - However, we have seen steady job group “creep” into adverse impact analyses and, more recently, into pay analyses
  - But wait, what do your job groups – created solely for AAPs – have to do with your actual hiring, promotion, termination and pay practices?

# Your Job Groups Are OFCCP's Entry Point -continued

- The job group has become the default “unit of analysis” for OFCCP at the start of audits for utilization, adverse impact and pay analyses
- But employers have not adjusted to the OFCCP's changing enforcement approach
- Job groups often have remained unchanged since the time when they were used solely for affirmative action goal-setting
- As a result, job groups often create statistical “false positives” that lead to avoidable OFCCP deep dive investigations
- While employers can seek to argue against OFCCP's use of job groups to make a preliminary finding and pursue an investigation, by then it is often too late



# Your Job Groups Are OFCCP's Entry Point continued

- Here's the good news – OFCCP regs give employers the discretion to create – and revise – job groups
- Given the changed enforcement reality – and OFCCP's effectiveness in using job groups as the entry point for the Agency's deep dive investigations – employers should undertake a comprehensive review of existing job groups
- Job Groups can be restructured to better align similar, and separate dissimilar, jobs
- The new, strategic job group structure can reduce/avoid “false positive” statistical flags while still achieving sufficient sample size to produce meaningful utilization analysis results and to set placement goals
- How do we do this? An excellent question. Let's answer it together.

# Ok, Let's Start Here – Big Numbers are Bad Numbers

Analysis	Rate for Females	Rate for Males	80% Rule	Standard Deviation
Female v. Male	1/50 .02	5/50 .10	.20	1.68
Female v. Male	10/500 .02	50/500 .10	.20	5.32
Female v. Male	100/5000 .02	500/5000 .10	.20	16.8

# The Before Picture – Job Group Structure



# The Before Picture - Hiring into Professional Jobs

Applicants-Hires Adverse Impact				
Junior Professionals				
Analysis	Rate for Black	Rate for White	80% Rule	Standard Deviation
Black v. White	13/1259 .01	37/1071 .03	.33	4.02

# The Before Picture - Promotions into Management Jobs

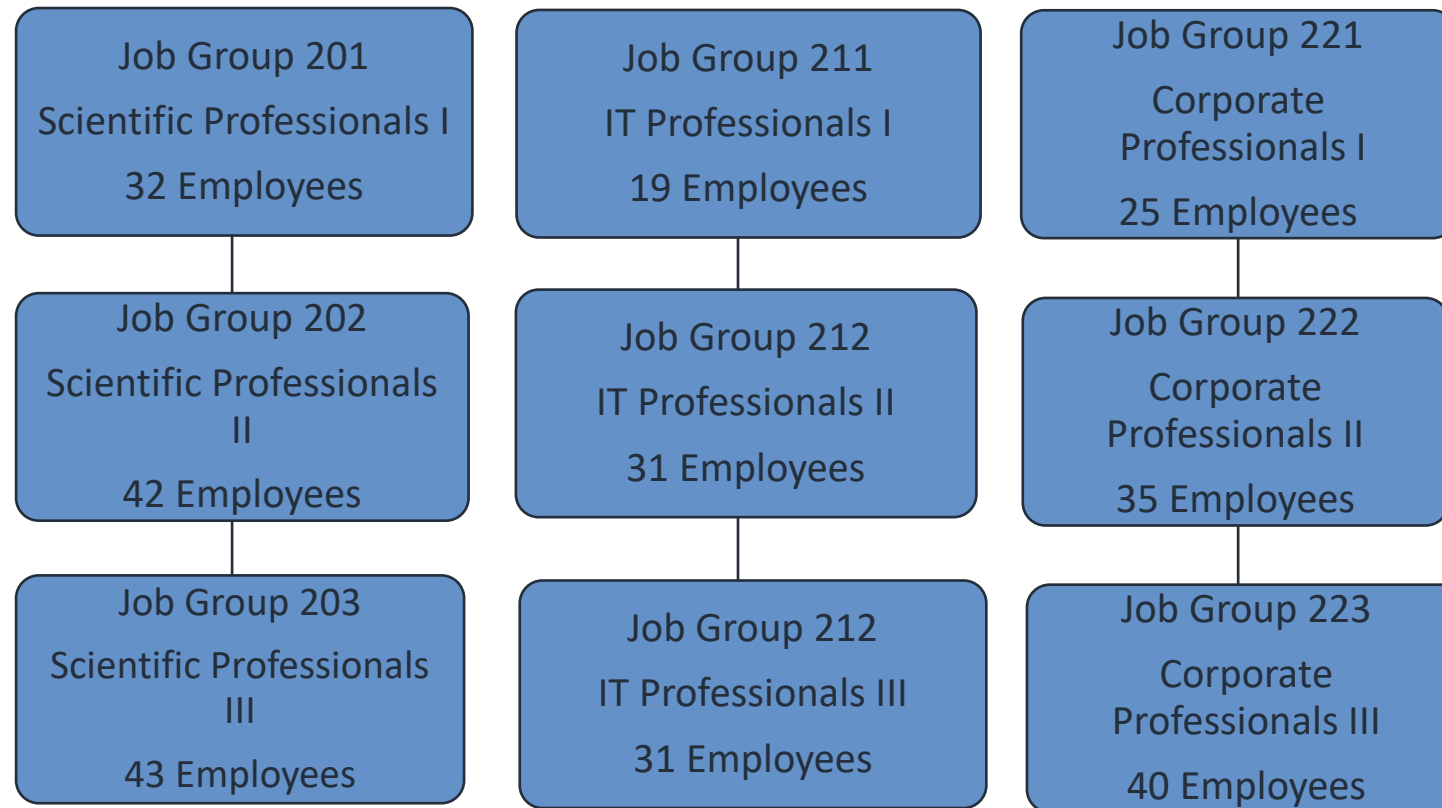
Promotions Adverse Impact				
Junior Officials & Managers				
Analysis	Rate for Females	Rate for Males	80% Rule	Standard Deviation
Female v. Male	5/47 .11	20/50 .40	.28	3.30

# The After Picture – Job Group Structure





# The After Picture – Job Group Structure



# The After Picture - Hiring into Professional Jobs

Applicants-Hires Adverse Impact				
Professionals III				
Analysis	Rate for Black	Rate for White	80% Rule	Standard Deviation
Corporate	4/591 .01	4/218 .02	.50	1.48
IT	5/270 .02	17/371 .05	.40	1.88
Scientific	4/398 .01	16/482 .02	.33	2.29

# The After Picture - Promotions into Management Jobs

Promotions Adverse Impact				
Management				
Analysis	Rate for Females	Rate for Males	80% Rule	Standard Deviation
Supervisors	3/22 .14	6/18 .33	.42	1.48
Managers	2/11 .18	8/16 .5	.36	1.68
Senior Managers	0/14 .00	6/16 .38	.00	2.56

# Pay Analyses – The Before Picture

Job Group	Employee Total	Average Salary	Difference	Statistical Significance
<b>202 - Jr. Professionals</b>	<b>120</b>			
White*	63	\$80,223		
Asian	28	\$76,590	\$3,633	SD = 1.92
Black	18	\$75,182	\$5,041	SD = 3.09
Hispanic	11	\$74,561	\$5,662	SD = 3.18

# Pay Analyses – The After Picture

Job Group	Employee Count	Average Salary	Difference	Statistical Significance
<b>203 - Scientific Professionals III</b>	<b>46</b>			
White*	23	\$80,657		
Asian	9	\$71,432	\$9,225	SD = 1.87
Black	7	\$65,227	\$15,430	SD= 3.5
Hispanic	7	\$73,003	\$7,654	SD=1.69
<b>213 - IT Professionals III</b>	<b>34</b>			
White	16	\$83,240	\$4,315	SD = 1.61
Asian*	14	\$87,555		
Black	3	\$82,398	\$5,157	FET = .06
Hispanic	1	\$78,331	\$4,909	N/A
<b>223 - Corporate Professionals III</b>	<b>40</b>			
White	24	\$76,772	\$1,149	SD = .84
Asian	5	\$70,784	\$7,137	SD = 2.36
Black*	8	\$77,921		
Hispanic	3	\$72,350	\$5,571	FET = .04

# Proposed Regulation - Procedures to Resolve Potential Employment Discrimination

- Posted on the Federal Register on 12/30/2019
  - <https://www.federalregister.gov/documents/2019/12/30/2019-27258/nondiscrimination-obligations-of-federal-contractors-and-subcontractors-procedures-to-resolve>
- Comments were submitted by **1/29/2020**
  - OFCCP requested comments for improving certainty in setting parameters for statistical evidence, including methodologies, minimum sample sizes, data groupings, methodological limitations, and ways to improve objectivity.



# Proposed Regulation Statistics Needed to Make Claim – But what about Anecdotal Evidence?

- 2 Standard Deviations – Equates to 95% confidence that the observed differences didn't occur by chance
- 3 Standard Deviations – Equates to 99% confidence that the observed differences didn't occur by chance
- “Didn't occur by chance” ***does not equal*** “discrimination”
- 2.00 – 3.00 SDs – OFCCP needs anecdotal evidence
- Over 3.00 SDs – OFCCP does not need anecdotal evidence
- This is not consistent with Title VII and relevant case-law

# MPHASIS CONCILIATION AGREEMENT

## 4. AFFIRMATIVE ACTION VIOLATIONS

### 4.1 ESTABLISHMENT OF SEPARATE GOALS

- A. STATEMENT OF VIOLATIONS. Mphasis – San Jose did not establish separate utilization goals for particular minority groups or for men or women of a particular minority group when establishing placement goals.
- B. OFCCP’S SPECIFIC FINDINGS. Specifically, OFCCP alleges that for the period of January 1, 2014 through May 31, 2017, Mphasis - San Jose failed to establish goals for white applicants in the Computer Systems Analyst job group when there was a substantial disparity in their utilization as required by 41 CFR § 60-2.16.
- C. REMEDY. In the event of a substantial disparity in the utilization of a particular minority group or in the utilization of men or women of a particular minority group, Mphasis – San Jose will establish separate goals for such groups. The method used in establishing those goals will be the same that Mphasis - San Jose uses in determining availability for the rest of Mphasis – San Jose’s workforce pursuant to 41 CFR § 60-2.14 and 41 CFR§ 60-2.15.

# Mphasis Conciliation Agreement

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# Key Takeaways

- OFCCP has found an effective entry point for in-depth investigations
  - With record-setting results to show for it
- Job group “creep” has created the danger of false positives that result in *avoidable* deep dive investigations
- Undertake a comprehensive review of your organization’s job groups and make revisions that present an improved, strategic job group structure
- And, don’t set goals for whites



# QUESTIONS?



Questions.  
Comments.  
Want to Chat?



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