



NILG Advisory Council Panel on Compensation Standards and Best Practices

**Compensation
Roundtable Follow-up
with OFCCP**

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Disclaimer

The information presented in this presentation is intended to be of use to the Office of Federal Contract Compliance Programs (OFCCP) as it develops policies and procedures for how the Agency and contractors may best perform statistical and nonstatistical reviews of contractors' compensation systems.

The information in this report includes the general observations, in the aggregate, of the members of the NILG Advisory Council Panel on Compensation Standards and Best Practices. Neither this report in whole or in part should be viewed as statistical or legal advice. Because the report contains general observations and recommendations, individual members of the Panel may disagree with some of the observations and/or recommendations.

Importantly, the observations and/or recommendations in this report may or may not generalize to a specific situation. The information is not intended to represent the view of any or all of the Panelists when addressing any particular situation. One of the important themes throughout this report is that context matters, and that the consultant, attorney or practitioner should evaluate a variety of particularized considerations when planning and conducting any pay analysis to identify potentially unlawful disparities. Those seeking specific legal advice or technical assistance should contact an attorney or expert in statistical analysis of pay, as appropriate.

This report includes observations and recommendations about standards and best practices as of late 2019 through mid 2020; as such, any changes in statutes, regulations, case law, scientific literature and trends in actual practice after the date of this report have not been considered.

Our Meeting Today

Thank you for joining Compensation Roundtable 3 hosted by NILG – in collaboration with OFCCP.

The participants in the discussion include **OFCCP officials and prominent industrial and organizational (I/O) psychologists and labor economists**

Our discussion today will cover:

- **Recap** of “Roundtable” interaction between OFCCP and experts
- **Review** of OFCCP’s compensation practice updates occurring since February Roundtable
- Further **exchange of opinions** on how OFCCP and practitioners can best identify pay disparities requiring remediation

Joining You

OFCCP

- Craig Leen, Director
- Bob LaJeunesse, Director of Enforcement
- David Garber, OFCCP Labor Economist

Moderator

- NILG Chair, Paul McGovern

Expert Panel

- Mike Aamodt, I/O Psychologist, DCI
- Mike DuMond, Labor Economist, Economists Incorporated
- David Cohen, I/O Psychologist, DCI
- Valentín Estévez, Labor Economist, Welch Consulting
- Christopher Haan, Labor Economist, Seyfarth Shaw
- Lisa Harpe, I/O Psychologist, DCI
- Rick Holt, Labor Economist, Resolution Economics
- Dan Kuang, I/O Psychologist, Biddle
- Rob Speakman, Labor Economist, Economists Incorporated
- Jora Stixrud, Labor Economist, Welch Consulting
- Paul White, Labor Economist, Resolution Economics

Presenting today

Compensation Roundtable History

Roundtable 1 – April 2019 OFCCP/NILG Spring Face-to-Face meeting

Roundtable 2 – February 2020 webinar: OFCCP, NILG Experts Panel

Roundtable 3 – July 2020, NILG 2020 Virtual Conference

**“OFCCP’s compensation review must follow the law and
use well-accepted tests”**

**Director Leen, OFCCP/NILG Monthly MOU Meeting,
March 31, 2020**

What's New Since Roundtable 2

- Director Leen crafts compensation **“principles”**
- OFCCP applies **“transparency” to all phases** of compensation-focused audits
- OFCCP clarifies that the agency will seek statistical, quantitative, and **qualitative, i.e. anecdotal** evidence to support actionable findings of pay disparity
- The Agency's systemic focus means that it is **less focused on isolated problems** (a single or a few small job groups)

These slides are created by NILG
to facilitate continued dialogue
and are not OFCCP's slides

What's New – Continued

- OFCCP clarifies that contractors who provide non-privileged review of compensation system **need not produce** privileged compensation reviews
- OFCCP clarifies that **liability** cannot be based exclusively on **"summary "** or **"omnibus" aggregations of PAGs**
- Absent an articulated reason discussed with the contractor, OFCCP **should** use the contractor's **PAGs** and **job grades**

Key Topics for Discussion: Director Leen's "Principles"

1. Adopt clear standards for grouping incumbents
2. Group similarly-situated incumbents
3. SSEG "reasonableness"
4. Discuss when OFCCP creates its own groupings
5. Avoid over-aggregation
6. Always evaluate "interactions"
7. Control for all variables the contractor uses
8. Ensure that reviews are fair

Leen Principle #1: Adopt clear standards for grouping incumbents that contractors can understand

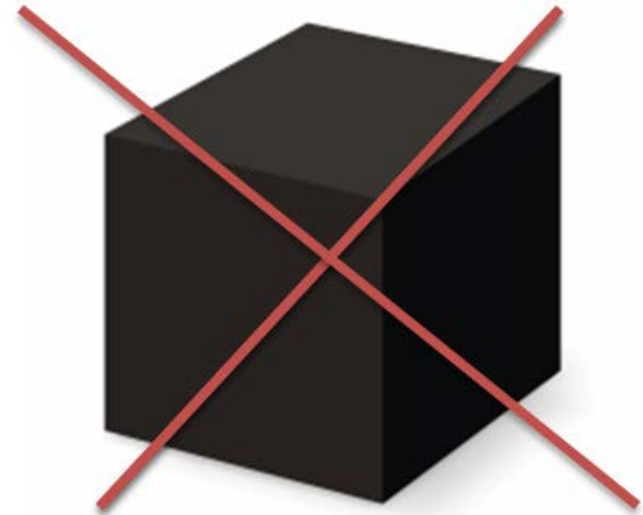
- Director Leen emphasizes the need for **transparency** in the OFCCP compensation audit process
 - Directive 2018-05 (Compensation Practices)
 - Directive 2018-08 (Transparency)
- There has been meaningful progress, but **challenges remain**
 - Inconsistent application across audits
 - Lack of adequate detail/clarity/certainty

Guiding Principle

The OFCCP should always provide adequate information so the contractor can replicate Agency calculations and analyses

What is Transparency in Compensation?

- Clear understanding of the **data relied upon** and of **all data manipulations**
- Details of **methodology** (employee groupings & control factors)
- Applies to **all calculations & all audit stages**
 - Data sources and manipulations
 - Pay equity analyses
 - Damages computations



Leen Principle #2: Group Similarly-Situated Incumbents

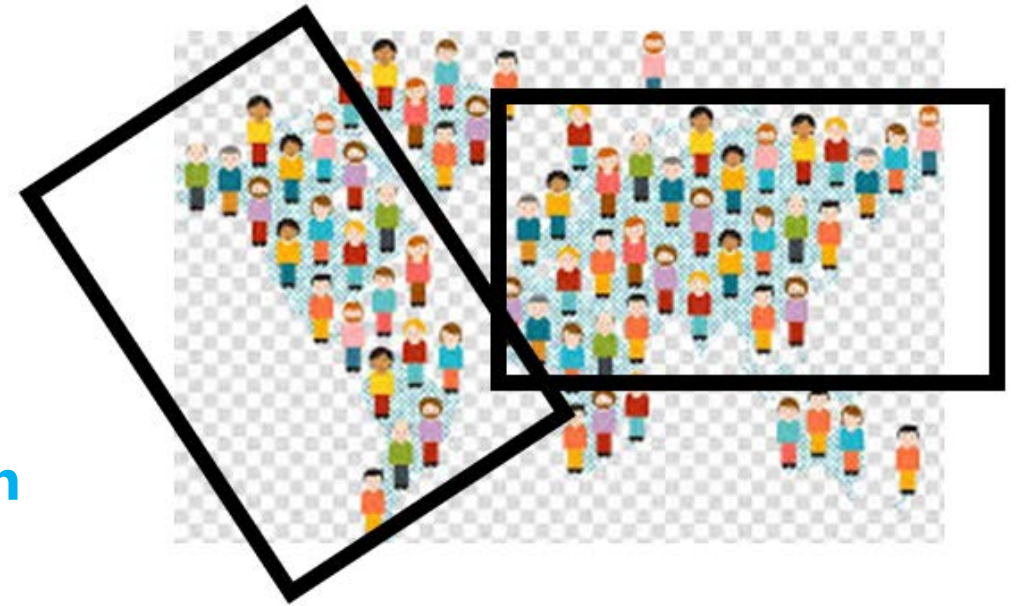
- Title VII requires reviewing similarly-situated employees, and **prohibits** using regression to align **dissimilar** employees for review
 - You can combine rum and coke
 - You can combine peanut butter and jelly

But whipped cream on beer?

- Agency will avoid combining employees or levels of employees that are not expected to be paid the same.
- You **cannot** combine employees or levels of employees who
 - Are not similarly situated (tasks performed, skills, effort, responsibility, etc.)
 - Are not expected to be paid the same

Leen Principle #3: “Reasonableness” - 70-80% of incumbents in SSEGs

- OFCCP should use contractor’s proffered compensation hierarchy and job structure if
 - Aligned to contractor’s compensation **policies**
 - Employees are under a **similar compensation system** and have similar job functions
 - Groupings are large enough to conduct **meaningful** statistical analysis



Expert Recommendations on “Reasonableness”

- Group employees that are similarly situated in **pay, skills and work complexity**
- Absent other considerations, OFCCP should commonly **accept contractor groupings** if they **allow at least 70%** of the workforce to be covered in a statistical analysis

Leen Principle #4 – Hold Discussions when OFCCP Creates its Own Groupings

- OFCCP “default” should be using contractor’s **“reasonable”** pay systems to conduct analyses
- OFCCP **must** provide detailed reasoning for rejection of contractor’s system
- OFCCP should respect the unique **context** and elements of the contractor’s compensation system

Expert Recommendations on Groupings

- **Use contractor's SSEGs/PAGs**, if presented, unless OFCCP can articulate a reason for rejection that is consistent with Director Leen's principles
- **Before** rejecting contractor's groupings, **define and discuss** with the contractor what the Agency believes to be missing or misspecified
- When OFCCP groups contractor data, it should model tenure, education, job level, grade, job code, market rate and other factors so they are **consistent** with the contractor's pay practices

Leen Principle #5: Avoid Over-Aggregation

- Why **small sample analysis**?
 - To investigate for systemic pay discrimination, OFCCP wants 80% coverage in audits.
 - **But** typically 50% of plan incumbents are in small groups
- PAGs are **not the best tool** for reviewing small groups
 - Different jobs have **different drivers** of pay
 - PAGs composed of disparate jobs with small groups may produce **inaccurate results**

Small Group Analysis, Continued

- When sample is **too small to use regression**, measure pay equity using
 - **Rank Sum**
EEOC: Federal Register Vol. 81, No. 20 / EEO1-Comp 2, fn 47
 - **Fisher's Exact**
EEOC Compensation Compliance: Section 10-III.3.B
 - **Cohort Analysis**
EEOC Compensation Compliance: Section 10-III.2
 - **T-tests**
Any basic statistics text
 - **A Combination of Tools**
- OFCCP **can** meet its goal to analyze 70-80% plus of the workforce by using appropriate small group tests



Expert Recommendations on Small Group Analysis

- Contractors – use small tests as a triage tool, followed by **employee-level research** to review potential problems that the tests identify
- OFCCP – **please** identify a **small set of simple tests** that contractors can use for self-audit
- OFCCP - If small tests do not reveal potential problems, **please do not combine groups to “find” a problem - or the search could go on forever ...**



Guiding Principle – Compensation should not be an exception to the “Certainty” pillar !

Leen Principle #6: Always Evaluate “Interactions”

- **Aggregation**: pay comparisons within a job or within a group of jobs
 - The more one attempts to compare dissimilar employees, the more **complicated** comparisons become
 - What do employees do? How well do they do it? How are they paid?

So, You Want to Aggregate?

*“Be careful what you wish for,
lest it come true!”*

Aesop's Fables

Aggregation: This gets confusing fast!

- **Simple Model:** Time-in-job, time-in-other-jobs, prior experience & organization
- Job – Employees who are impacted **equally** by “determinants of pay”, i.e., pay is expected to grow by 3% for each year in the job
- Group of Jobs – Employees **across** “jobs” may be impacted **unequally** by determinants of pay, e.g.:
 - Job A: Pay grows by 4% per year
 - Job B: Pay grows by 2% per year

Note: Gender pay often
differs across jobs

Aggregation: Confused yet?

- How can we account for potential differences across jobs if choosing to aggregate?
 - Include **“interaction”** terms and test their statistical importance
 - If relevant interactions are omitted, regressions are **flawed, meaningless, and potentially misleading**
 - **Interactions must be considered carefully**, ambiguity can lead to different and conflicting statistical models – i.e., **complete confusion**



Expert Recommendations on Aggregation

- Aggregation **complicates** the statistical model and can be confusing due to ambiguities in how the model is built – **beware!**
- If done incorrectly, the statistical comparisons are **meaningless** and lead to unsupported conclusions
- It is not clear that aggregation leads to increased “statistical power” => **no benefit**
- There is a way to avoid this complication...
Don't aggregate!

Leen Principle #7 - Control for all variables that the contractor uses

- If OFCCP insists on using regression analysis, Directive 2018-05 suggests and Analogics holds that OFCCP must **use the contractor's major factors** to reflect the contractor's compensation practices
- However, OFCCP practice often **jettisons** contractors' groupings:
 - Regrouping to ensure 10+ employees for each variable in the regression ("10:1 rule")
 - Regrouping to ensure 5+ employees in each level of a variable included in the regression ("Rule of 5")

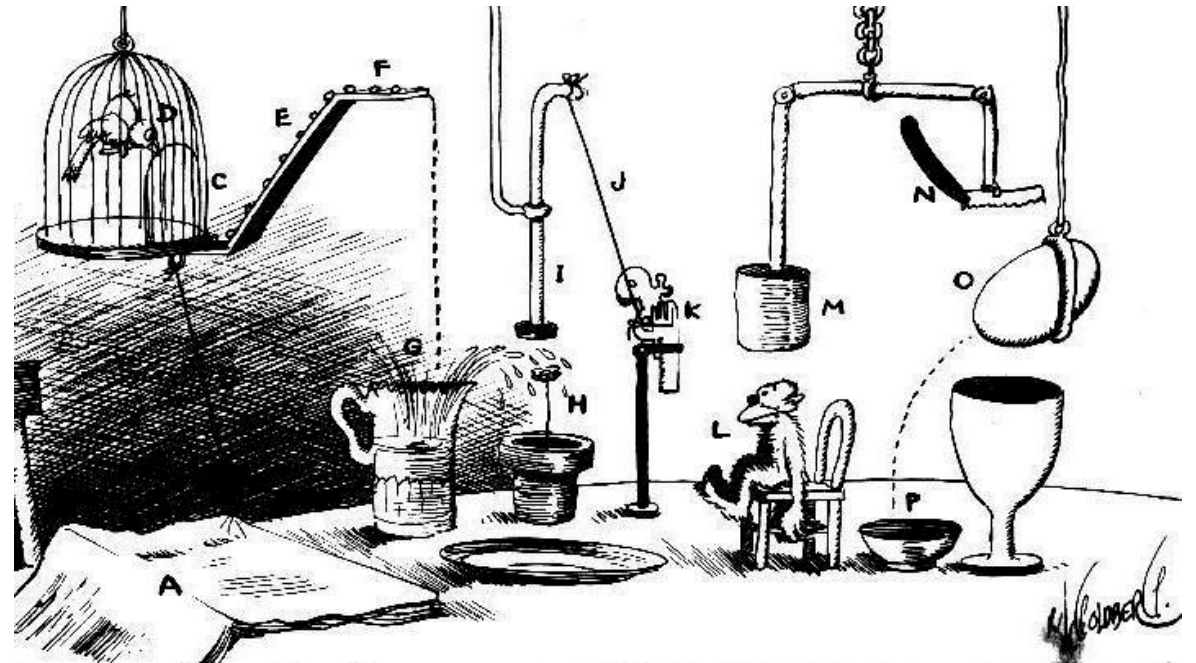
More on Variables

- **Unfortunate Aspects** of OFCCP Practice:
 - To meet the 10:1 rule, OFCCP **omits necessary variables** or **combines jobs that are not similarly situated**
 - To meet the Rule of 5, OFCCP **combines levels of a variable** that do not reflect a contractor's actual practices ("variable fusion")

| Grade | Salary | Grade Midpoint | OFCCP Grouping |
|-------|-----------|----------------|------------------|
| 6 | \$245,000 | \$240,000 | Grades 6, 7, & 8 |
| | \$235,000 | | |
| | \$225,000 | | |
| 7 | \$180,000 | \$185,000 | |
| 8 | \$130,000 | \$125,000 | |
| | \$120,000 | | |

More on “Variable Fusion”

- OFCCP **complicates** matters by merging highest and lowest performance categories, grouping very different locations, grouping unrelated job codes, etc.
- Such “fusion” can cause **misleading** results
- Absent **complete** transparency, contractor cannot duplicate OFCCP results



Expert Recommendations on Variables

- **Don't** combine jobs or employees that are not similarly situated
- **Don't** exclude variables (e.g. performance) on the **assumption** they are **"tainted"**
- **Don't** use "Rule of 5" and "10:1"
- **Don't** combine levels into meaningless combinations
- **Don't** combine employees or levels of employees who are not similarly paid!

Leen Principle #8: Ensure that Reviews are Fair

- Directive 2018-05 is a **significant improvement** over Directive 307
- It encourages contractors to develop PAGs that are **consistent with SSEGs**
- FAQs acknowledge that **not all statistical indicators are “practically significant”**

Issue –

Unless OFCCP respects the contractor's reasonable PAGs and all of the elements of the contractor's pay system, aren't we right back to Directive 307?

Expert Recommendations on Fairness

- OFCCP **should understand** that contractors **care** about pay equity
 - 1,300 attended February Compensation Roundtable!
 - Contractors seek expert advice even when the OFCCP is not auditing them
- **Fairness requires reasonable and transparent OFCCP review**

Reflections on the OFCCP's BES Presentation

- It is **positive** that the OFCCP recognizes that finding a few indicators **does not equal** a pattern of discrimination
- It is also encouraging that the OFCCP is reviewing the statistical literature and recognizing the **importance of reviewing outliers** to understand indicators
- Unfortunately
 - OFCCP **avoids committing** to using the contractor's PAGs or including in its analyses all the pay factors submitted by the contractor
 - OFCCP continues to hold an **unbalanced** view of statistical tests:
"...Failing the test" is a very bad sign, but passing it may convey little to no information..." (BES Presentation, Slide 8, emphasis added)

Expert Recommendations on Fairness

- OFCCP **should adopt contractors' PAGs** (or clearly articulate concerns about them)
- **Avoid aggregation**
- **Provide definitions** of “practical significance” and “systemic discrimination”
- View an indicator not as **not proof** of discrimination but as a call for further review

Conclusion

Let's continue to **work together** to ensure that Compensation reviews

- “Follow the law and use well-accepted tests”
- Ensure certainty
- Ensure efficiency



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Nashville, Tennessee

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