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Higher Education Institutions May Be Back in the Department of Labor's Crosshairs

The gender equity movement focused higher education institutions on pay equality. For example, in 2016, the Equal Employment Opportunity Commission (EEOC) sued the University of Denver alleging gender discrimination in professor compensation that resulted in the university paying \$2.66 million to resolve the matter. Now, the recent racial justice movement has raised the stakes for these institutions. The current landscape includes aggressive efforts on the part of institutions to further commit to diversity, equity, and inclusion to fend off costly government investigations and litigation. These emerging trends came into focus with the U.S. Department of Labor announcing that it had settled two pay discrimination cases against major universities with one resolution totaling \$1.2 million. Especially in these times of financial and structural challenge, it is important for institutions to reduce risks and costs where they are able to do so.

The DOL's Office of Federal Contract Compliance Programs (OFCCP) has made it clear that it will begin targeting higher education institutions. In 2018, the agency had paused its compliance audits of institutions by removing them from its scheduling list. In the meantime, OFCCP wrote and [issued](#) its Technical Assistance Guide (TAG) for higher education institutions. The TAG provides general and specific guidance on how OFCCP will approach its reviews of institutions and how institutions should approach their compliance obligations as they relate to hiring, promotions, pay, and other employment actions. However, the TAG contains significant language regarding how the agency will approach compensation, suggesting that the agency will aggregate various groups into single "pay analysis groups" for statistical analysis and attempt to use statistical controls to account for job differences. The agency utilized this approach in one of the recent settlements which grouped all full professors into a single pay analysis group without any controls for market factors. This fall, OFCCP has made clear that higher education institutions are slated to be reviewed again and that the agency will attempt to utilize this approach, raising major questions from legal and statistical standpoints. From a legal standpoint, OFCCP's approach is contrary to the touchstone of Title VII compensation law which provides that liability exists where pay disparities occur among employees who are similarly situated. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76 (1978). On the statistical front, many labor economists disagree that statistical controls can account for job similarity in data sets incorporating a wide range of job duties. Notwithstanding these contractor concerns, OFCCP's approach increases the risks that the agency will calculate (and demand) large back pay settlements.

We do not expect Joe Biden's election to change the landscape for higher education institutions significantly. Rather, we anticipate that the incoming Biden administration will renew its focus on more aggressive approaches. Compensation practices will remain top of mind as the administration will likely focus significantly on highly paid positions such as professors and senior leaders. The tactics will likely move from a compliance mindset to an enforcement mindset. To that end, new leaders at the agency will likely seek out large settlements and enforcement complaints as a way to send a message to contractors that the agency is focused on enforcement. Further, we anticipate that the agency will dial back its Early Resolution Procedures program with its pass on audits for five years likely to be withdrawn. Finally, while not directly relevant to federal contractor EEO compliance, we expect that this administration will put forward union-friendly policies whenever possible.

Higher education institutions can take steps in anticipation of enhanced scrutiny, including by conducting internal pay equity audits—under attorney-client privilege—that can not only forecast how OFCCP will look at their compensation systems, but also evaluate pay using accepted Title VII concepts. These evaluations and targeted adjustments greatly reduce the issues that OFCCP may target during a compliance audit into pay practices. Further, institutions should evaluate their affirmative action plan (AAP) structure. An effective AAP structure and strategy can negate some of the more aggressive tactics employed by OFCCP's statisticians in

compensation cases.

The federal government's focus on these areas will continue to present risks for higher education and institutions should ensure that experienced counsel can assist them in seeing around the corner to address any overreach.

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