



# **What Does Your Data Say? – Defending An EEOC/OFCCP Statistical Analysis of Your Employment Practices.**

Elizabeth A. Schallop Call

# When Would An Agency Request Your Data?

- OFCCP

- Desk audit submittal
- Areas of potential concern
  - Applicant/hire data
  - Compensation data



- EEOC – investigations of systemic discrimination under:
  - Title VII (background check practices, pre-employment testing)
  - Americans with Disabilities Act (no fault attendance policies, leave policies)
  - Equal Pay Act

---

## What's The Big Deal?

- ✓ RFIs request data in electronic format – allowing for total manipulation and analysis of data.
- ✓ Most employers do not keep all information relevant to their selection, hiring, etc. decisions in electronic format.
- ✓ The EEOC/OFCCP has staff statisticians and regularly submits data for regression analysis.
- ✓ The EEOC/OFCCP *does not* know your business or factors driving your decisions which should be included in regression analysis.
- ✓ Both agencies may seek back-pay, and sometimes injunctive relief, based largely on statistical findings.

---

## Exposure To Big Dollar Settlements - OFCCP

- **Baldor Electric Co. (June 2012):** Company agreed to pay \$2M in back wages and interest to settle allegations of systemic discrimination against women and minorities stemming from the company's applicant screening process and to make at least 50 job offers to members of the original class as positions become available.
- **Brunswick Corp., Lund Boats Co. (Sept. 2012):** Companies agreed to pay \$295k to 185 female job applicants who were rejected for entry-level positions and to extend job offers to at least 27 women in the original class as positions open.
- **Meyer Tool, Inc. (Sept. 2012):** Company agreed to pay \$325k in back wages and interest to 60 qualified African-American applicants who were rejected for entry-level machinist positions and will extend job offers to at least 11 members of the original class.

---

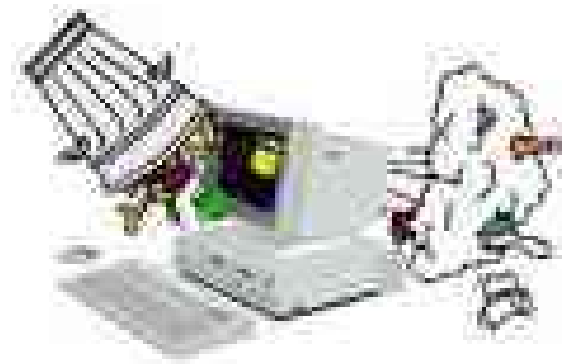
## Exposure To Big Dollar Settlements - EEOC

- **EEOC v. Sears, Roebuck and Co. (Sept. 2009):** The Company paid \$6.2M to settle allegations that it violated the ADA by having a rigid worker's compensation leave policy which automatically fired employees at the end of one year of leave.
- **Verizon Wireless (July 2011):** Company paid \$20M to settle a suit challenging its no fault attendance brought by the EEOC.
- EEOC investigations take longer and are more likely to lead to litigation.

---

## “Bad Doer” Or Bad Data?

- Bad or misleading data can lead to erroneous findings.
- Incomplete data also is bad data.
- Once bad data is provided to the agency, it is difficult to back track.



---

## Examples Of Bad Or Incomplete Data

- When responding to an applicant/hire or failure to hire concern:
  - Missing, incomplete or overly general disposition codes for applicants, i.e., not most qualified applicant.
  - Missing applicant data, i.e., applicants sourced by third parties.
  - Failure to identify non-applicants.
    - Did not meet basic qualifications.
    - Did not consider.



---

## Examples Of Bad Or Incomplete Data

- When responding to concerns regarding other employment practices, i.e., pay, leaves:
  - Non-descriptive or misleading HRIS codes for pay changes, leaves or other employment decisions.
  - Information used to make hire, pay, separation decision is kept in hardcopy or scanned personnel files – not in HRIS, applicant tracking or other system.





---

## What Are The Risks Of Providing Bad Data?

- False positives, i.e., inaccurate statistical findings.
- Threat of litigation.
- Settlements for back pay, injunctive relief and possibly compensatory damages (Title VII).
- Loss of contractor status (for federal contractors).



---

## Important Considerations When Responding To A Data Request.

- The agency generally will not give you the “benefit of the doubt.”
- The agency has the “upper hand.”
  - In-house statisticians at no additional cost.
  - Statisticians can be costly.
- The EEOC/OFCCP investigator will not be familiar with your HRIS or how you manage your data.
  - Overbroad and confusing requests for data.
  - Data requests may be irrelevant or “fishing expedition.”
  - May not ask for the correct data.

---

## Avoiding The Typical Misguided Notions

- *“If I bury them in information, they won't know where to start.”*
- *“We are a good company and try to be fair. Our data would not show any problems.”*
- *“I looked at the data and it seems fine. It must be O.K.”*
- *“If I ignore the request, maybe, they will go away.”*



---

## Responding To A Data Request

- Ensure data integrity.
  - Is the data correct?
  - DO NOT submit data that you have not verified first.
- Provide a comprehensive response.
  - Does the data provide the complete story?
  - Do we need to include additional information to clarify the decisions at issue?
  - How can we include this information in an electronic format so that it can be factored into an analysis?

Best practice: Review the data and run the analysis *before* submitting it to the agency. Caveat: Cost considerations.

---

## Three Steps For Responding To A Request

- **Prepare** your data.
- **Analyze** your data.
- **Communicate** the company's position.
  - In your submittal
  - Talk to your contact at the agency to understand their continued concerns and provide clarifying information.



---

## Preparing Your Data

- What are they looking for?
  - Pay discrepancy?
  - Disparity in selection process?
  - Concern about disparate impact of a policy or practice?
- What data would answer their questions?
- Do we have this data available in electronic format? If not, where is it?

---

## Example

**OFCCP is concerned that your Hispanic RNs are paid lower than your White and Asian RNs. The OFCCP asks for all information that would explain your pay decisions with respect to your RNs, including the factors listed in the request, such as time with the company, time in job, etc.**

*How do you respond?*

- 
- A) Provide the information requested that is available electronically in the HRIS.
  - B) Same as A but also offer to provide the rest of the information in paper form.
  - C) Same as A but consider what other information would best explain the company's pay decisions and provide it electronically if available, otherwise in paper form.
  - D) Same as C but figure out how to provide the additional information electronically with the submittal.



---

## Example (cont.)

**The company's compensation policy computes starting pay based on the RN's prior years of experience. Your HRIS does not include this information, and manually compiling this information would be very time consuming. You really don't have the time or the resources to do it right now.**

???

---

## Conducting Your Own Analyses

- Why?
  - Level the playing field, i.e., understand what the agency will see in their analysis.
  - Identify additional factors to provide for inclusion in the agency's analysis.
  - Identify the correct model to assess your pay practices.
- How?
  - Retain an expert.
  - Consider privilege issues.

---

## Best Practice

Review the data and run the analysis *before* submitting it to the agency.

Caveat: Cost considerations.

## Use Your Expert Wisely

- Understand and replicate the agency's statistical model(s).
- Provide guidance on capturing other factors in your analysis.
- Explore various regression models to better understand the factors driving the employment practice at issue, i.e., pay rates.
- Identify outliers.
- Act as an interpreter.



\* The assistance of an expert can be priceless.

---

## Other Information To Include In Your Response

- *All* additional data needed to explain the challenged employment practice – in electronic format.
- *All* policy or practice documentation, i.e., compensation practices, leave policies, personnel file information (for outliers).
- Keys or other explanations of data, i.e., field names or contents.
- A narrative explaining the data provided and the appropriate statistical model and factors for the analysis, including identification of outliers.



---

## Managing The Relationship With The Agency

- Keep in mind that the investigator is just doing her job.
- Educate the agency on your business and practices.
- Help the agency resolve their concern.
- A “hide the ball” strategy is rarely effective.
  - This is not litigation.
  - The agency has unlimited resources and time for the investigation.
  - Credibility is key.



---

## Another Example

The EEOC is investigating your leave policy. The EEOC requests all of your leave data for the location at issue dating back to 2006. When you review your HRIS data, it is clear that:

- 1) There is an enormous amount of data; and
- 2) The data does not provide the complete picture, i.e., it doesn't explain why many employees did not return from leave.

How do you respond to the EEOC?

- 
- A) Provide the information requested and keep your fingers crossed that the EEOC lets it gather dust and does nothing else with it.
  - B) Same as A but provide more than requested and hopefully bury them with data.
  - C) Provide the information requested and then review the data to understand any concerns and have answers ready when asked.
  - D) Review the data before providing it to the EEOC to understand what potential concerns they may identify and what additional information you may want to provide with your submittal.



---

## Other Considerations and Final Thoughts

- Always keep in mind what the agency is investigating and what they will do with your data.
- Different types of inquiries require different analyses and responses.
  - Pay Data
  - Applicant/hire Data
  - Leave Data
- Put the time in *now* to understand your data.
- Use your expert as an “interpreter.”
- Stay in touch and monitor the investigation.

---

Questions???