

Compliance Issues Come To The Fore In Human Resources

By Peyton Keaton and Scott Hudson

Compliance regulations are no doubt a constant in our industry, but some areas seem to go through periods of relative quiet. One area of compliance that seems to have been stimulated lately is that of human resources. Affirmative action, equal pay, and wage and hour issues have recently become somewhat more visible, so we turned to Seay Management Consultant, an ACB Partner company, for a brief review of some of these issues. ACB members have instant consulting access to Seay Management at no cost, to discuss any human resources issues of concern.

As community bankers, we are faced with regulators and compliance concerns at every turn. In the current political climate, a sense of urgency permeates the Department of Labor and financial institutions are experiencing a growing number of new and very serious types of Department of Labor investigations. The challenges facing the industry are two-fold; financial institutions are confronted with (1) an increasing number of affirmative action compliance reviews and (2) the enforcement agencies targeting reviews of pay discrepancies between men and women, as well as minorities and non-minorities.

According to the Office of Federal Contract Compliance Programs, the agency increased both the number of affirmative action reviews and the amount of money awarded to minority and female workers during the last fiscal year. The overall recovery in financial settlements was \$41.6 million, up from the previous year's total of \$35.5 million and the highest in OFCCP history. With respect to Equal Pay investigations, the OFCCP garnered more than \$10

million in pay-related settlements in a recent five-month period and increased glass ceiling reviews by 10 percent.

Who Is Required to Develop an Affirmative Action Program?

According to federal regulations and requirements, financial institutions with 50 or more employees are required to develop, implement and maintain a written affirmative action plan covering minorities and women, disabled persons and veterans. An affirmative action plan is a complex document, which includes a plethora of statistics, charts, analyses and other information. It is a plan for insuring that minorities, women, veterans and disabled individuals are employed and moved through the workforce in representative numbers.

Failure to develop a compliant program in accordance with Executive Order 11246 could subject a financial institution to the loss of federal insurance, but would more likely include an enormous amount of federal oversight and supervision of employment practices and policies and a heavy financial liability. The OFCCP has already

flagged 7,000 federal contractors as potentially out of compliance with affirmative action requirements and Executive Order 11246. That's why it's so important to make sure that you have an affirmative action plan that is: (1) written according to the government's requirements and (2) updated on an annual basis.

Equal Pay Focus: Is Your Institution A Target?

The Department of Labor has initiated a very specific program to address pay discrepancies that may exist between males and females, as well as minorities and non-minorities. Since the initiation of the Equal Pay Initiative in 1999, the Department of Labor has recovered more than \$15 million in back pay for 11,000 women and minorities and resolved more than 30 pay-related actions. The Equal Pay Initiative was developed in order to assist in eliminating pay gaps that are based on discriminatory, non-job-related factors.

The Equal Pay Initiative focuses on three areas within the agency's authority: (1) ending pay discrimination; (2) eliminating

occupational segregation; and (3) promoting pension equity.

One of the biggest concerns for community bankers is that the Department of Labor places the burden of proof on the employer. This means that if you are unable to prove that your pay practices are based on non-discriminatory factors, the agency will assume you are guilty.

What Can You Do?

We recommend that community banks stay a step ahead by reviewing their compensation practices to ensure rates of pay are defensible on proper, nondiscriminatory factors. Typically, consider the following factors when determining rates of pay:

- Length of time at the company, in the position, or both;
- Size of branch;
- Grade or pay level;
- Market value of the position, both due to the job and geographic location performance evaluations;
- Education or certificates required;

- Relevant experience; and
- Any other job-related and nondiscriminatory factor.

Some of the approaches OFCCP compliance officers use as they conduct evaluations include:

Median approach. The median value for men and women is calculated and compared for each element affecting compensation. The medians are then compared, both individually by element and for combinations of elements, such as length of service and pay, or performance ratings and pay.

Average approach. For example, the government would compare the average salaries of male branch managers to the average salaries of female branch managers. If there is a discrepancy, the question becomes: Can the institution point to specific and consistent nondiscriminatory factors to explain the higher average pay of the group?

These are just two of the numerous types of compensation analysis that the OFCCP may perform during an audit. The problem with these two types of compensation

analyses, like many others, is that the results may be skewed by a number of variables. For example, should you have your salary data analyzed via the “average approach,” the government may question why your male branch managers are paid more than their female counterparts. You may defend the pay gap by rationalizing that your male branch managers have more length of service. However, should the compliance officer find that the average performance evaluations for the female branch managers are clearly more favorable than their male counterparts, you may be put in a tough position of trying to validate the pay differential. The bottom line is that it is critical that each community bank has identifiable, job-related reasons for discrepancies in pay.

Recommendations

We recommend that financial institutions with 50 or more employees develop an affirmative action plan immediately. Owing to the complexity of development, you may wish to consider outsourcing this project. With respect to equal pay liability, at the very minimum, we recommend that each financial institution conduct a compensation assessment to determine potential equal pay liability. Employers would also be well advised to develop a salary administration program that lends a large measure of objectivity to the establishment of pay rates.

The landscape of employee regulations is changing in an expeditious manner and financial institutions represent a prime target of the OFCCP. A timely review of your current practices in these sensitive areas could pay large dividends. **15**

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