



Written by [Veronique de Rugy](#) on January 16, 2020

Social Engineering Run Amok in the Department of Labor

A few years ago, the U.S. Chamber of Commerce released two reports detailing enforcement and litigation abuses by the Department of Labor's Office of Federal Contract Compliance Programs, or OFCCP. Instead of holding firms accountable when they engage in real discrimination against their employees, the agency has become a government arm for securing high-dollar settlements on dubious grounds.



Congress has not moved to rein in this abuse, though that may change if one of the few companies that are finally standing up to the agency prevails against its abuser.

Created by a Lyndon Johnson-era Executive Order 11246, OFCCP enforces the federal government's affirmative action and anti-discrimination mandates on federal contractors. It typically does so through routine audits, which are often fishing expeditions. The behavior of its auditors has been widely criticized for decades. Complaints include allegations of arbitrary and abusive exercises of power, waste of resources and intimidation. There's no good excuse for this type of bullying by a government agency.

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Because the agency has the power to debar contractors — meaning the government will no longer do business with them — companies fear retribution if they defend themselves. One recent exception is Google, which decided that supplying 740,000 pages of documents at the cost of 2,300 man-hours and about \$500,000 ought to be enough for the agency to review the firm's compensation practices. When OFCCP said it wasn't and Google needed to send over the names of its employees, OFCCP sued. Google won a victory in which a Labor Department administrative law judge — with every incentive to defer to the government — found that OFCCP's additional demands were “over-broad, intrusive on employee privacy, unduly burdensome, and insufficiently focused on obtaining the requested information.”

This private-sector vindication, however, is an exception to the rule. OFCCP recently extracted its largest ever settlements from Goldman Sachs and Dell Technologies — \$10 and \$7 million, respectively — and, shortly before that, got \$4.2 million from Bank of America. But those numbers pale in comparison to the \$400 million OFCCP alleges that Oracle Corp. owes to female, Asian, and African American employees. The only thing more astonishing than the amount of money sought is the flimsiness of the government's case.

To prove its discrimination claim, OFCCP relies entirely on a statistical analysis that fails to reflect the labor market's great complexity. For instance, the government uses crude controls for employee education and experience, both of which have a large impact on compensation. For education, OFCCP considers only an employee's degree level but not whether the degree is actually relevant to the job performed. As for experience, it considers only the employee's age and time at Oracle, omitting both length at the current position — which is where the most useful experience is gained — and the relevance of prior work. OFCCP, in other words, thinks that any employees of the same age and with the same tenure with their current employer possess the same experience.



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OFCCP's analysis also treats employees with the same job title as similarly situated, creating more grounds for discrimination claims. However, a software engineer working on databases does very different work than one who develops artificial intelligence. Yet if the worker in the higher-demand field, who can therefore demand higher pay, happens to be Caucasian or male, while the other is female or a minority, then the government concludes the pay disparity is due to discrimination by Oracle.

In short, the government fails to compare like employees to like, and it doesn't control for perfectly innocent variables that explain pay differences.

Thankfully, Oracle is fighting back. Unfortunately, the ideas driving the social-engineering agenda are spreading. In 2018, California instituted quotas for the number of women on corporate boards. And Sen. Elizabeth Warren proposes even more interference from the federal government, such as banning contractors from asking about salary or criminal history and requiring significant reporting on employee pay, broken down along demographic lines. For companies that contract with the federal government and employ about a quarter of the American workforce, such invasive requirements carry a hefty compliance cost for government contractors and taxpayers.

Quite a lot is riding on whether Oracle can fend off the government goliath. Given the size of the case, a government victory will almost certainly embolden the social engineers even further.

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