



- Our mission is to create workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and promoting affirmative action and equal employment regulatory compliance –

**A REVIEW OF OFCCP ENFORCEMENT STATISTICS:
A CALL FOR TRANSPARENCY IN OFCCP REPORTING**

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March 2009

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EXECUTIVE SUMMARY

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“Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public.”¹
Barack Obama, January 21, 2009

Introduction: The Center for Corporate Equality (CCE), a national nonprofit employer association, conducted a comprehensive analysis in 2008 of the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) equal employment and affirmative action enforcement results for fiscal year 2007. We conducted this study because OFCCP does not publicly release detailed data about its fiscal year enforcement results. The in-depth results of our analysis will provide useful information about OFCCP’s enforcement programs that the agency does not make publicly available. This information will also assist federal contractors subject to OFCCP review with important information that will facilitate their compliance with the agency’s EEO and affirmative action requirements.

¹ “Transparency and Open Government,” Memorandum for the Heads of Executive Departments and Agencies, President Barack Obama, January 21, 2009. ([74 Federal Register 4685-4686, January 26, 2009](http://www.federalregister.gov)).

CCE calls upon the OFCCP to become transparent in the reporting of its fiscal year enforcement results. We urge the OFCCP to conduct comparable analyses of its enforcement results in the future and make this data available to the public.

Background: In recent years the OFCCP has released “record breaking” results of their enforcement efforts to ensure employers doing business with the federal government comply with the equal employment opportunity (EEO) and affirmative action provisions of their contracts. For fiscal years 2005 through 2008, OFCCP reported that it had conducted a total of nearly 16,000 audits of federal contractors’ affirmative action programs and collected about \$215.8 million in financial remedies for approximately 76,800 workers through settlements with these contractors.

Despite these impressive statistics, however, OFCCP has publicly disclosed very few details about what kinds of discriminatory practices they found during their compliance evaluations of federal contractors and what kinds of employees and/or applicants were impacted by them. As a result, the public does not have access to important information it needs to fully evaluate how the OFCCP enforces its equal employment and affirmative action programs. Moreover, federal contractors do not have access to important information about these settlements that would help them improve their EEO and affirmative action compliance programs.

To address this enforcement data gap, CCE decided to take its own close look at the underlying information that OFCCP uses to develop its enforcement reports and to share the results with stakeholders. To our knowledge, this is the only publicly released report containing an in-depth analysis of OFCCP’s fiscal year 2007 enforcement results, the most recent year in which data was available for analysis.

What Data are Missing from OFCCP’s Reporting and Why is it Important? Several important details are missing from OFCCP’s annual enforcement reports that are important for stakeholders to understand. For example:

- What types of industries did the reported \$215.8 million in financial remedies come from?
- How were financial remedies calculated?
- Did covered individuals hold lower or higher level jobs?
- On what basis did contractors discriminate against covered individuals and what types of personnel practices were involved?
- How long does it take OFCCP to resolve a compliance evaluation that results in a settlement with financial remedies – one year, two years, or even longer?
- Does OFCCP enforce its programs uniformly across its various regional offices that serve as the front-line enforcers for the agency?

Additionally, given the public outcry over the gender wage gap and OFCCP's systemic compensation discrimination guidelines (2006), it would be useful to know whether, in fact, OFCCP uncovered systemic compensation discrimination against women in their pay, to what extent, and what personnel practices led to pay discrimination. In the 16,000 compliance evaluations conducted by OFCCP during the past four fiscal years, what did the OFCCP find contractors doing well, and in what areas could employers improve upon?

These are all examples of important data that would benefit the public, and would help contractors make any necessary improvements and adjustments in their EEO and affirmative action compliance programs. The detailed data would also provide valuable baseline trends to evaluate OFCCP's progress in subsequent enforcement reports.

Without detailed enforcement data, the public is unable to fully understand how the OFCCP carries out its mission and what impact their operations have on various constituencies. Even the U.S. Government Accountability Office (GAO), which conducted

a review last year of OFCCP's compensation discrimination enforcement,² concluded there was insufficient recordkeeping at the agency.

Analysis and Conclusions from OFCCP FY 2007 Settlements: CCE obtained settlements from OFCCP's regional offices for fiscal year 2007.³ Some settlements included financial remedies related to allegations of systemic discrimination, while others included only technical violations that did not require financial remedies. CCE decided to analyze only those settlements that resulted in financial remedies stemming from allegations of systemic discrimination. In total, CCE analyzed 58 conciliation agreements and three consent decrees from FY 2007 that resulted in financial results.

Here is a summary of the key findings:

1. Nearly all of the settlements (95 percent) involved allegations of systemic discrimination in hiring. Only five percent of the settlements involved allegations of systemic compensation discrimination. No OFCCP settlements in fiscal year 2007 involved allegations of systemic discrimination in promotions or terminations.
2. No "Glass Ceiling" Corporate Management Compliance Evaluations (CMCE), which is an audit of a corporate headquarters that focuses on identifying barriers to women and minorities advancing to senior executive positions, resulted in findings of systemic discrimination.
3. More than half of the settlements involved alleged systemic discrimination against applicants for lower level jobs in food service and manufacturing industries.

² "Federal Agencies Should Better Monitor Their Performance in Enforcing Anti-Discrimination Laws," Report to Congressional Requesters, GAO-08-799, U.S. Government Accountability Office, August 2008, <http://www.gao.gov/new.items/d08799.pdf>.

³ Note that no federal contractor names are listed in this report. Federal contractor identities were treated as confidential.

4. Certain lower level jobs, such as laborers and operative positions, were found in about three-quarters of settlements.
5. Only settlements involving allegations of systemic discrimination resulted in financial remedies for workers.
6. The average length of time between the start of the compliance evaluation and the signing of a conciliation agreement or consent decree was 2.5 years.
7. Women and minorities benefited in fairly equal numbers in these settlements.
8. There were no settlements from compliance evaluations of a Functional Affirmative Action Plan (FAAP), which is a plan based on functional or business units rather than a business location.
9. Enforcement strategies, such as the length of time to conciliation, how data were analyzed, how financial remedies were calculated, etc., varied between the six OFCCP Regional Offices that conducted the compliance evaluations.

Recommendation: We recommend the OFCCP conduct comparable analyses of its enforcement results in the future and make this data available to the public. This information will provide much needed important information to the public about OFCCP's operations and decisions.

Conclusion: We recognize the public has diverse interests and perspectives about how the agency should enforce its equal employment opportunity and affirmative action requirements mission. Transparency in OFCCP's enforcement reporting is one area where all stakeholders should find common ground. We call upon the OFCCP to become transparent in the reporting of its enforcement results.

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The authors alone are responsible for all findings and conclusions.

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About The Center for Corporate Equality

The Center for Corporate Equality (CCE) is a national nonprofit employer association based in Washington DC and dedicated to creating workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and promoting affirmative action and equal employment regulatory compliance. CCE members are the senior corporate leaders from the compliance, compensation, and staffing functions of some of the largest global corporations in the world.

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I. INTRODUCTION AND OVERVIEW

The U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) administers and enforces equal employment opportunity (EEO) and affirmative action requirements. In carrying out its responsibilities, OFCCP uses several enforcement procedures, including conducting compliance evaluations and complaint investigations of covered federal contractors and subcontractors’ personnel policies and procedures, obtaining conciliation agreements from contractors and subcontractors who are in violation of regulatory requirements and recommending enforcement actions to the Solicitor of Labor. OFCCP’s primary enforcement mechanism is to obtain conciliation agreements from contractors and subcontractors that violate OFCCP regulatory requirements and to recommend enforcement actions to the Solicitor of Labor in situations where conciliation fails.⁴ Each year OFCCP publishes a report on its annual fiscal year enforcement results.

OFCCP’s “Record Breaking” Results in FY 2005 Through FY 2008: For the past four fiscal years (2005 through 2008), OFCCP has reported that it conducted a total of nearly 16,000 audits of federal contractors’ affirmative action programs and collected a record \$215.8 million in financial remedies for approximately 76,800 workers through settlements with these contractors. The table below depicts the years in which OFCCP

⁴“About OFCCP,” posted on the OFCCP’s website at <http://www.dol.gov/esa/ofccp/aboutof.html>. OFCCP also identifies other enforcement procedures such as offering technical assistance to federal contractors and subcontractors to help them understand the regulatory requirements and review process, monitoring contractor and subcontractor progress in fulfilling the terms of their agreements through periodic compliance reports, forming linkage agreements between contractors and Labor Department job training programs to help employers identify and recruit qualified workers, and debarment—the loss of a company’s federal contracts. Other forms of relief available to victims of discrimination may also be available including back pay for lost wages.

obtained its record breaking results.⁵

Table 1: OFCCP Enforcement Activity from FY 2001-2008

Fiscal Year	Financial Remedies Obtained	Workers Recompensed by OFCCP Agreement	Compliance Evaluations
2008	\$67,518,982	24,508	4,333
2007	\$51,680,950	22,251	4,923
2006	\$51,525,235	15,273	3,975
2005	\$45,156,462	14,761	2,730
2004	\$34,479,294	9,615	6,529
2003	\$26,220,356	14,361	4,698
2002	\$23,975,000	8,969	4,135
2001	\$28,975,000	9,093	4,716
Change From 2001 to 2008	133%	170%	-8%

What Data are Missing from OFCCP’s Enforcement Reports? Several important details are missing from OFCCP’s fiscal year enforcement reports for 2005 - 2008 that are important for stakeholders to understand. For example, OFCCP released a two-and-one half page report of its enforcement results in fiscal year 2007.⁶ Similar to other OFCCP enforcement reports, the FY 2007 report provided only a few key statistics to describe the results obtained in this year.

Table 2 shows the 2007 statistical data OFCCP provided in its enforcement announcement and some important details that were not included in their report.

⁵“Detailed Year-by-Year Accomplishments by The Office of Federal Contract Compliance Programs,” posted on the OFCCP’s website: http://www.dol.gov/esa/ofccp/regs/compliance/detailed_accomp.html. The entire chart can be found under the section “Enhanced Conciliation Capacity Equals Stronger Enforcement.”

⁶ “OFCCP Once Again Produces Record Financial Remedies for a Record Number of American Workers in FY 07,” posted on the OFCCP website at <http://www.dol.gov/esa/ofccp/enforc07.pdf>.

Table 2: Information Included and Not Included in OFCCP’s FY 2007 Enforcement Announcement

<u>Statistical Data OFCCP Provided in its FY 2007 Enforcement Announcement</u>	<u>Data OFCCP Did NOT Provide in its FY 2007 Enforcement Announcement</u>
OFCCP obtained \$51,680,950 in back pay and annualized salary and benefits in financial remedies.	How were the financial remedies calculated? How much of the \$51,680,950 was back pay and how much of the total number was the annualized salary and benefits? What portion of the \$51,680,950 was actually distributed to workers covered under OFCCP settlements? ⁷
22,251 workers were recompensed by OFCCP settlements.	What kinds of jobs did these workers hold, e.g, lower level, professional/management, or senior level positions? What kinds of industries did these covered individuals work in? What protected groups were recompensed – did settlements focus on race, ethnicity, gender, disability, and/or veterans status?
4,923 compliance evaluations were completed.	What was the duration of these compliance evaluations from the start of the audit to the settlement agreement, e.g., one year, two years, or longer? Did OFCCP enforce its programs uniformly across its six regional offices that serve as the front-line enforcers for the agency? In other words, would a contractor’s facility in San Francisco be evaluated in a comparable way as their establishment in Dallas, Chicago, Atlanta, Philadelphia or New York?
98% [of the financial remedies of \$51,680,950) were collected in cases of systemic discrimination.	What types of systemic discriminatory practices did OFCCP uncover during these compliance evaluations, e.g, hiring, termination, promotion, compensation, etc.? What types of personnel practices and procedures were involved in discriminatory practices, and which ones were the most common?

⁷ Note that the portion of financial remedies actually distributed to covered workers is not included in settlements. Although there is a natural time lag for obtaining this information, it would be useful to understand how OFCCP enforcement relates to financial remedies actually received by employees and/or applicants.

<p>In FY 2005-2007 OFCCP closed an average of 11.4% of evaluations with a conciliation agreement compared with 6.7% of evaluations closed with a conciliation agreement in FY 2004.</p>	<p>According to this calculation, approximately 561 of the 4,923 compliance evaluations completed in FY 2007 were closed with a conciliation agreement. How was the balance of the 4,362 compliance evaluations closed? How many notices of violation did OFCCP issue and for what reasons? Did OFCCP uncover any noteworthy best practices in these compliance evaluations that would be useful to federal contractors?</p>
<p>OFCCP referred 14 systemic discrimination cases to the Solicitor of Labor and obtained \$18,051,288 in financial remedies for 6,980 workers.</p>	<p>What was the outcome of these 14 cases? For example, did these cases result in consent decrees? What types of systemic discriminatory practices did OFCCP uncover during these compliance evaluations, e.g, hiring, termination, promotion, compensation, etc.? What types of personnel practices and procedures were involved? What were the most common discriminatory practices that OFCCP uncovered? What kinds of jobs did these workers hold, e.g, lower level, professional/management, or senior level positions? What kinds of industries did these covered individuals work in?</p>
<p>OFCCP conducted 31 Corporate Management Compliance Evaluations (CMCEs)⁸ in FY 2007.</p>	<p>What types of systemic discrimination did OFCCP find in CMCEs (“glass ceiling audits”)? How much of the total \$51,680,950 in financial remedies in FY 2007 were related to CMCEs? How many women and minorities were recompensed under OFCCP agreements?</p>

These are all examples of important data that would benefit the public, and would help contractors make the necessary improvements and adjustments in their EEO and affirmative action compliance programs. In particular, since OFCCP released its systemic

⁸ “A corporate management review will determine whether such good faith efforts have, in fact, been made to ensure that qualified minorities, women, individuals with disabilities and covered veterans have an equal opportunity to advance to mid-level and senior corporate management.” A corporate management review will also determine: 1. whether there is any unlawful discrimination in selection processes and practices for mid-level and senior corporate management positions, including in any employee review procedures, or decisions on developmental assignments, and 2. whether minorities, women, individuals with disabilities, and covered veterans already in those positions are treated in a non-discriminatory manner in all aspects of their employment, including, but not limited to, assignments, total compensation (including benefits and perquisites), and developmental opportunities.” Federal Contract Compliance Manual (FCCM), Chapter 5 — Corporate Management Reviews, found at <http://www.dol.gov/esa/ofccp/regs/compliance/fccm/ofcpch5.htm>.

compensation discrimination guidelines in 2006,⁹ it would have been expected that the agency would have released data on their enforcement of these new guidelines.¹⁰

Without detailed enforcement data, the public is unable to fully understand how the OFCCP carries out its mission and what impact their operations have on various constituencies. Even the U.S. Government Accountability Office (GAO), which conducted a review last year of OFCCP's compensation discrimination enforcement, concluded that there was insufficient recordkeeping at the agency.¹¹ Additionally, other federal agencies, such as the Equal Employment Opportunity Commission (EEOC), are much more transparent in reporting enforcement results. The EEOC has routinely reported detailed data on its own discrimination enforcement results for several years.¹²

II. DATA AND METHODOLOGY

CCE decided to take its own close look at the underlying data OFCCP used to develop its enforcement report and to share the results with the public. This report is based on our analysis of the underlying data contained in conciliation agreements and consent

⁹“Final Interpretive Standards of Systemic Compensation Discrimination Under Executive Order 11246,” [71 Fed. Reg. 35124 \(June 16, 2006\)](#). “Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination,” [71 Fed Reg. 35114 \(June 16, 2006\)](#).

¹⁰OFCCP's release for its FY 2008 enforcement results also did not contain specific data regarding the number of workers recompensed in systemic compensation discrimination claims. “Higher and Higher: OFCCP Wins Record Annual Number of Financial Remedies for More American Workers Than Ever Before,” U.S. Department of Labor Press Release, December 30, 2008. http://www.dol.gov/esa/ofccp/regs/compliance/detailed_accomp.html

¹¹“Federal Agencies Should Better Monitor Their Performance in Enforcing Anti- Discrimination Laws,” Report to Congressional Requesters, GAO-08-799, U.S. Government Accountability Office, August 2008, <http://www.gao.gov/new.items/d08799.pdf>.

¹²Equal Employment Opportunity Commission Charge Statistics, FY 1997 Through FY 2007, <http://www.eeoc.gov/stats/charges.html>.

decrees believed to have formed the basis for OFCCP's FY 2007 enforcement results.¹³ The data came from 58 conciliation agreements and three consent decrees that resulted in financial remedies and were finalized in FY 2007, the most recent year in which data were available for analysis.

The types of data found in these settlements and analyzed included:

1. Types of employment processes and procedures, such as compensation, hiring, promotion, termination, etc. that resulted in systemic discrimination settlements;
2. Types of industries where most settlements occurred;
3. The job levels and position titles of employees who most often benefited in FY 2007 settlements, and the specific details of those settlements, such as financial remedies;
4. Technical aspects involved in these settlement agreements; for example, how did OFCCP determine whether there was systemic discrimination?
5. Potential differences between OFCCP regional offices in their investigatory approach and resultant settlements.

Figure 1: The Settlement Review Process: This figure displays a five-step process flow of how we reviewed the data in this report.

¹³CCE sent a request to OFCCP's national office requesting copies of fiscal year 2007 conciliation agreements. The OFCCP treated CCE's letter as a request under the Freedom of Information Act (FOIA). OFCCP's regional offices submitted their FY 2007 conciliation agreements, and in addition, one OFCCP regional office submitted two consent decrees in addition to conciliation agreements. CCE obtained the third consent decree separately from the request made to the OFCCP. CCE cross-referenced OFCCP consent decrees with the BNA Daily Labor Report® archives and other publicly available databases, and there were no additional consent decrees that were publicly available. However, CCE has been unable to independently verify whether it has all of the relevant consent decrees in FY 2007. This report included the analysis of three finalized consent decrees from FY 2007. OFCCP reported referring 14 cases to the Solicitor's Office in 2007. The temporal lag between referring a case to the Solicitor's office and having an administrative law judge (or federal district court judge if a ruling is appealed) decide the case may explain this difference, although no data are available to confirm this explanation. An understanding of cases that OFCCP referred to the Solicitor's office would be useful to federal contactors interested in improving their equal employment and affirmative action compliance.

Step 1: OFCCP's six regional offices provided CCE with copies of their fiscal year 2007 settlement data in response to CCE's request for this information. Each OFCCP regional office¹⁴ provided CCE with copies of conciliation agreements resolved within their region during this timeframe. Each regional office redacted certain types of common information from the conciliation agreements pursuant to the Freedom of Information Act.

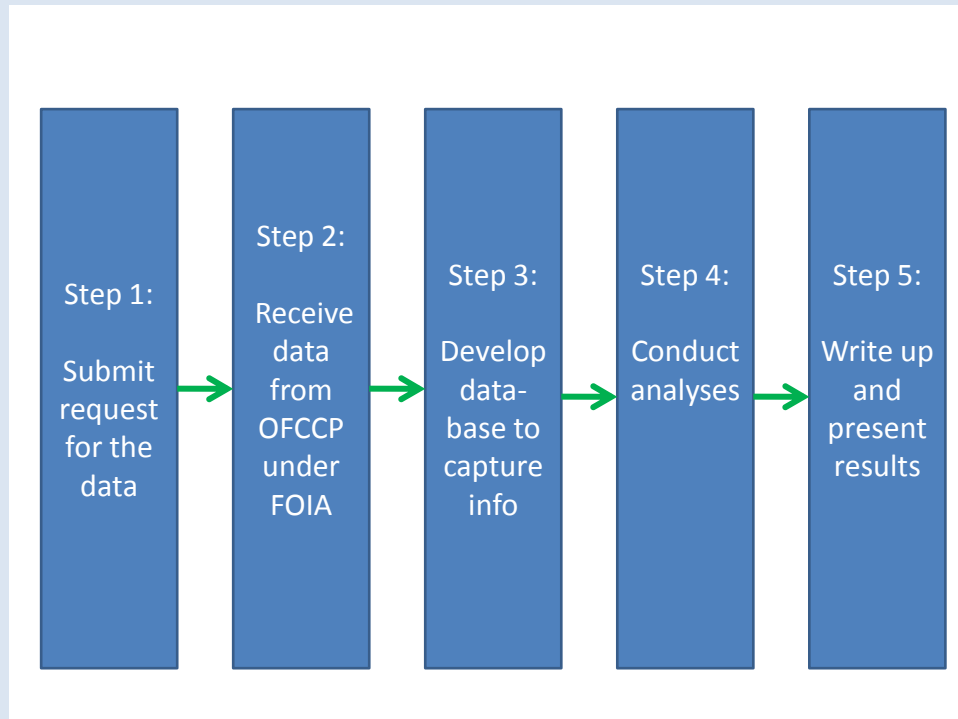
Five of the six OFCCP regional offices submitted conciliation agreements that contained the specific financial remedies involved in the settlement. However, one OFCCP regional office redacted the financial remedy data from the conciliation agreements submitted to CCE. Since we did not possess all of the financial remedy data from every regional office for FY 2007, we were unable to include these data in the report.

Step 2: CCE decided to analyze only the data contained in settlements resulting in financial remedies to mirror how OFCCP reported its FY 2007 enforcement results. These settlements all involved allegations of systemic discrimination.¹⁵

¹⁴Six OFCCP regional offices are responsible for enforcing equal employment opportunity and affirmative action laws and regulations. These offices are: Northeast regional office (New Jersey, New York, Puerto Rico, Virgin Islands, Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont); Mid-Atlantic regional office (Delaware, District of Columbia, Maryland, Pennsylvania, Virginia, West Virginia); Southeast regional office (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, Tennessee); Midwest regional office (Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio, Wisconsin), Southwest and Rocky Mountain regional office (Arkansas, Colorado, Louisiana, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Texas, Utah, Wyoming); and Pacific regional office (Alaska, Arizona, California, Guam, Hawaii, Idaho, Nevada, Oregon, Washington). <http://www.dol.gov/esa/ofccp/contacts/ofcpckeyp.htm>

¹⁵ In many cases there were both systemic and technical violations in a settlement. Settlements that resulted from technical violations alone did not involve financial remedies and were resolved with the contractor's agreement to comply with the requirement in the future. Examples of typical technical violations include recordkeeping, failure to conduct adverse impact analyses, failure to post the EEO poster, etc., and these were excluded from this analysis.

Figure 1: The Settlement Review Process: A Step by Step Approach



Step 3: CCE developed a settlement database and a settlement coding model to analyze and better understand the content of the settlements under review. Staff members coded particular regions according to an initial coding scheme.¹⁶ The coding sheet was organized into four general dimensions: (1) federal contractor information, (2) OFCCP characteristics, (3) audit characteristics, and (4) technical characteristics. Within each general dimension, a series of separate variables were coded.¹⁷

1. Federal contractor information:

- Contractor name
- Contractor ID in the database¹⁸

¹⁶ Coder agreement was assessed by initially coding a small set of settlements. After this initial coding, staff members discussed the coding scheme, any issues they had, and how to come to consensus.

¹⁷ Steps 4 and 5 of the process are presented in the preceding sections.

¹⁸ Contractor identities were considered confidential and are not reported.

- Contractor Location
2. OFCCP characteristics:
- OFCCP District
 - OFCCP Region
3. Audit characteristics:
- Contractor industry¹⁹
 - Type of alleged systemic discrimination (e.g., hiring, compensation, etc.)
 - Specific employment practice under review (e.g., a test, application screen, compensation, etc.)
 - Type of job(s) under review (EEO category)
 - Whether the validity of the employment practice played a role in the audit
 - Protected group membership (i.e., the alleged victims of discrimination)
 - Comparison group membership (i.e., the favored group)
4. Technical characteristics:
- Which adverse impact test was used?
 - What was the level of analysis?
 - What data aggregation methods were used?
 - If data were aggregated, how?
 - What was the time period in question?
 - What were the financial remedies?
 - Were there any other remedies?

¹⁹ CCE staff researched the supplies and/or services performed by each corporation to determine the contractor industry.

- What was the length to closure (i.e., time between start of the audit and date of settlement)?
- What was the length of the settlement period?
- How were remedies calculated (e.g. back pay, interest, benefits, etc.)?

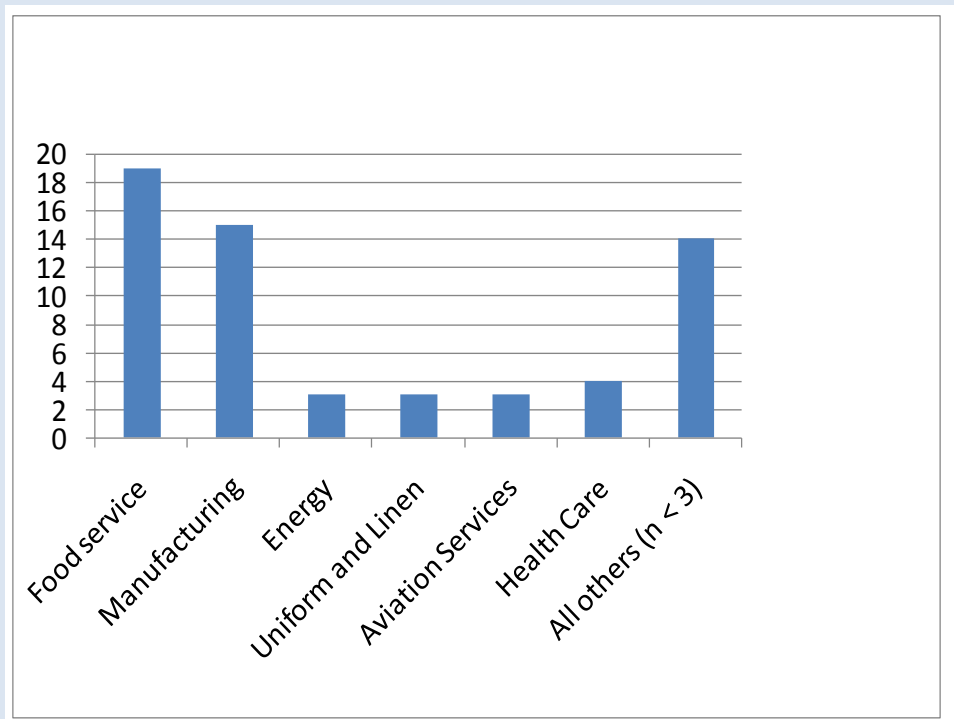
Step 4: Data Analyses: A series of analyses were conducted to identify trends in OFCCP audits that produced settlements in FY 2007. Most of these analyses examined the number (and percentage) of settlements across different types of industries, jobs, audit characteristics, technical characteristics, etc.

III. RESULTS OF THE ANALYSIS

A. Audit Characteristics

Figure 2: OFCCP Settlements by Contractor Industry.²⁰ Based on FY 2007 settlements, contractors in the food service industry were most likely to be involved in OFCCP settlements. Specifically, food service industry contractors represented about *one third* of all settlements. Contractors from the manufacturing industry were found in about *one quarter* of settlements. This was the only other federal contractor industry that was found in more than 10 percent of settlements. Contractors from the energy, aviation service, healthcare, and uniform/linen services were each found in between five percent and 8 percent of settlements.

Figure 2: OFCCP Settlements by Contractor Industry



²⁰ For most figures in this report, numbers on the Y axis represent the number of settlements. Results in the text are discussed in percentages to simplify interpretation.

Figure 3: OFCCP Settlements by Type of Systemic Discrimination: Over 90 percent of settlements focused on hiring discrimination. The remaining settlements alleged discrimination in compensation practices. Note that not a single settlement focused on promotion or termination practices. This is a noteworthy finding given that federal contractors are required to include promotion and termination data in affirmative action plans.

Figure 3: OFCCP Settlements by Type of Systemic Discrimination

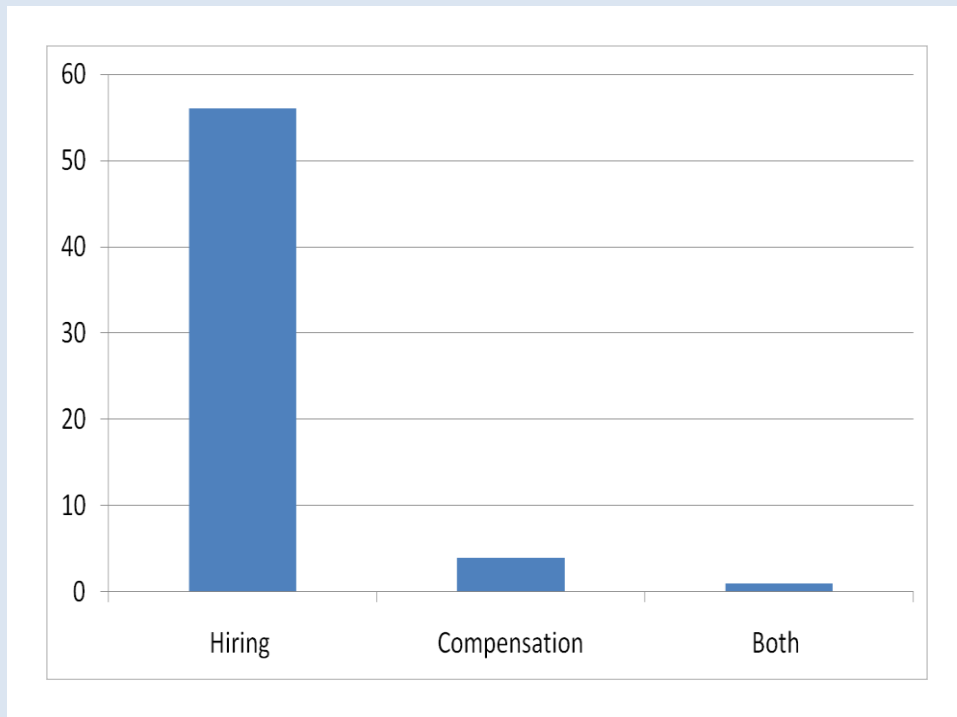
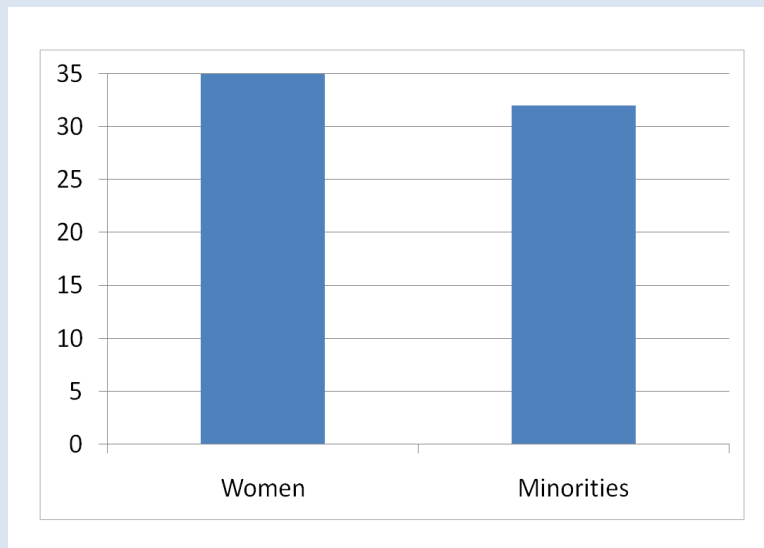


Figure 4: OFCCP Settlements by Protected Groups: Several settlements included systemic discrimination against both women and minorities. For this reason, percentages do not add up to 100 percent.²¹ Women were the most common protected group in settlements, and were included in 57 percent. One or more racial/ethnic minority groups were the protected group in about 52 percent of the settlements. ‘Total minority’ appeared to be the protected group in about 23 percent of settlements, whereas specific racial/ethnic subgroups (e.g., African-American, Hispanic, etc.) were the protected group in the other settlements.²² Interestingly, ‘non-Hispanics’ were the covered group in three settlements.^{23, 24}

Figure 4: OFCCP Settlements by Protected Groups



²¹ This ‘multiple categories’ issue is generally why percentages do not add up to 100 percent in the report.

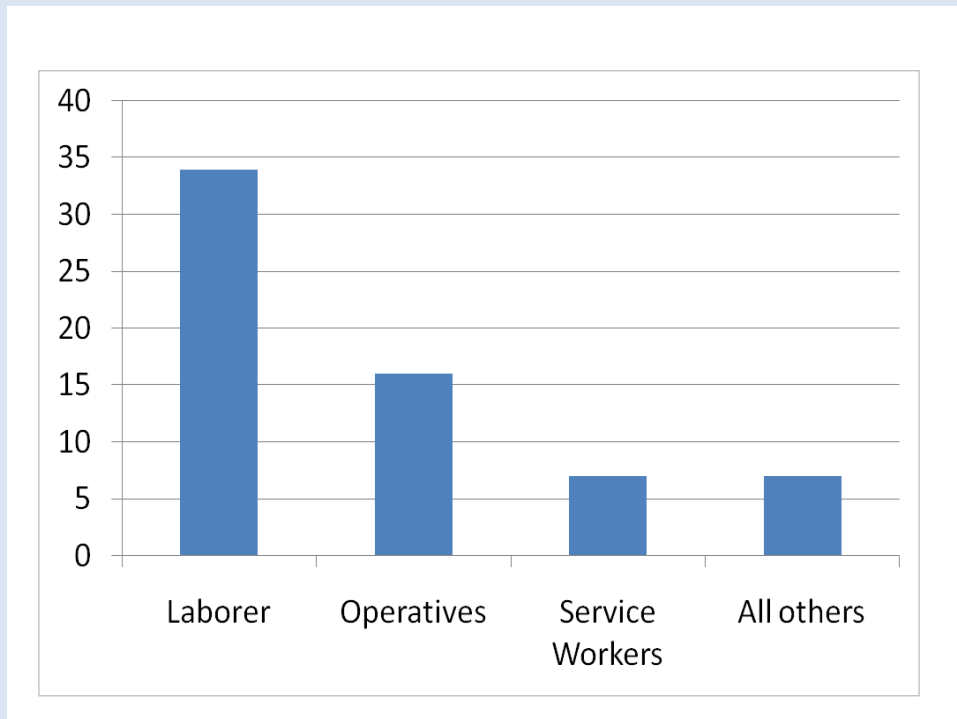
²² Total minority is an ease of use aggregation method where all minority groups (Black, Asian, Hispanic, Native Hawaiian, Native American and Two or More Races) are combined into one category labeled “total minority”. These analyses typically compare the selection rates of Whites to Total Minority. However, there is nothing in Title VII of the Civil Rights Act of 1964, as amended, or Executive Order 11246, as amended, that indicates that “Total Minority” is an actual class protected under the law. In other words, analyses of race discrimination must be conducted at the subgroup level (e.g., separate analyses of African-American, Hispanic, Asian, group members etc.) to mirror statutory protection.

²³ Non-Hispanics were alleged victims of discrimination in two cases arising out of the OFCCP’s Southwest regional office and in one case from the Pacific regional office. It should be noted that in these three cases, there was also some anecdotal evidence of intentional discrimination in addition to statistical evidence of adverse impact.

²⁴ When females were the alleged victims of discrimination, males were the alleged favored group (as expected). In cases where minorities were the alleged victims of discrimination, whites were usually the alleged favored group in the majority of cases. In the three cases where Non-Hispanics were the alleged victims of discrimination, the favored group was Hispanics.

Figure 5: OFCCP Settlements by Type of Jobs Investigated: Laborer jobs were included in about 56 percent of settlements. Operative jobs were included in about 26 percent of settlements. Service workers were included in about 6 percent of settlements. No other type of job represented more than 5 percent of settlements.²⁵

Figure 5: OFCCP Settlements by Type of Jobs Investigated

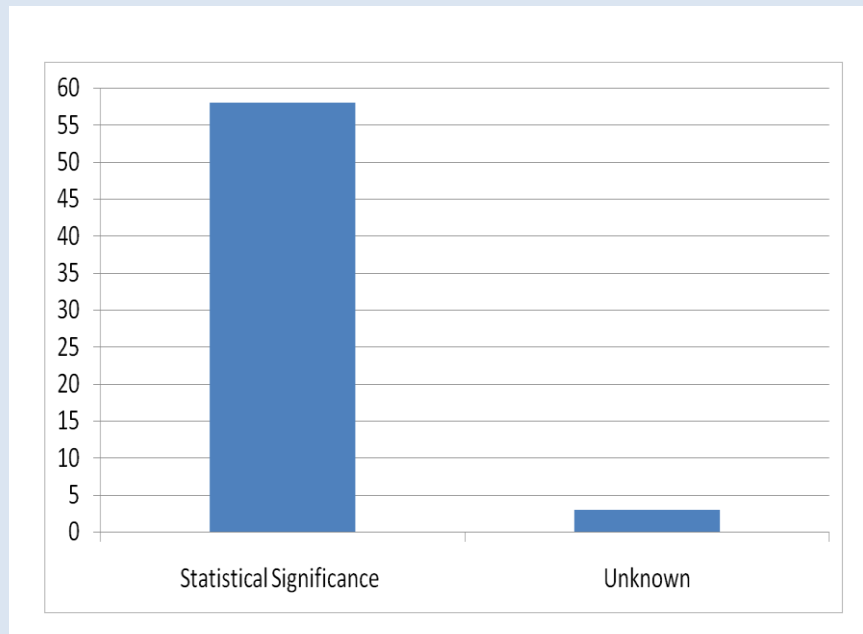


²⁵ There was one settlement related to professional jobs, and it involved a nursing position.

B. Technical Characteristics

Figure 6: OFCCP Settlements by Adverse Impact Tests Used: There was an overwhelming trend toward the use of statistical significance tests in adverse impact analyses. Specifically, statistical significance tests were used about 95 percent of the time. In the few remaining cases, the settlement did not have enough information to make a determination of which statistical test was used. This is consistent with the common impression within the federal contractor community that the ‘Two Standard Deviation’ test is the most commonly used adverse impact statistic.²⁶ The 4/5ths (or 80 Percent) rule endorsed by the *Uniform Guidelines on Employee Selection Procedures* (UGESP)²⁷ was not used in a single OFCCP settlement in FY 2007.

Figure 6: OFCCP Settlements by Adverse Impact Tests Used

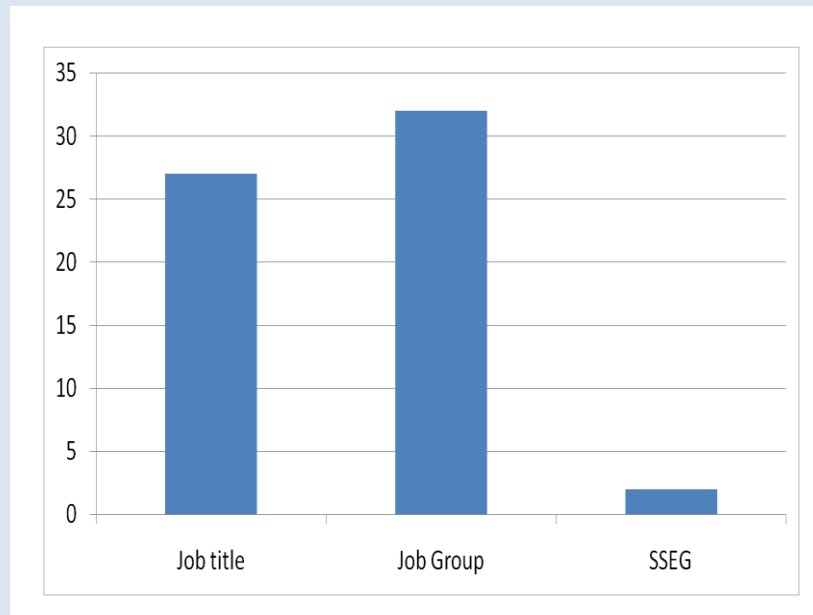


²⁶ In the case of small sample size (e.g., a sample of less than 30 total persons) and/or a small number of group members or selections (e.g., less than 5), the OFCCP may use Fisher’s Exact Test (FET) to assess adverse impact. Note that the Z ‘Two Standard Deviation’ test and the chi-square test are essentially estimators of FET. In some cases the choice between FET and an estimator test can make an important difference in determining whether a disparity is statistically significant. In these situations FET provides the more accurate answer.

²⁷ Uniform Guidelines on Employee Selection Procedures, 41 C.F.R. § 60.3 (1978).

Figure 7: OFCCP Settlements by Level of Adverse Impact Analyses: Depending on context, adverse impacts analyses may be conducted at various levels, including by requisition, job title, job group, job family and/or “similarly situated employee grouping” (SSEG). OFCCP conducted the majority of analyses by job group (about 52 percent) and then by job title (about 44 percent).²⁸ Note that OFCCP used SSEGs only for compensation analyses.

Figure 7: OFCCP Settlements by Level of Adverse Impact Analyses



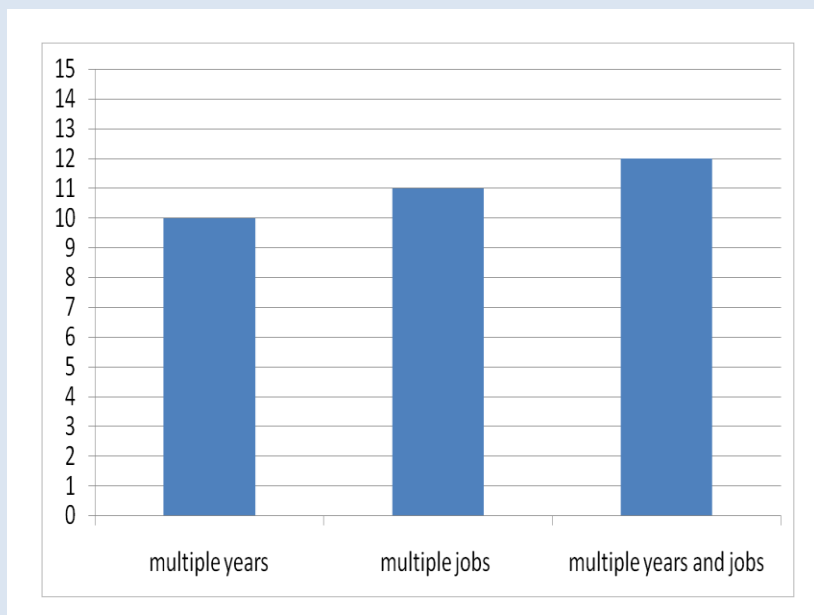
Additionally, a review of the settlements suggested that the OFCCP aggregated data in about 60 percent of the settlements. Aggregating data increases the statistical power of a test, which increases the likelihood of finding statistically significant results. In

²⁸ An affirmative action job group is an aggregation of job titles that are similar in content, wage and opportunity. Small federal contractors will construct the affirmative action plan by EEO category, while larger contractors will develop affirmative action plans by these job groups. However, note that all jobs within a job group are not necessarily similarly situated and may not have the same basic qualifications and/or selection criteria. This lack of similarity may ‘bias’ adverse impact analyses. In addition, the OFCCP scheduling letter allows the contractor to submit personnel activity data by affirmative action job group or job title.

statistical significance testing, smaller differences in selection rates are more likely to be significant in larger samples. Inappropriate aggregation can produce an analysis that does not mirror the reality of employment practices.²⁹ In this context ‘artificial’ statistical power may produce a statistically significant disparity that is not meaningful in reality, because reality is no longer being captured by analyses.

Figure 8: OFCCP Settlements by Aggregation Methods: This figure shows a clear trend toward data aggregation in OFCCP enforcement. OFCCP aggregated data across multiple strata (i.e., time and job) in about 20 percent of the settlements. Data were aggregated across only job in about 18 percent of the settlements, and across only time in 16 percent of the settlements.

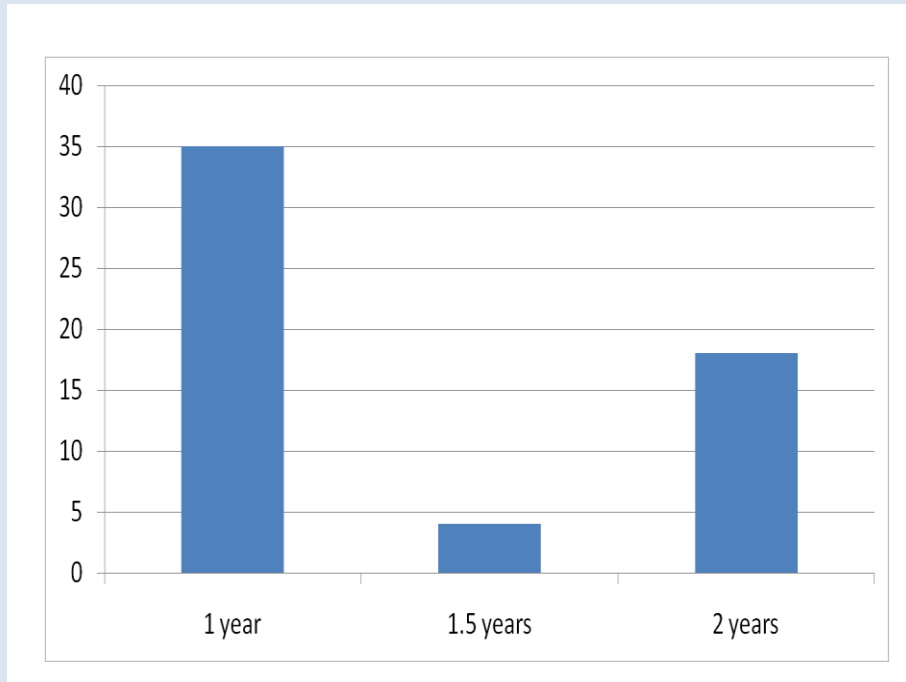
Figure 8: OFCCP Settlements by Aggregation Methods



²⁹ For example, hiring practices may be very different across two years depending upon economic conditions, the demand for jobs, the makeup of an applicant pool, etc. In one year a company may have only a handful of applicants, little diversity in the applicant pool, and/or make only a few hires, while in another year a company may have a huge number of applicants, have a diverse applicant pool, and make many hires. Likewise, two different employment practices could be used across years. If these two years are combined important differences across years (and modeling the reality of hiring) could be lost in simpler adverse impact analyses. Further, inaccurate aggregation of employment data may produce erroneous findings of statistically significant results, or erroneous findings of no significant differences. This phenomenon is often referred to in the statistical literature as Simpson’s paradox.

Figure 9: OFCCP Settlements by Time Period Investigated: OFCCP analyzed only one year of data in about 60 percent of settlements.³⁰ Necessarily, this means that data were aggregated across 18 to 24 months in the remaining 40 percent of the settlements.³¹

Figure 9: OFCCP Settlements by Time Period Investigated

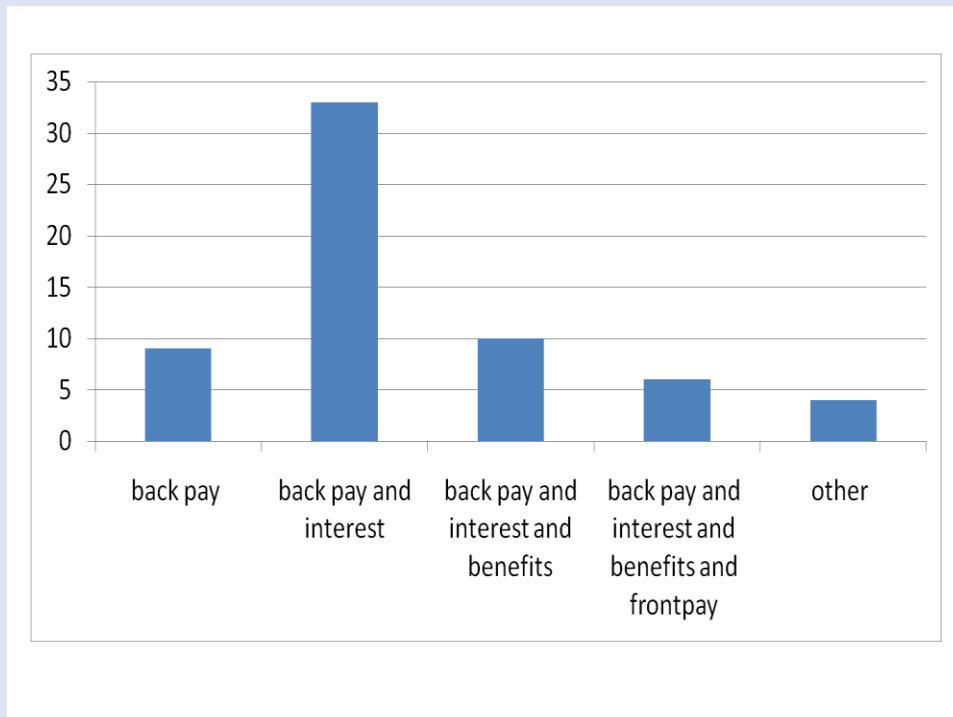


³⁰ This is consistent with the requirements of an annual affirmative action plan.

³¹ Compensation settlements are not included in this table since snapshots (i.e., compensation on a day) of data are analyzed in allegations of compensation discrimination.

Figure 10: OFCCP Settlements by Financial Remedy Calculation: OFCCP included back pay and interest in the vast majority of financial remedy calculations. These two factors were used as the financial remedy calculation in more than half of all settlements. Benefits were added to back pay and interest in about 16 percent of settlements. In another 10 percent of the settlements, front pay was added to back pay, interest and benefits.³²

Figure 10: OFCCP Settlements by Financial Remedy Calculation



Average Length of Time to Audit Closure: One other settlement outcome of interest is the average length to audit closure, which was measured as the time period between the start date of the scheduling letter and the date the settlement was signed. The average length to closure was about 30.5 months (standard deviation= 16 months), or about 2.5 years. However, there was substantial variability in this outcome. For

³² Over 60 percent of settlements included non-financial remedies; of these, EEO training was required in almost 90 percent of those, while retroactive seniority was required in the other settlements.

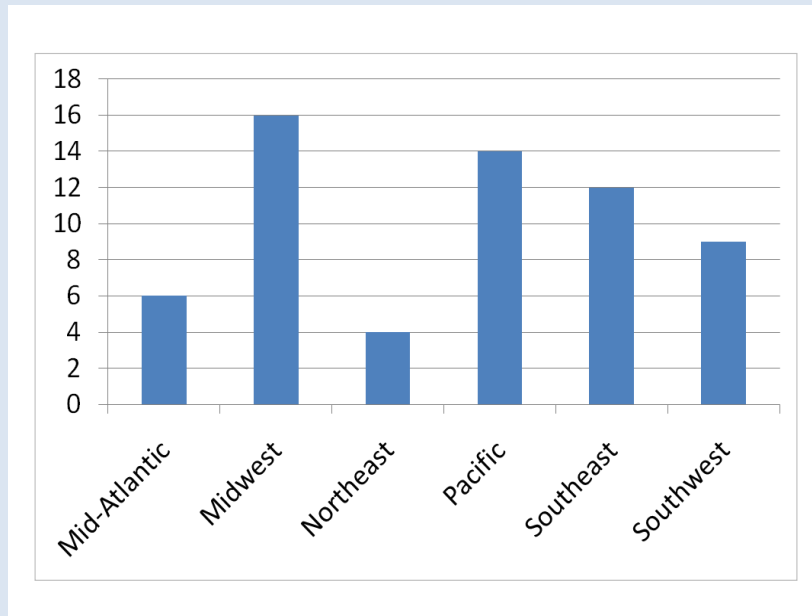
example, the minimum length to conciliation was four months, while the maximum was 93 months (or about eight years). More than a quarter of the audits lasted three or more years.³³

³³ Generally, interest was accrued for the entire period of the audit.

C. Analyses by OFCCP Region

Figure 11: OFCCP Settlements by OFCCP Region: This figure shows the number of settlements by OFCCP region.³⁴ The Midwest region produced the most settlements in 2007 (26 percent of all settlements), followed closely by the Pacific region (23 percent of all settlements). The Southeast (20 percent of all settlements) and Southwest (15 percent of all settlements) regions produced a moderate number of settlements in 2007. The Mid-Atlantic (10 percent of all settlements) and Northeast (7 percent of all settlements) regions produced the fewest settlements in FY 2007.³⁵ The following section presents some interesting differences by OFCCP region.

Figure 11: OFCCP Settlements by OFCCP Region



³⁴ Results by OFCCP district office were analyzed, but they did not identify any obvious trends and are not presented in this report.

³⁵ The number of settlements is only one measure of OFCCP regional office productivity. For example, the average (or median given small settlement samples within region) financial remedy is another measure of regional performance, and could not be published with confidence because CCE did not have financial remedy data from every OFCCP regional office.

Figure 12: Types of Systemic Discrimination in Settlements by OFCCP Region: The vast majority of settlements focused on systemic hiring discrimination regardless of OFCCP region. In fact, the only region that enforced compensation discrimination in more than 10 percent of the settlements was the Mid-Atlantic region, which had a small number of settlements (and thus one compensation settlement represented 17 percent of regional settlements). Note that the Northeast and Southwest regions did not settle any compensation cases in FY 2007.

Figure 12: Type of Systemic Discrimination in Settlements by OFCCP Region

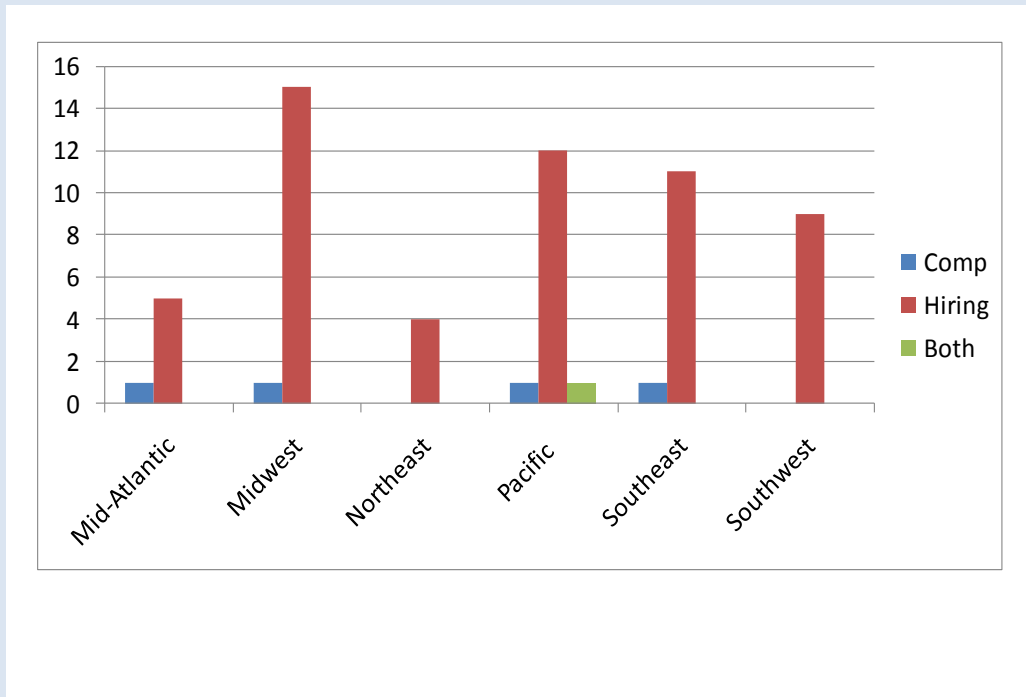


Figure 13: Contractor Industries in Settlements by OFCCP Region: About half of the settlements from the Mid-Atlantic region were with food service contractors. Additionally, the majority of the Midwest region settlements were with food service (31 percent) and manufacturing (31 percent) contractors. Half of the Northeast region settlements were with health care contractors. The Pacific region had settlements from a diverse set of federal contractor industries including food service (21 percent) and healthcare (14 percent). The Southwest region also had settlements from a diverse set of federal contractor industries including food service (57 percent) and manufacturing (22 percent).

Figure 13: Contractor Industries in Settlements by OFCCP Region

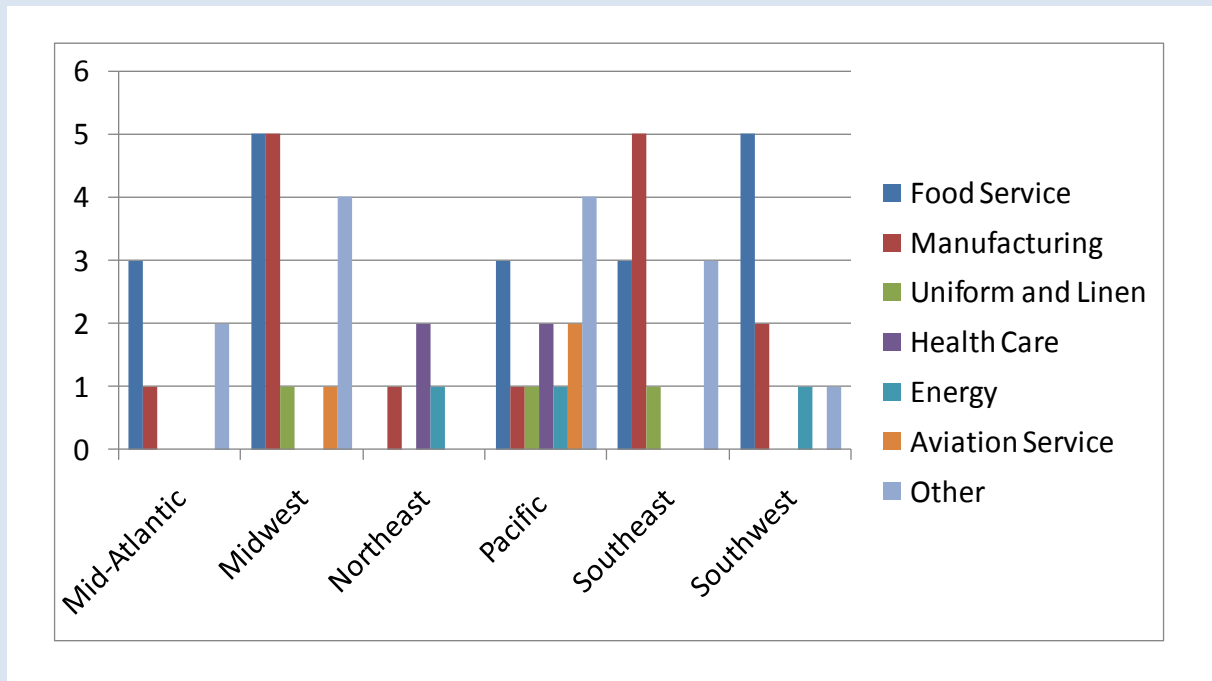


Figure 14: Protected Groups in Settlements by OFCCP Region: Settlements from the Mid-Atlantic region had a strong focus on gender; in fact, there were no race/ethnicity settlements for this region in FY 2007. Most of the other settlements from regional offices focused on both gender and race/ethnicity cases. The Midwest, Northeast, and Southwest regions settled slightly more race/ethnicity cases than gender cases. The Pacific region settled slightly more gender cases than they did race/ethnicity cases.

Figure 14: Protected Groups in Settlements by OFCCP Region

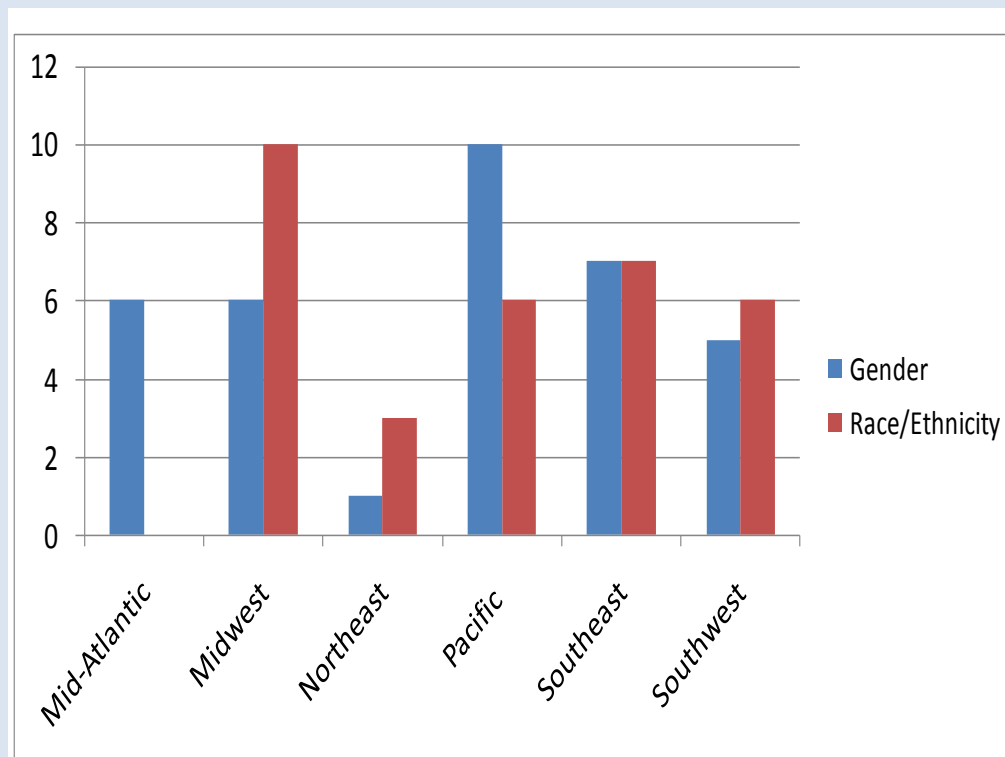


Figure 15: Types of Jobs Investigated in Settlements by OFCCP Region: Settlements that focused on laborers, operatives and service jobs were spread across OFCCP regions. Note that the Pacific region was the only region to settle more cases involving operatives than laborer positions.

Figure 15: Types of Jobs investigated in Settlements by OFCCP Region

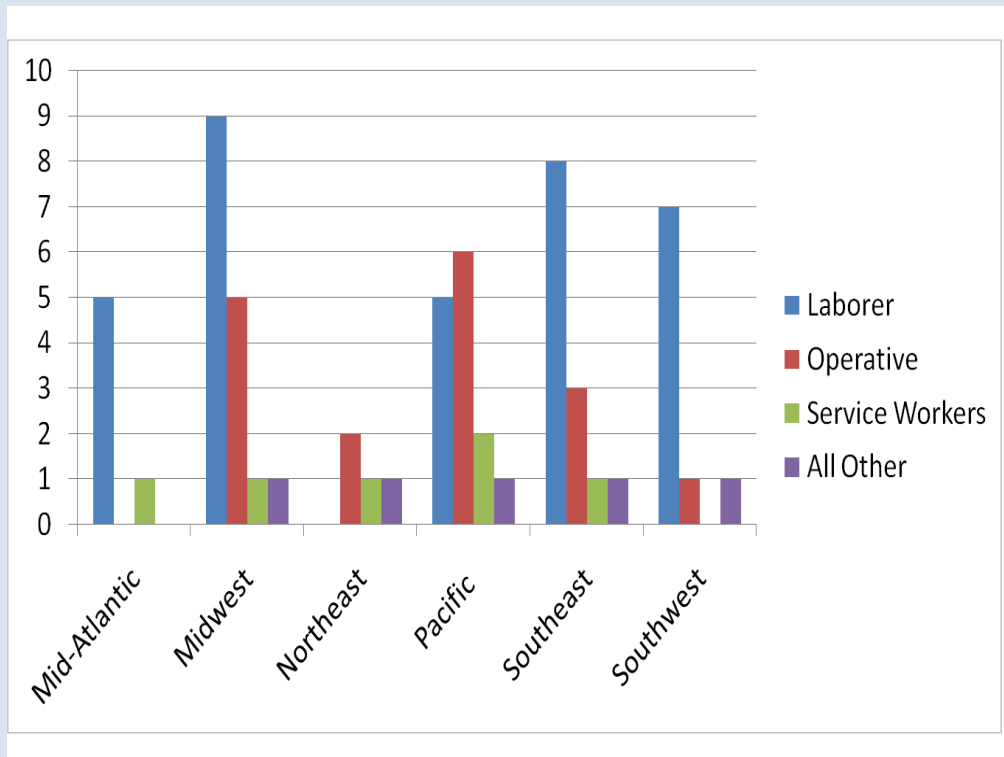


Figure 16: Level of Adverse Impact Analyses in Settlements by OFCCP Region: In the Mid-Atlantic, Midwest, and Southeast regions, the majority of analyses were conducted by job group. The Pacific and Southwest regions conducted analyses by job title more often than by job group. This was particularly the case in the Pacific region, where 66 percent of settlements included analyses at the job title level. As described earlier, aggregating data can have important consequences on the results and adequacy of adverse impact analyses.

Figure 16: Level of Adverse Impact Analyses in Settlements by OFCCP Region

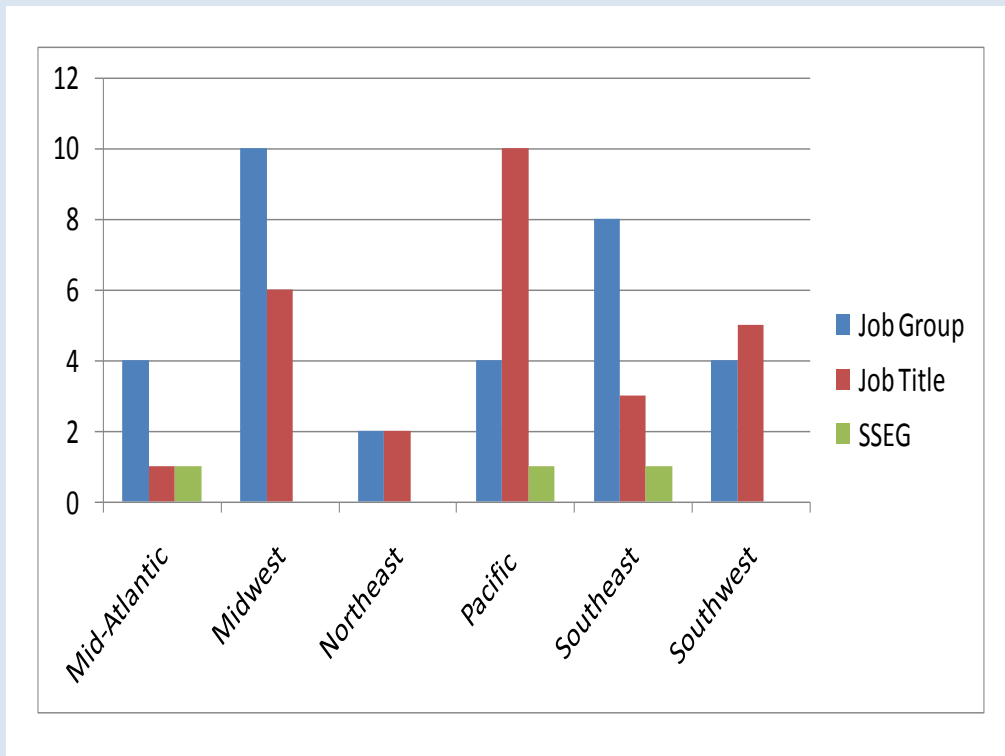


Figure 17: Aggregation Methods in Settlements by OFCCP Region: Data were aggregated in the majority of settlements regardless of region. The one exception was in the Pacific region, where data were aggregated only about 43 percent of the time. The Midwest region aggregated data in almost 70 percent of their settlements.

Figure 17: Aggregation Methods in Settlements by OFCCP Region

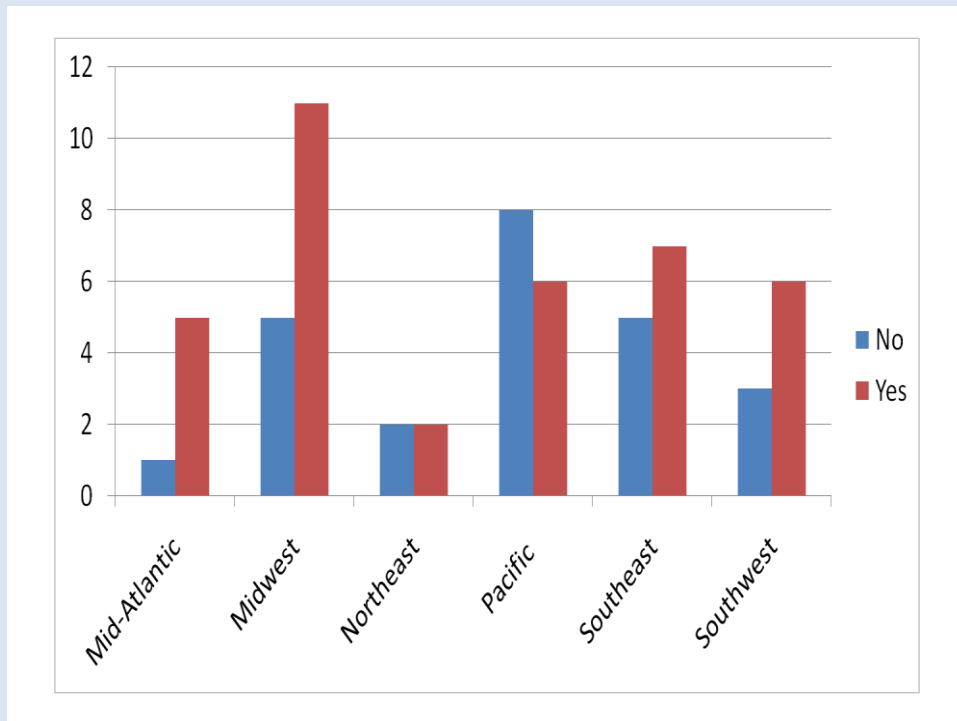


Figure 18: Time Periods Analyzed in Settlements by OFCCP Region: The Midwest and Southwest regions analyzed more than one year of data in the majority of settlements. The Southeast, Pacific, and Mid-Atlantic regions analyzed one year of data in the majority of settlements.

Figure 18: Time Periods Analyzed in Settlements by OFCCP Region

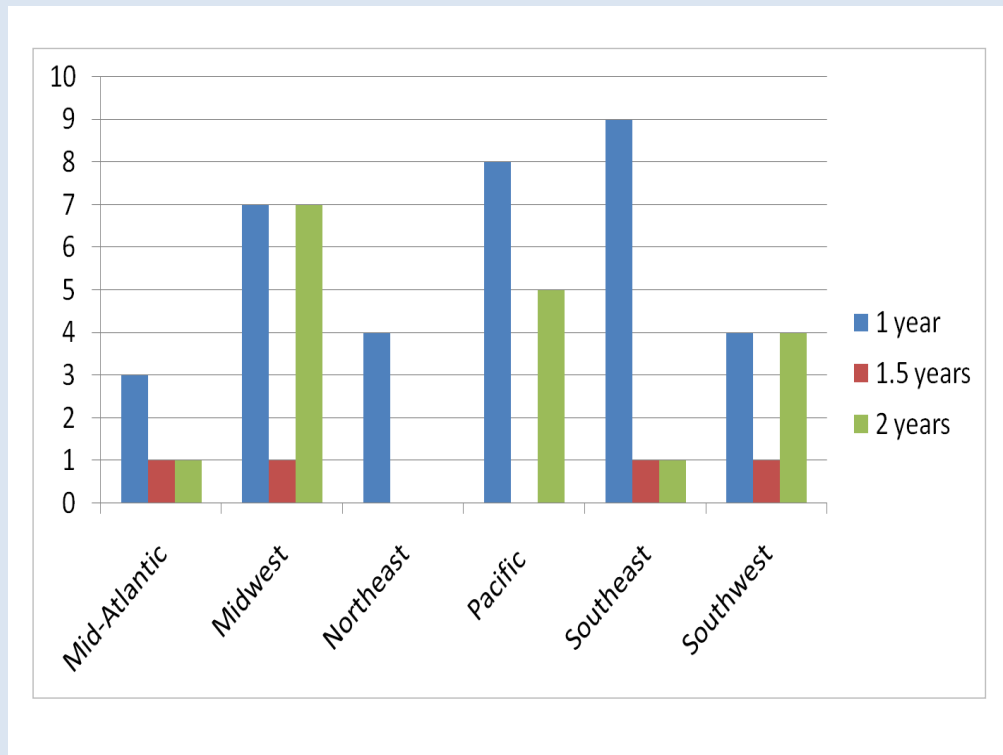


Figure 19: Financial Remedy Calculation by OFCCP Region: As previous results suggested, all regional settlements included back pay and interest. In a majority of their settlements, the Pacific, Southeast, and Southwest regions did not include additional factors in settlement calculations. However, the Northeast region included benefits in all of their damage estimates. The Midwest and Mid-Atlantic regions used a variety of strategies, perhaps varying by specific OFCCP districts.

Figure 19: Financial Remedy Calculation by OFCCP Region

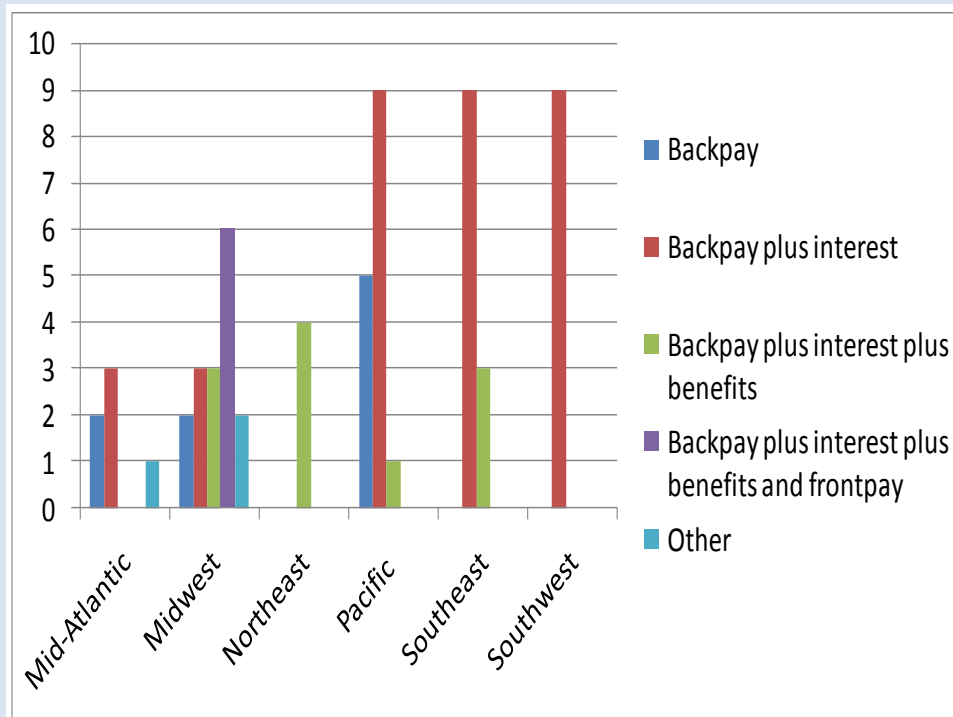


Table 3: Length to Closure Statistics by OFCCP Region: The Mid-Atlantic (46 months) and Midwest (42 months) regions had the highest average length to closure, at almost four years. Both of these regions had a small number of very long audits. For example, the Midwest region had one audit last 93 months and the Mid-Atlantic region had one audit last 84 months. The Pacific (19 months) and Southwest (22 months) regions had the shortest average length to closure. The Northeast and Southeast regions (29 months) had the same length to closure. These results are particularly noteworthy given that the OFCCP includes interest in the calculation of financial remedies.

Table 3: Length to Closure Statistics by OFCCP Region

OFCCP Region (# of settlements)	Average Length to Closure (months)	Length to Closure Minimum (months)	Length to Closure Maximum (months)
MidAtlantic (6)	46	24	84
MidWest (16)	42	21	93
NorthEast (4)	29	18	43
Pacific (14)	19	11	28
SouthEast (12)	29	4	50
SouthWest (9)	22	14	30

D. Other Interesting Analyses

Figure 20: Protected Groups in Settlements by Contractor Industry: Gender was the protected group in 75 percent of settlements for the aviation industry, in 80 percent of settlements for the food service industry, and in about half of the settlements for the manufacturing industry. Also note that minorities were the protected group in all of settlements from the energy industry.

Figure 20: Protected Groups in Settlements by Contractor Industry

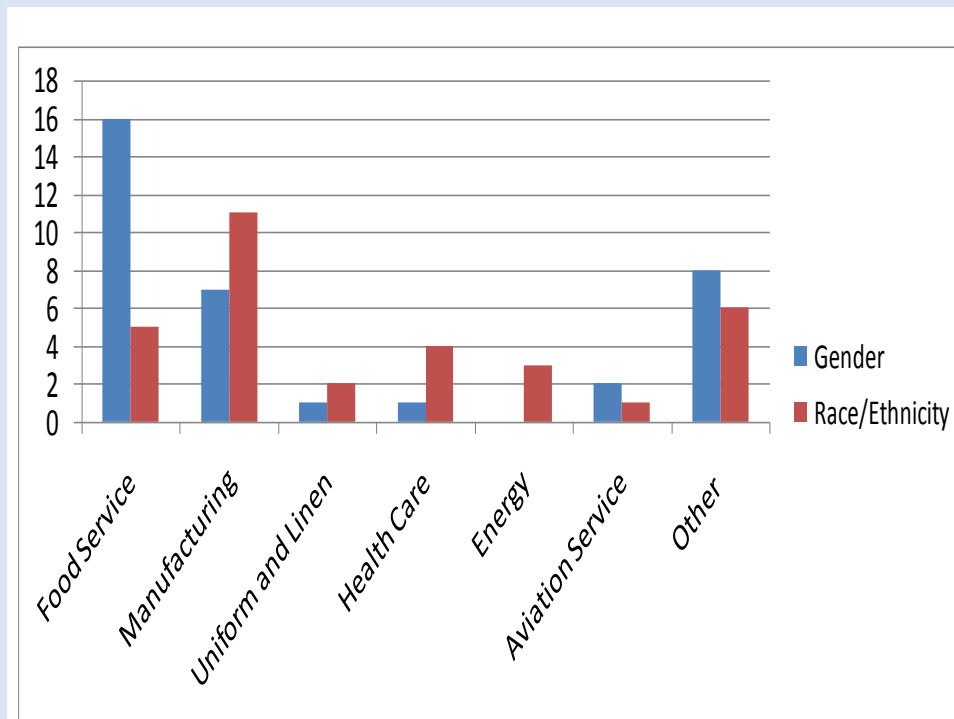


Table 4: Protected Groups by EEO Category for Hiring Settlements: Table 4 shows the protected group alleged to be discriminated against by EEO category for the 57 hiring settlements from FY 2007. Note that all of the settlements involving Craft, Office and Clerical, Sales, Technicians and Professional alleged discrimination against minorities. Only one case above the Craft worker category included a gender settlement. These results were particularly interesting because the OFCCP conducts approximately 40 to 50 Corporate Management Compliance Evaluations (CMCE) per year³⁶. The CMCE review is intended to focus on the promotions, compensation and placement of both minorities and females in the upper ranks of the organization. This is more commonly known as a glass ceiling review. Based on 2007 FY settlements, there did not appear to be a single promotion, hiring, or compensation case at the upper ranks of federal contractor organizations.

³⁶ "A CMCE is designed to ensure that qualified minorities, women, persons with disabilities and protected veterans do not encounter artificial barriers to future advancement into mid-level and senior corporate management. The CMCE focuses on the contractor's obligation to make good faith efforts to ensure equal employment opportunity extends to all levels of the workforce, including the developmental and selection processes for corporate management positions. In addition, the CMCE will determine whether there is any unlawful discrimination in the selection process for mid-level and senior corporate management positions." <http://www.dol.gov/esa/ofccp/regs/compliance/faqs/cmcefaqs.htm#Q1>

Table 4: Protected Groups by EEO Category for Hiring Settlements

Type of Job	Race		Gender		Total # of Cases	Comment
	#	%	#	%		
Professionals	1	100%	0	0%	1	Nursing Position
Technicians	1	100%	1	100%	1	Case was both race and gender
Sales	1	100%	0	0%	1	
Office & Clerical	1	100%	0	0%	1	
Crafts	1	100%	0	0%	1	
Operatives	10	67%	9	60%	15	Multiple cases were both race and gender
Laborers	15	45%	21	64%	33	Multiple cases were both race and gender
Service Workers	4	67%	2	33%	6	

In addition, there were no settlements based upon a Functional Affirmative Action Plan (FAAP) audit.³⁷

IV. Some Specific Settlement Trends

Based on our review of OFCCP’s FY 2007 settlements, systemic discrimination in *employee selection* was the major focus of the agency’s enforcement efforts. More than ninety percent of the settlements focused on hiring discrimination in FY 2007.

³⁷ A Functional Affirmative Action Plan (FAAP) is an affirmative action plan that is structured by line of business regardless of physical establishment. CCE staff believes that a FAAP settlement in FY 2007 had to be approved by the OFCCP’s national office in Washington, DC. <http://www.dol.gov/esa/ofccp/regs/compliance/faqs/faapfaqs.htm>

A. Discrimination in Employment Selection

Twelve settlements provided specific details concerning the employment practices evaluated in the OFCCP audit, and why those practices were alleged to be discriminatory. Six of the twelve settlements included allegations of discriminatory applicant screens (e.g., resume review, training, experience and education review, scored application blank, etc.), four included allegations of a discriminatory ‘paper and pencil’ test, two included allegations of a discriminatory employment interview, and one included general allegations of a discriminatory selection process. Key points from these settlements include the following:

- The subjectivity of employment decisions was a major theme across many of these settlements; unstructured and subjective processes can still be challenged from a legal defensibility perspective.
- In some cases, the employment test under review was no longer in use; practices that were used in the past but are no longer in use can still be challenged.
- In some situations, a test was developed for one job and then used to make hiring decisions for another.
- The UGESP were the only technical authority used to assess whether the validity evidence associated with an employment practice was adequate.
- Various settlements confirmed the notion that the absence of a validation study equates to a discriminatory employment practice when adverse impact exists.
- One settlement focused on the cut score used to determine who passes and who fails a test. This settlement demonstrated that the cut score is a critical component to the legal defensibility of employment decisions.
- Using a test to make hiring decisions and then hiring a few of the people that failed the test anyway is not legally defensible under most circumstances.

B. **Discrimination in Compensation**: Five of the settlements involved allegations of systemic compensation discrimination. Key points from these settlements include the following:

- Two of the five settlements included analyses that were by similarly situated employee grouping (SSEG);
- Three of the five settlements focused on multiple jobs, and it appears that these three analyses may have been aggregated across different jobs in interesting ways;
- Four of the five settlements alleged that females were the victims of compensation discrimination;
- One settlement focused on the use of explanatory variables in explaining the disparity in compensation via multiple regression analysis. In this audit, the OFCCP rejected the use of one particular 'time in' qualification variable. This is an example of the OFCCP and a contractor debating the specific variables included in the regression model;
- One settlement allowed previously made salary adjustments to function as the financial remedy. In other words, the financial remedy of the settlement was \$0 because salary adjustments had been made on a proactive basis before the settlement. This is an example of how proactive analyses can be useful in an audit.

V. General Summary of Findings and Other Considerations

A. Summary of Findings

1. Systemic discrimination: The OFCCP has, in fact, moved to a 'systemic' paradigm of enforcement, where compliance evaluations target employment practices that can discriminate against a large group of potential victims.
2. Hiring discrimination: Hiring discrimination was the major focus in FY 2007 enforcement, making up about 95 percent of settlements.
3. Promotions and Terminations: There were no settlements that focused on promotion or termination in FY 2007.
4. Compensation discrimination: Compensation was not a substantial issue in FY 2007 settlements, making up about 5 percent of settlements.
5. Low Level Jobs and Industries: Certain lower level jobs (e.g. laborers and operative positions) were found in about 75 percent of settlements. They were more likely to be included in settlements, as were certain industries (e.g., food service and manufacturing industries were found in more than 50 percent of settlements).
6. Women and Minorities: Women and minorities were the protected groups in about the same number of settlements.
7. Non-Hispanics (including Whites): Non-Hispanics (including Whites) were the protected group in three settlements.
8. Statistical Significance Tests: Statistical significance tests were the clear method of enforcement for OFCCP analyses of adverse impact.
9. 80 Percent Rule: The 80 percent rule was not found in a single settlement.
10. Data Aggregation: The OFCCP aggregated data (across job, year, etc.) in the majority of settlements.
11. Length of Audits: Audits took an average of 2.5 years to conciliate.
12. FAAPs and CMCEs: There were no findings of systemic discrimination in either the Functional Affirmative Action Plan (FAAP) or Corporate Management Compliance Evaluations (CMCE) reviews.

13. Interest on Financial Remedies: The majority of financial remedy calculations included interest.

14. Differences Between OFCCP Regional Offices: There were important differences by OFCCP region, including differences in the:

- number of settlements,
- federal contractor industries involved in settlement,
- protected groups that were alleged victims of discrimination,
- methods used to calculate financial remedies,
- length of conciliation to settlement.

B. **Other Considerations**

Some Settlement Trends May Not Reliably Predict Future OFCCP Enforcement: Some of the trends found in the FY 2007 settlement data may not reliably predict OFCCP's future enforcement strategies. Many FY 2007 settlements stem from OFCCP compliance evaluations that were initiated in 2003 and 2004 before new enforcement initiatives were implemented.³⁸ Since the OFCCP compensation standards were finalized in 2006, this lag might explain the surprisingly small number of FY 2007 settlements that focused on systemic compensation discrimination, as well as how OFCCP managed these audits technically. It is highly likely that OFCCP enforcement results for fiscal years after 2007 would include substantially more systemic compensation discrimination cases.³⁹

Changes in OFCCP Processes May Impact Settlements: Additionally, the effects of OFCCP's Active Case Management system, in which the agency uses centralized scheduling and statistical software to better target its resources towards contractor

³⁸ The average length of time from the start of the compliance evaluation to the settlement was 2.5 years.

³⁹ The OFCCP is also expected to increase its enforcement of compensation discrimination in 2009, particularly in light of new administration support for pay equity measures, such as the recently enacted Lilly Ledbetter Fair Pay Act of 2009.

facilities engaged in systemic discrimination, were not fully realized until 2005.⁴⁰ Thus, given the time lag in EEO enforcement, settlements from fiscal year 2008 and later may have different audit content than FY 2007 settlements. Additionally, the OFCCP's Federal Contractor Selection System (FCSS), which determines the vast majority of federal contractor locations that will be audited in a fiscal year, was implemented in 2004. As such, settlements from audits that started after FCSS implementation may be different in terms of content from those finalized in 2004.

Technical Staff Hired by OFCCP: OFCCP hired some key technical staff in recent years, particularly in the areas of statistical analysis and employment testing. These staff are in part responsible for developing and implementing new policies and procedures related to these areas in recent years. Thus, settlements from audits starting after new policies and procedures have been implemented may be different than those considered in this review.

Temporal Lag Time in Settlements Increases Financial Remedies: This temporal lag also has some important financial remedy implications. As noted earlier, the most common computation of financial damages used by the OFCCP included interest. The natural time lag and average length to conciliation results have obvious implications in this context; the longer an audit takes to settle, the more interest will be compounded. Consequently, the longer the audit takes to complete, the larger the amount of potential financial remedies.

⁴⁰ "Detailed Year-By-Year Accomplishments by The Office of Federal Contract Compliance Programs," posted on the OFCCP website at http://www.dol.gov/esa/ofccp/regs/compliance/detailed_accomp.html.

VI. Recommendations

We recommend the OFCCP conduct comparable analyses of its enforcement results to those presented in this report, and in the future make these data available to the public.

Here are examples of data that we recommend OFCCP include in future fiscal year enforcement reports:

1. Enforcement Focus: Data that confirms OFCCP's is, in fact, evaluating those specific areas that it has announced are enforcement targets, e.g. systemic discrimination.
2. Types of Systemic Discrimination Uncovered: What types of systemic discrimination were identified in settlement agreements, e.g., compensation, hiring, promotion, terminations, disability, etc.?
3. Protected Groups Benefited in Settlement Agreements: Which protected groups of current and former employees and potential hires are most commonly identified in settlement agreements as victims of discrimination?
4. "Glass Ceiling Audits": What types of discrimination did OFCCP find during Corporate Management Review Evaluations?
5. Jobs Levels and Industries Audited: What types of jobs were most commonly found in settlement agreements, entry-level, professional, middle management, executive, etc., and in what types of industries?
6. Duration of Compliance Evaluations Through Settlement: How long did it take OFCCP to begin a compliance evaluation and close it with a settlement agreement?
7. Differences Between OFCCP Regional Offices: What are the differences between OFCCP regional offices in their investigatory approach and resultant settlements?
 - Technical Aspects of Settlements: What general strategies did OFCCP use in investigating employer's personnel practices that ended in settlements with contractors to resolve alleged discrimination? Examples include the: Statistical methodology OFCCP used to conduct adverse impact analyses to identify evidence of discrimination;
 - Job level OFCCP used to conduct adverse impact analyses on;

- Aggregation strategies used to determine whether there was evidence of discrimination;
- Time periods covered in settlements;
- Financial remedy models used in settlement agreements; and
- Whether these policies and procedures were followed consistently between OFCCP regions.

Conclusion: The “record breaking” enforcement results that OFCCP has reported for the last four fiscal years are impressive. However, unless OFCCP begins to provide in-depth data in the future that explains their enforcement results, the public will continue to be denied information that it needs to understand the agency’s operations and decisions.

We recognize the public has diverse interests and perspectives about how the agency should enforce its equal employment opportunity and affirmative action mission. Transparency in OFCCP’s enforcement reporting is one area where all stakeholders should find common ground. We call upon the OFCCP to become transparent in the reporting of its enforcement results.