



*- 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 FOR FISCAL YEAR 2008**

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**February 2010**

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## EXECUTIVE SUMMARY

### A REVIEW OF OFCCP ENFORCEMENT STATISTICS FOR FISCAL YEAR 2008

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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.”<sup>1</sup> Barack Obama, January 21, 2009*

**Introduction:** This report is the second<sup>2</sup> in a series that will annually summarize OFCCP enforcement statistics. The in-depth results of this analysis provide useful information about OFCCP’s enforcement programs that the agency does not make publicly available. This report will also provide federal contractors subject to OFCCP review with important information that will facilitate their compliance with the agency’s EEO and affirmative action requirements. We continue to urge the OFCCP to conduct comparable analyses of its enforcement results in the future and make these data available to the public.

**Background:** In recent years, the OFCCP has announced “record breaking” results of its 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,<sup>3</sup> OFCCP reported that it had conducted nearly 16,000 compliance evaluations of federal contractors’ affirmative action programs and collected about \$215.8 million in financial remedies for approximately 76,800 workers through voluntary settlements and litigation.

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

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

<sup>2</sup> The first annual report that reviewed FY 2007 enforcement is entitled ‘A Review of OFCCP Enforcement Statistics: A Call for Transparency in OFCCP Reporting’, and is publically available at [http://cceq.org/ts\\_pub.asp](http://cceq.org/ts_pub.asp)

<sup>3</sup> Note that, at the time this report was written, OFCCP had not released results of FY 2009 enforcement.

action programs. Moreover, federal contractors do not have access to important information about these settlements that would help them improve their own EEO and affirmative action compliance programs.

To address this need, 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 series that includes in-depth analysis of OFCCP's enforcement results.

***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:

- From what types of industries did financial remedies come?
- 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?
- Does OFCCP enforce its programs uniformly over time?
- 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.
- What technical violations accompanied allegations of systemic discrimination?

It is important to note that, without detailed enforcement data on OFCCP policies and procedures, 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 of OFCCP's compensation discrimination enforcement in 2008,<sup>4</sup> concluded there was insufficient recordkeeping at the agency.

***Analysis and Conclusions from OFCCP FY 2008 Settlements:*** Similar to the 2007 report, CCE obtained settlements from OFCCP's regional offices for Fiscal Year 2008

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<sup>4</sup> "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>.

via a Freedom of Information Act (FOIA) request.<sup>5</sup> This year, CCE only requested settlements that included financial remedies related to allegations of systemic discrimination. In most cases these settlements also included a variety of technical violations. In total, CCE analyzed 70 conciliation agreements and three consent decrees from FY 2008 that resulted in financial remedies. Here is a summary of the key findings:

1. The number of OFCCP settlements increased from 61 in FY 2007 to 73 in FY 2008.
2. Once again, nearly all of the settlements (over 95%) involved allegations of systemic discrimination in hiring. About 5% of the settlements focused on employee placement, and one settlement focused on promotion policies. No settlement involved allegations of systemic compensation discrimination or discrimination in termination decisions.
3. No “Glass Ceiling” Corporate Management Compliance Evaluations (CMCE)--audits of a corporate headquarters that focuses on identifying barriers to females and minorities advancing to senior executive positions--resulted in findings of systemic discrimination.
4. The majority of settlements involved alleged systemic discrimination against applicants for lower level laborer and operative jobs in food service and manufacturing industries.
5. The typical length of time between the start of the compliance evaluation and the signing of a conciliation agreement or consent decree was about two and a half years.
6. Females and minorities benefited in fairly equal numbers in these settlements.
7. Veteran applicants were alleged victims of discrimination in one settlement because zero veterans were hired.
8. About one quarter of settlements focused on a ‘Total Minority’ aggregate as the covered group, while a handful of settlements focused on ‘Non-Hispanics’ as the covered group.
9. 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 physical establishment.
10. Statistical significance testing was used as stand-alone evidence of disparities in over 93% of settlements. The 4/5ths percent rule was used in two settlements.
11. 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.
12. Trends were identified when comparing OFCCP enforcement across Fiscal Years 2007 and 2008.

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<sup>5</sup> Note that no federal contractor names are listed in this report. Federal contractor identities were treated as confidential.

***Recommendation:*** CCE again recommends that OFCCP conduct comparable analyses of its enforcement results in the future and make these data available to the public. Such analyses will provide much needed information to the public about OFCCP'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 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.

## TABLE OF CONTENTS

Executive Summary	ii
<b>SECTION I. INTRODUCTION AND OVERVIEW</b>	<b>1</b>
Table 1.1: OFCCP Enforcement Activity from FY 2001-2008	2
Table 1.2: Information in OFCCP's FY 2008 Enforcement Announcement	3
Figure 1.1: The Settlement Review Process: A Step by Step Approach	7
<b>SECTION 2: SIMPLE DESCRIPTIVE STATISTICS</b>	<b>11</b>
Figure 2.1: Number of OFCCP Settlements by Federal Contractor Industry	11
Figure 2.2: Number of OFCCP Settlements by Allegations of Discriminatory Policies and Procedures	12
Figure 2.3: Number of OFCCP Settlements by Covered Groups	13
Figure 2.4: Number of OFCCP Settlements by Jobs Investigated	14
Table 2.1: Covered Group Representation by EEO Category for Settlements that Alleged Discrimination in Hiring	15
Figure 2.5: Number of OFCCP Settlements by Adverse Impact Tests Used	17
Figure 2.6: Number of OFCCP Settlements by Level of Adverse Impact Analyses	18
Figure 2.7: Number of OFCCP Settlements by Data Aggregation Methods	19
Figure 2.8: Number of OFCCP Settlements by Aggregation Methods	20
Table 2.2: Descriptive Statistics for OFCCP Settlements by Time Period Investigated, Length to Audit Closure, and Length of Conciliation Agreement	21

Figure 2.9: Number of OFCCP Settlements by Financial Remedy Calculation	22
Figure 2.10: Number of Technical Violations accompanying Allegations of Systemic Discrimination	24
<b>SECTION 3: ANALYSES BY OFCCP REGION</b>	<b>25</b>
Figure 3.1: OFCCP Settlements by OFCCP Region	25
Figure 3.2: Allegations of Discriminatory Policies and Procedures in Settlements by OFCCP Region	26
Figure 3.3: Contractor Industries in Settlements by OFCCP Region	27
Figure 3.4: Covered Groups in Settlements by OFCCP Region	28
Figure 3.5: Types of Jobs Investigated in Settlements by OFCCP Region	29
Figure 3.6: Level of Adverse Impact Analyses in Settlements by OFCCP Region	30
Figure 3.7: Data Aggregation in Settlements by OFCCP Region	31
Figure 3.8: Data Aggregation Methods in Settlements by OFCCP Region	32
Figure 3.9: Financial Remedy Calculation by OFCCP Region	33
Table 3.1: Length to Closure Statistics by OFCCP Region	34
Table 3.2: Time Period Analyzed in the Settlement by OFCCP Region	35
Table 3.3: Length of Agreement by OFCCP Region	36
Figure 3.10: Technical Violations by OFCCP Region	37

<b>SECTION 4: OFCCP ENFORCEMENT ACROSS FISCAL YEARS 2007 AND 2008</b>	<b>38</b>
Table 4.1: Allegations of Discriminatory Policies and Procedures across Year	38
Figure 4.1: Settlements by Region across Year	39
Figure 4.2: Settlements by Industry across Year	40
Figure 4.3: Settlements by Job Type across Year	41
Table 4.2: Protected Groups by EEO Category for Settlements that Alleged Discrimination in Hiring across year	42
Figure 4.4: Statistical Methods Assessing Adverse Impact across Year	43
Figure 4.5: Frequencies for Level of Adverse Impact Analysis across Year	44
Figure 4.6: Data Aggregation Methods across Year	45
Figure 4.7: Settlements by Covered Groups across Year	46
Figure 4.8: Financial Remedy Calculations across Year	47
Table 4.3: Length of Closure across OFCCP Region and Year	48
<b>SECTION 5: SOME SETTLEMENT TRENDS IN NARRATIVE FORM</b>	<b>49</b>
<b>SECTION 6: GENERAL SUMMARY OF FINDINGS</b>	<b>52</b>



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## **ABOUT THE CENTER FOR CORPORATE EQUALITY**

The Center for Corporate Equality (CCE) is a national nonprofit research association based in Washington, D.C., 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 research is strategically intended to have implications for compliance, compensation, and staffing considerations.

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## SECTION I: INTRODUCTION AND METHODOLOGY

### Introduction

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 of federal contractors and sub-contractors. OFCCP enforces Executive Order 11246, Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act of 1974 and its amendments. 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. Each year, OFCCP publishes a high level summary of its annual Fiscal Year enforcement results.

In Fiscal Years 2005 through 2008, OFCCP has reported that it conducted a total of nearly 16,000 compliance evaluations of federal contractors' affirmative action programs and collected a record \$215.8 million in financial remedies for approximately 76,800 workers through voluntary conciliation and litigation. Table 1.1 depicts enforcement data from the years in which OFCCP obtained its record breaking results.<sup>6</sup>

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<sup>6</sup> "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](http://www.dol.gov/esa/ofccp/regs/compliance/detailed_accomp.html). Unfortunately, this publication was removed late in 2009.

**Table 1.1: OFCCP Enforcement Activity from FY 2001-2008**

<b>Fiscal Year</b>	<b>Financial Remedies Obtained</b>	<b>Workers Recompensed by OFCCP Agreement</b>	<b>Compliance Evaluations</b>
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%

It is important for stakeholders to understand that several important details are missing from OFCCP’s Fiscal Year enforcement. For example, OFCCP released a two-and-one half page report of its enforcement results in Fiscal Year 2008.<sup>7</sup> 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 1.2 shows the 2008 statistical data OFCCP provided in its enforcement announcement and some important details that were not included in their report.

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<sup>7</sup> “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>. Once again, it appears that this publication was removed late in 2009.

**Table 1.2: Information in OFCCP’s FY 2008 Enforcement Announcement**

<b>Statistical Data OFCCP Provided in its FY 2008 Enforcement Announcement</b>	<b>Data OFCCP Did NOT Provide in its FY 2008 Enforcement Announcement</b>
<p>OFCCP obtained just under \$68,000,000 in back pay and annualized salary and benefits in financial remedies.</p>	<p>How were the financial remedies calculated? How much of the remedy was back pay and how much of the total number was the annualized salary and benefits? What portion of the financial remedy was actually distributed to workers covered under OFCCP settlements?<sup>8</sup></p>
<p>Just under 25,000 workers were recompensed by OFCCP settlements.</p>	<p>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 covered groups were recompensed – did settlements focus on race, ethnicity, gender, disability, and/or veteran status?</p>
<p>4,333 compliance evaluations were completed.</p>	<p>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? What enforcement policies and procedures were used in these audits? How were data analyzed? What statistical tests were used? Did OFCCP enforce its programs uniformly across its six regional offices? 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?</p>
<p>The vast majority of financial remedies were collected in cases of systemic discrimination.</p>	<p>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? What technical violations were most likely to accompany allegations of systemic discrimination?</p>

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<sup>8</sup> 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.

These are all examples of important data that would benefit the public by helping contractors make the necessary improvements and adjustments in their EEO and affirmative action compliance programs. To further illustrate, since OFCCP released its systemic compensation discrimination guidelines in 2006,<sup>9</sup> it would have been expected that the agency would have released data on their enforcement of these new standards. Without detailed enforcement data, the public is unable to fully understand how the OFCCP carries out its mission and the impact its operations have on various constituencies. Even the U.S. Government Accountability Office (GAO), which conducted a review in 2008 of OFCCP's compensation discrimination enforcement, concluded that there was insufficient recordkeeping at the agency.<sup>10</sup> 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.<sup>11</sup>

***Some Temporal Context to Consider:*** It is important to note that the change of administration in Washington, D.C. will have implications on OFCCP enforcement. In fact, in September of 2009, Patricia Shiu was named the new politically-appointed Director of the OFCCP under the Obama Administration. In addition, with the elimination of the Employment Standards Administration (ESA)<sup>12</sup> and the increase in funding and staff it is anticipated that the agency will have more power and resources for enforcement efforts. The enforcement results described in this report (FY 2008) represent the last full year that OFCCP was directed by Charles James, the politically appointed

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<sup>9</sup>“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 \(June 16, 2006\)](#).

<sup>10</sup>“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>.

<sup>11</sup>Equal Employment Opportunity Commission Charge Statistics, FY 1997 Through FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/index.cfm>

<sup>12</sup> Secretary's Order 7-2009 devolved specific authorities and responsibilities of ESA to the Office of Federal Contract Compliance Programs

Director under the Bush Administration. Fiscal Year 2009 enforcement, which will likely be presented in a similar report next fall, would essentially represent the ‘in-between’ year after Charles James’ appointment ended and before Patricia Shiu was appointed the new director.

Why is this important? A section new to this FY 2008 report is an analysis comparing enforcement activity in 2007 to enforcement activity in 2008; last year CCE only had one year of data to analyze. CCE intends to trend OFCCP enforcement changes over time in this series of reports, and one potential predictor of that change is a new administration in Washington, D.C. In other words, if policies and procedures, enforcement initiatives, and focus areas change with a new administration, in theory that change may be identified by comparing OFCCP enforcement across years and across administrations. Toward that end, it is important to keep in mind that FY 2008 may be very similar to FY 2007, and that both years represent enforcement under the same general OFCCP leadership. It will be interesting to see if FY 2009 enforcement looks any different than previous years, simply because OFCCP did not have politically appointed leadership for most of FY 2009. FY 2010 will essentially represent the first year of enforcement under the new administration.

### **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 decrees believed to have formed the basis for OFCCP’s FY 2008 enforcement results.<sup>13</sup> The data came from 70 conciliation agreements and three consent decrees that resulted in financial remedies and were finalized in FY 2008, the most recent year in which data were

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<sup>13</sup>CCE sent a request to OFCCP’s national office and the Department of Labor’s Office of the Solicitor requesting copies of Fiscal Year 2008 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 2008 conciliation agreements, and in addition, three OFCCP regional offices submitted consent decrees in addition to conciliation agreements. 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 2008. This report included the analysis of three finalized consent decrees from FY 2008.

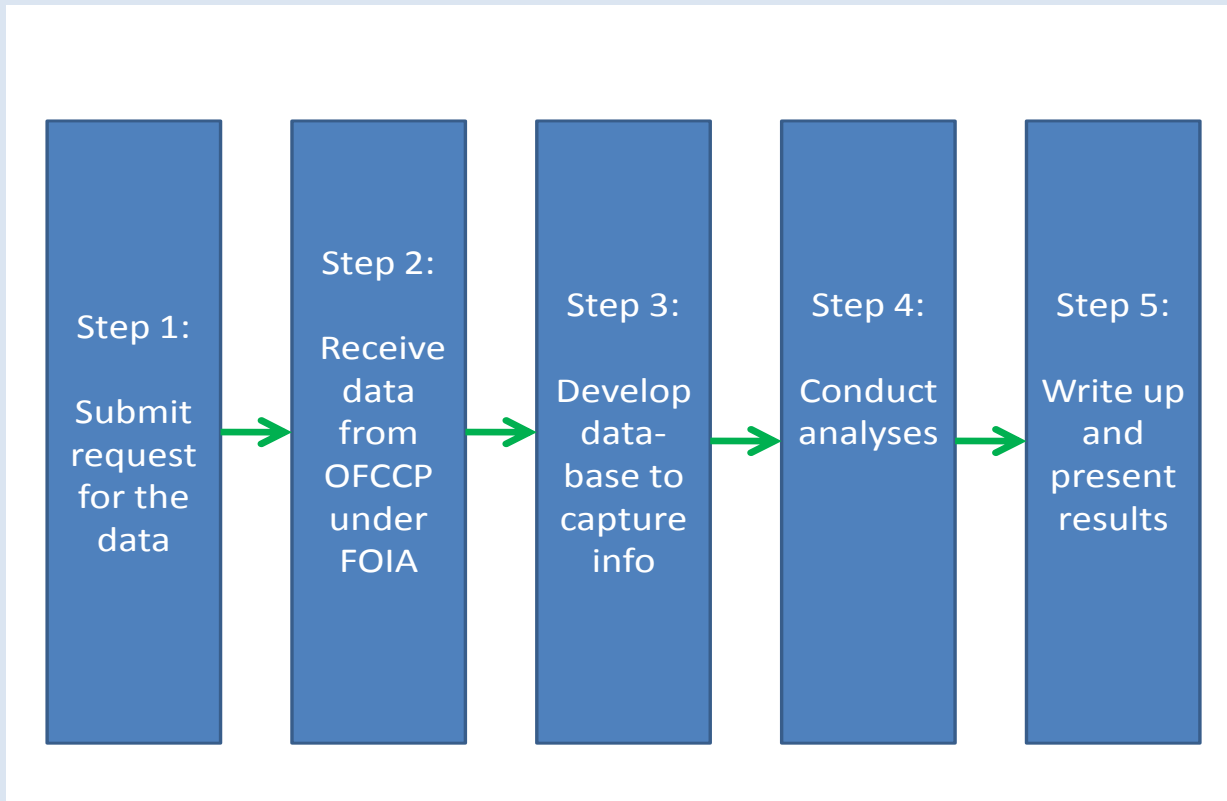
available for analysis. Figure 1 displays a five-step process flow of how we reviewed the data in this report.

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;
3. The job levels and position titles of employees who most often benefited in 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? What technical violations accompanied allegations of systemic discrimination?



**Figure 1.1: The Settlement Review Process: A Step by Step Approach**



**Step 1:** OFCCP’s six regional offices provided CCE with copies of their FY 2008 settlement data in response to CCE’s request. Each OFCCP regional office<sup>14</sup> provided CCE with copies of conciliation agreements resolved within their region during this timeframe. CCE specifically requested settlements that ended with allegations of

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<sup>14</sup>Six 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/ofccp/contacts/ofnation2.htm>

systemic discrimination, and thus financial remedy collected on behalf of alleged victims of discrimination. Each regional office redacted certain types of common information from the conciliation agreements pursuant to the Freedom of Information Act.<sup>15</sup>

**Step 2:** CCE received settlements from each regional office. Because one conciliation agreement was settled and sent to CCE in FY 2007 and thus analyzed in last year's CCE report, it was removed from FY 2008 data. Additionally, five consent decrees from Fiscal Years earlier than 2008 were sent, and these were also withheld from analyses under the rationale that they did not represent enforcement that concluded in FY 2008.

**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.<sup>16</sup> 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.<sup>17</sup>

1. Federal contractor information:

- Contractor name
- Contractor ID in the database<sup>18</sup>
- Contractor Location

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<sup>15</sup> It is important to note that different OFCCP regions redacted different information from settlements. This has implications for missing data, and obviously affected what analyses could be conducted with reasonable confidence.

<sup>16</sup> 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.

<sup>17</sup> Steps 4 and 5 of the process are presented in the proceeding sections.

<sup>18</sup> Contractor identities were considered confidential and are not reported.

2. OFCCP characteristics:

- OFCCP District
- OFCCP Region

3. Audit characteristics:

- Contractor industry<sup>19</sup>
- 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
- Covered 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?
- What was the length to closure (i.e., time between start of the audit and date of settlement)?
- What technical violations accompanied allegations of systemic discrimination?

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

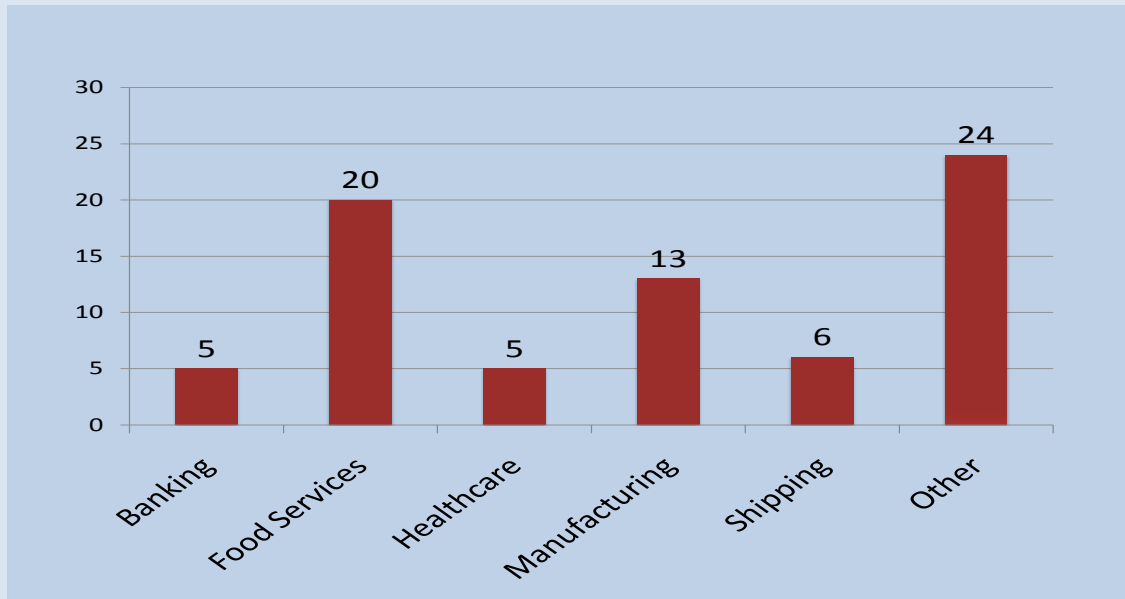
- What was the length of the settlement period?
- How were remedies calculated (e.g., back pay, interest, benefits, etc.)?

**Step 4: Data Analyses:** A series of analyses were conducted to identify trends in OFCCP audits that produced settlements in FY 2008. Most of these analyses examined the number (and percentage) of settlements across different types of industries, jobs, audit characteristics, technical characteristics, etc. Additionally, analyses were conducted to examine enforcement across (1) OFCCP region, and (2) FY 2007 and FY 2008.

## SECTION 2: SIMPLE DESCRIPTIVE STATISTICS

**OFCCP Settlements by Contractor Industry.**<sup>20</sup> One initial question of interest concerns what industries were represented most often in OFCCP settlements. Based on FY 2008 settlements, contractors in the food service industry were most likely to be involved in OFCCP settlements. Specifically, food service industry contractors represented 27% of all settlements. Contractors from the manufacturing industry were found in 18% of settlements. These were the only two federal contractor industries that were found in more than 10% of settlements. Contractors from the healthcare, banking, and shipping industries represented 7%, 7%, and 8% respectively of the settlements.<sup>21</sup>

**Figure 2.1: Number of OFCCP Settlements by Federal Contractor Industry**



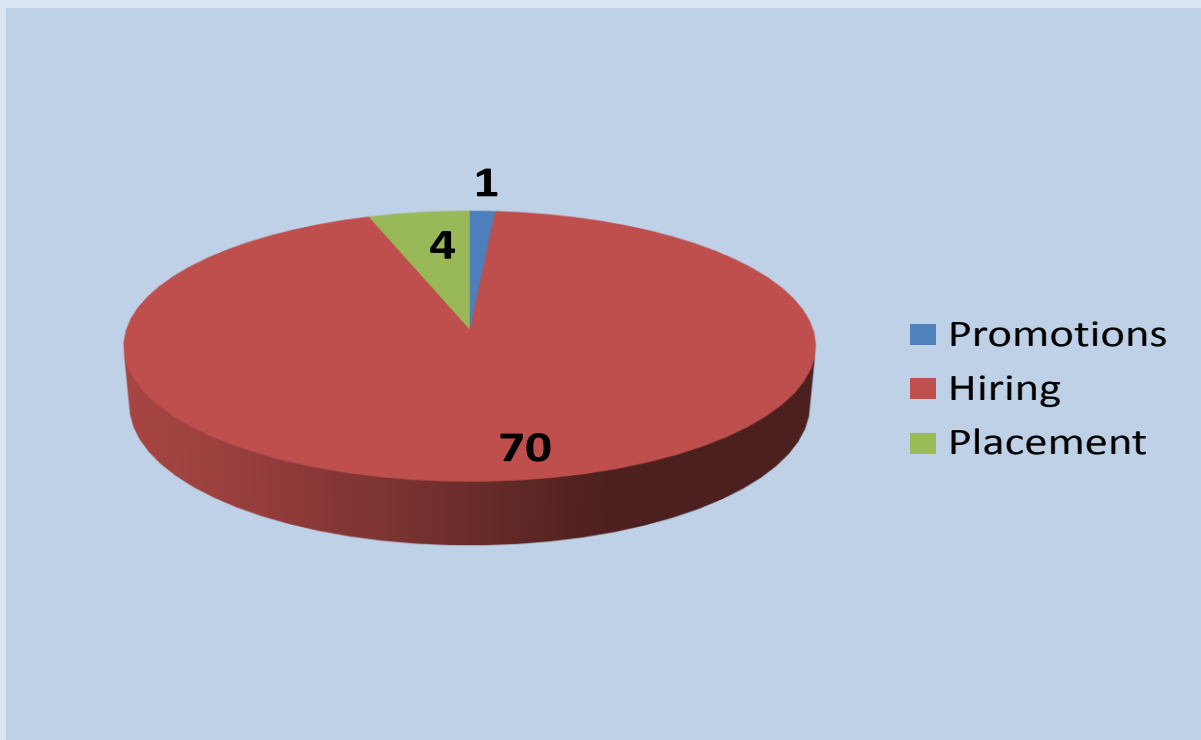
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<sup>20</sup> For most figures in this report, numbers on the Y axis represent the number of settlements. Results in the text are discussed in percentages to simplify interpretation.

<sup>21</sup> The 'Other Industry' category included the following industries (with frequencies in percentages): aviation (3), biotech (2), charity (1), book wholesaler (1), communications (2), construction (2), correctional facility (1), education (1), electronics (1), energy (1), facility services (1), furniture (2) gardening (1), hospitality (3), packaging (1), and security (1).

**OFCCP Settlements by Type of Systemic Discrimination:** Figure 2.2 shows the types of alleged systemic discrimination found in FY 2008 settlements. Over 95% of settlements included an allegation of hiring discrimination. The remaining settlements included alleged discrimination in employee placement<sup>22</sup> into higher and lower paying jobs (6%) and promotion (1%). Note that zero settlements alleged systemic discrimination in compensation practices. Thus, three years after OFCCP released revised compensation standards, no settlements focused on this issue. Additionally, no settlements alleged systemic discrimination in termination practices. This is a noteworthy finding given that federal contractors are required to include termination data in affirmative action plans when audited.

**Figure 2.2: Number of OFCCP Settlements by Allegations of Discriminatory Policies and Procedures**

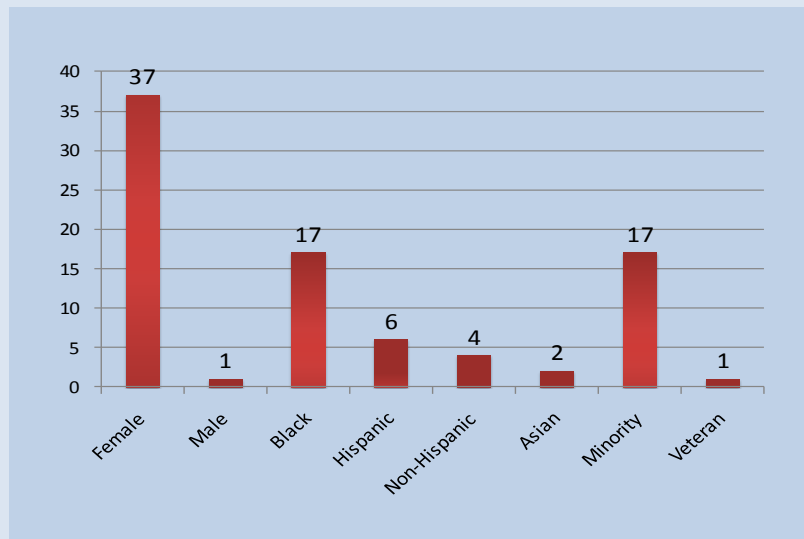


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<sup>22</sup> In this context a ‘placement’ refers to an employment decision about which job an applicant is hired into. Thus, instead of comparing two groups (e.g., male and female) on a hired/not hired employment decision, placement cases compare two groups on whether applicants were hired into a more attractive job/hired into a less attractive job.

**OFCCP Settlements by Covered Groups:** Several settlements included systemic discrimination against both females and minorities. For this reason, data do not add up to the total number of frequencies or 100% in Figure 2.3.<sup>23</sup> Females were the most frequently covered group in settlements, and were included in just over 50% of the settlements. One or more racial/ethnic minority groups were a covered group in about 63% of the settlements. ‘Total Minority’ and Black applicants were each a covered group in about 23% of settlements. Hispanics (8%) and Asians (3%) were covered groups in a smaller percentage of settlements. Note that members of a ‘Non-Hispanic’ group, which appeared to include Whites, were a covered group in 5% of settlements.

**Figure 2.3: Number of OFCCP Settlements by Covered Groups**



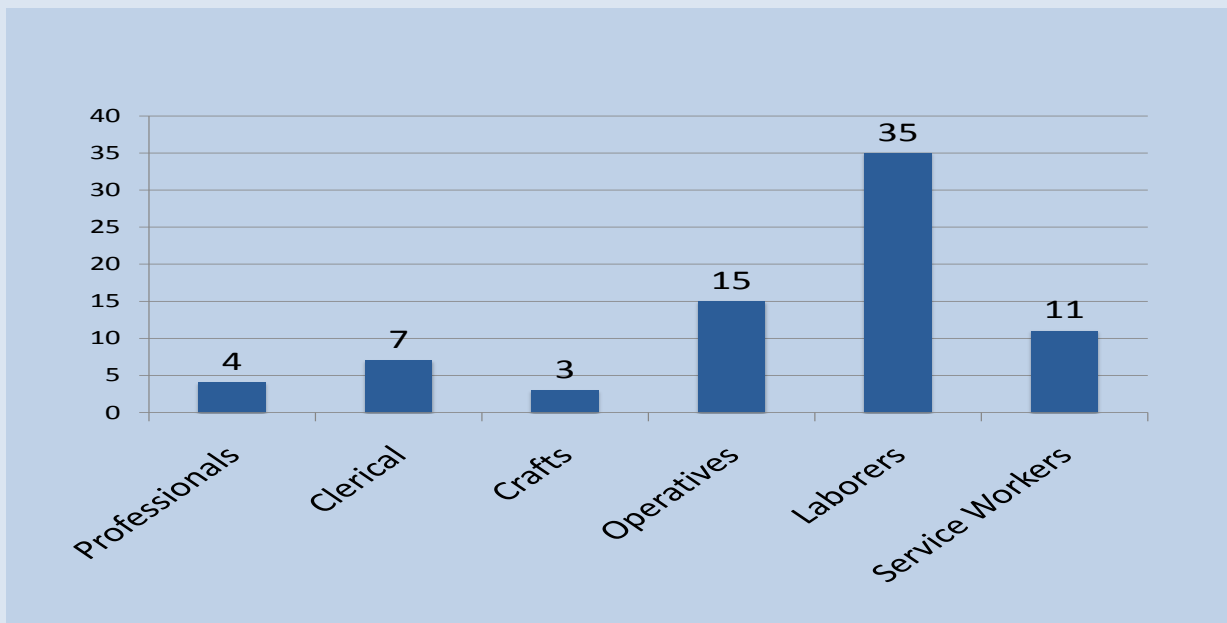
‘Total Minority’ is often an ‘ease of use’ aggregation method where all minority groups (Black, Asian, Hispanic, Native Hawaiian/other Pacific Islander, Native American and Two or More Races) are combined into one category. Analyses then typically compare the selection rates of Whites (‘Non-Minorities’) to ‘Total Minority’. However, there is nothing in Title VII of the Civil Rights Act of 1964, as amended, or the Uniform Guidelines on Employee Selection Procedures (UGESP), as amended, that indicates that

<sup>23</sup> This ‘multiple categories’ issue is generally why percentages do not add up to 100 percent in figures and tables found in this report.

“Total Minority” is an actual covered group. It is interesting that ‘Total Minority’ continues to make up a meaningful percentage of covered groups in OFCCP settlements. It was also interesting to note that in one settlement, veterans were alleged victims of systemic discrimination based upon the fact that the contractor did not hire any covered veterans during an affirmative action plan year. One settlement also collected remedies for both males and females (as separate covered groups) as alleged victims of discrimination.

**OFCCP Settlements by Type of Jobs Investigated:** As expected, the majority of OFCCP settlements involved lower level jobs. For example, laborer jobs were a focus in about 48% of settlements, operative jobs were included in about 21% of settlements, and service workers were included in about 15% of settlements. Clerical positions were the focus in about 10% of settlements and professional jobs (three engineering jobs and one nursing position) made up 5%. No other type of job represented more than 5% of settlements.

**Figure 2.4: Number of OFCCP Settlements by Type of Jobs Investigated**





**Covered Group Representation by EEO Category in Settlements that Alleged Discrimination in Hiring.** Table 2.1 shows the protected groups alleged to be discriminated against by EEO category for the 70 settlements that focused on hiring practices in FY 2008. Note that very few settlements involving professional (0%), clerical (14%), craft (50%), or service jobs (30%) alleged discrimination against females. Instead, settlements focusing on these types of jobs tended to identify racial/ethnic groups as alleged victims of discrimination. The vast majority of settlements focusing on gender groups as alleged victims of discrimination were for laborer (20 or 61%) and operative (11 or 79%) jobs.

**Table 2.1: Covered Group Representation by EEO Category for Settlements that Alleged Discrimination in Hiring**

Type of job	# Race/Ethnicity Cases	# Gender Cases	Total # Cases	Comment
Professional	4 (100%)	0 (0%)	4	One case alleged Native Hawaiians/Other Pacific Islanders as victims; Three engineering jobs and one nursing job was included in this group
Clerical	6 (86%)	1 (14%)	7	
Crafts	1 (50%)	1 (50%)	2	
Operatives	5 (36%)	11 (79%)	14	
Laborers	16 (48%)	20 (61%)	33	One case alleged discrimination against Male and Female; four cases alleged discrimination against Non-Hispanics
Service Workers	7 (70%)	3 (30%)	10	

These results are particularly interesting because the OFCCP conducts approximately 40 to 50 Corporate Management Compliance Evaluations (CMCE) per year.<sup>24</sup> The CMCE review—commonly known as a glass ceiling review—is intended to focus on the promotions, compensation and placement of both minorities and females in the upper ranks of the organization. On the basis of 2008 FY settlements, there did not appear to be any findings of systemic discrimination at the upper ranks of federal contractor organizations. One exception was a settlement out of the Midwest alleging hiring discrimination against Black applicants for management trainee positions.

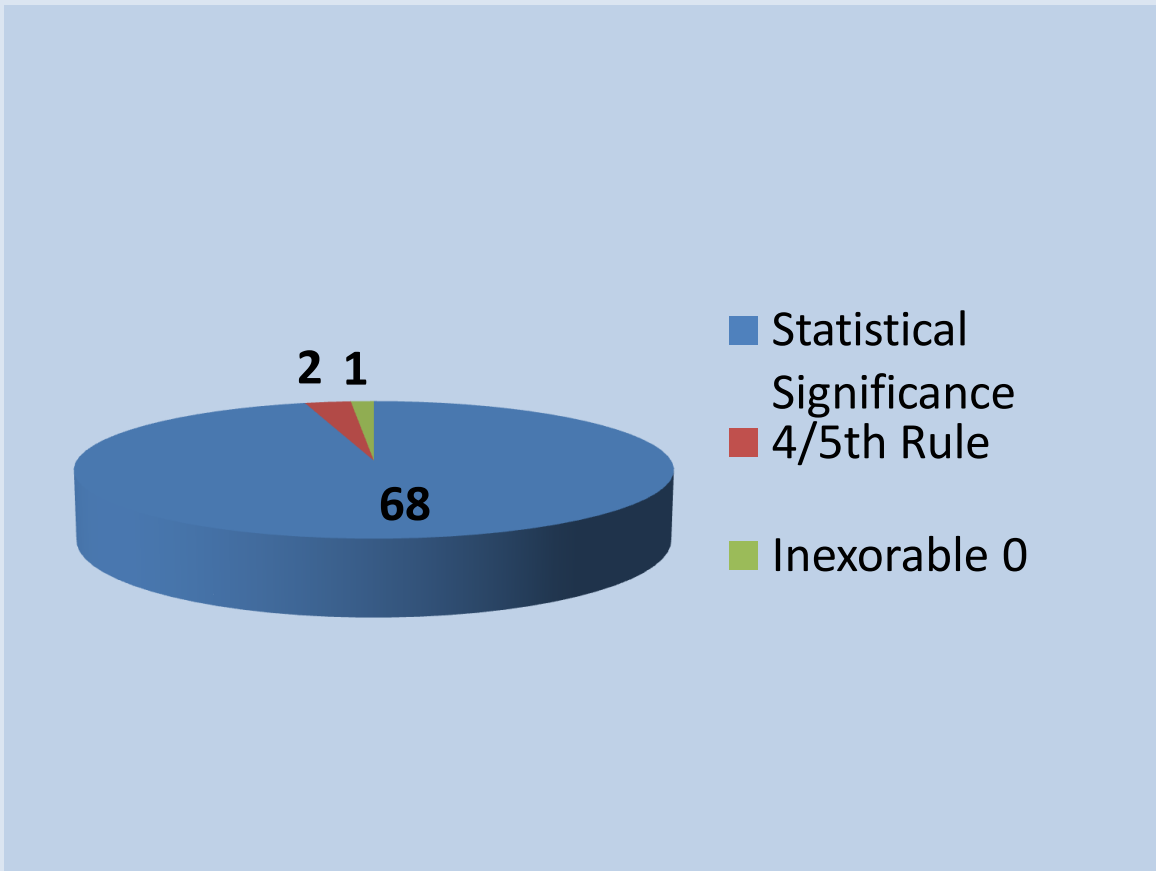
***OFCCP Settlements by Statistical Methods used to Assess Adverse Impact:*** As expected, there was an overwhelming trend toward the use of statistical significance tests in disparity analyses, regardless of whether a specific selection procedure was identified as the discriminatory mechanism or whether an unstructured hiring process was the focus via a ‘pattern or practice’ scenario. Specifically, statistical significance tests were used as stand-alone statistical evidence of disparities in about 93% of settlements. These results are consistent with the common impression within the federal contractor community that the ‘Two Standard Deviation’ Z test is the most used adverse impact statistic.<sup>25</sup> The 4/5<sup>th</sup> rule, which is the adverse impact detection method described in the Uniform Guidelines, was used as stand-alone statistical evidence of discrimination in two settlements.

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<sup>24</sup> "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/ofccp/regs/compliance/faqs/cmcefaqs.htm>

<sup>25</sup> One settlement included the Fisher's Exact Test for a small sample analyses. 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. In some cases the choice between FET and an estimator test like Z can make a substantial difference in determining whether a disparity is statistically significant.

**Figure 2.5: Number of OFCCP Settlements by Adverse Impact Tests Used**

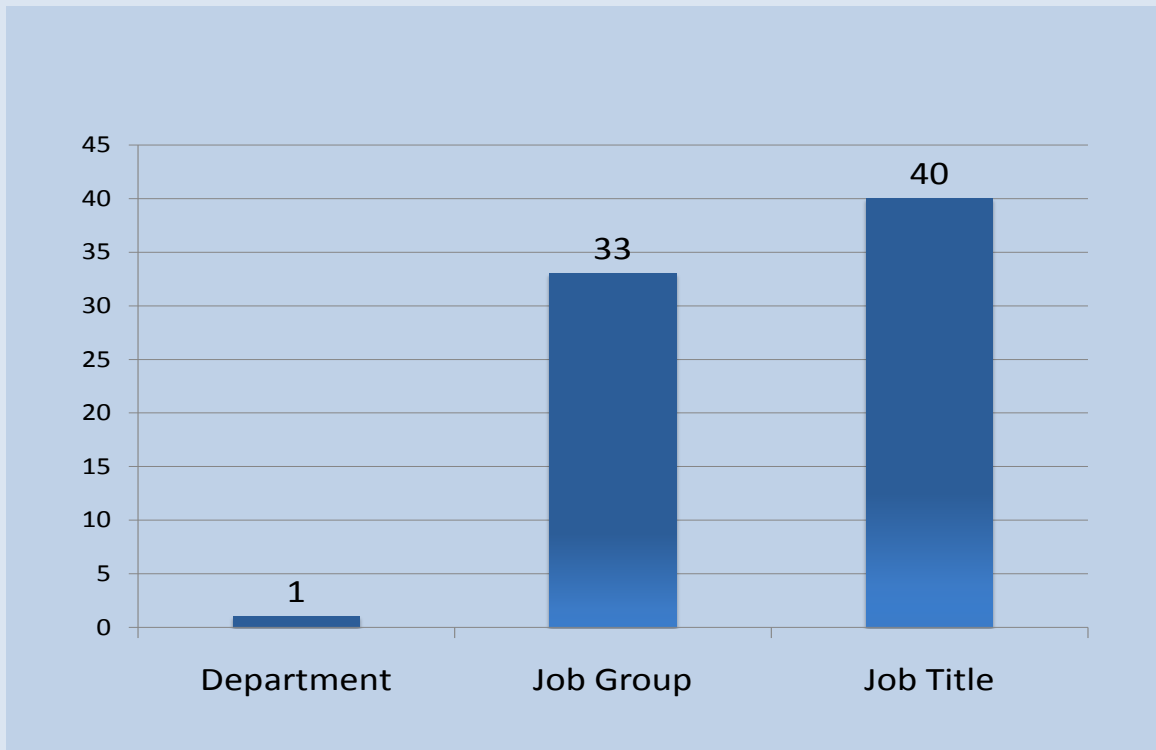


Note that an inexorable zero appeared to be used in one settlement, where the ‘statistical evidence’ was the fact that zero veteran applicants were hired; OFCCP concluded that there was evidence of systemic discrimination by the mere fact that no veterans were hired during an affirmative action plan year. Interestingly, this type of analysis is not required by federal regulations. In two cases, the settlement did not have enough information to make a determination about what statistical test was used.

***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). In FY 2008, OFCCP conducted the majority of analyses by job title (about 55% percent)

and then by job group (about 45%).<sup>26</sup> Note that in one settlement, OFCCP appeared to conduct the adverse impact analysis at the department level independent of job.

**Figure 2.6: Number of OFCCP Settlements by Level of Adverse Impact Analyses**



**Data Aggregation and Aggregation Methods in OFCCP Settlements** Recall that the level of analysis matters because results may differ by the manner in which data is aggregated or disaggregated. In many situations, aggregating data to larger samples increases the statistical power of a test, which increases the likelihood of finding statistically significant results. With statistical significance testing, smaller differences in selection rates are more likely to be significant in larger samples. In other situations, evidence of disparities, and thus potential discrimination, may be masked by artificial

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<sup>26</sup> 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.

aggregation. In both of these examples, aggregation can produce an analysis that does not mirror the reality of employment practices.<sup>27</sup> Figure 2.7 shows a clear trend toward data aggregation in OFCCP enforcement. In fact, OFCCP aggregated data across some strata (i.e., time, job, covered group, location, etc.) in about 70% of settlements.

**Figure 2.7: Number of OFCCP Settlements by Data Aggregation Methods**

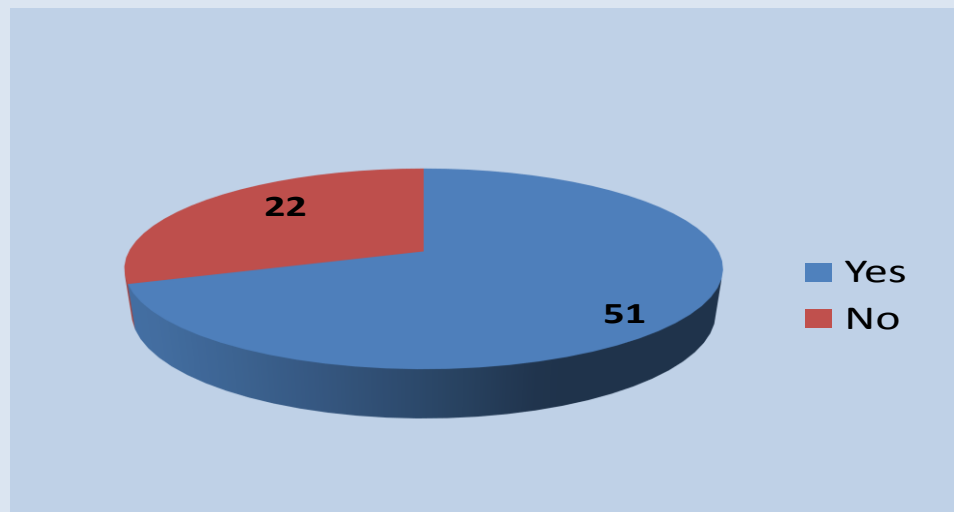


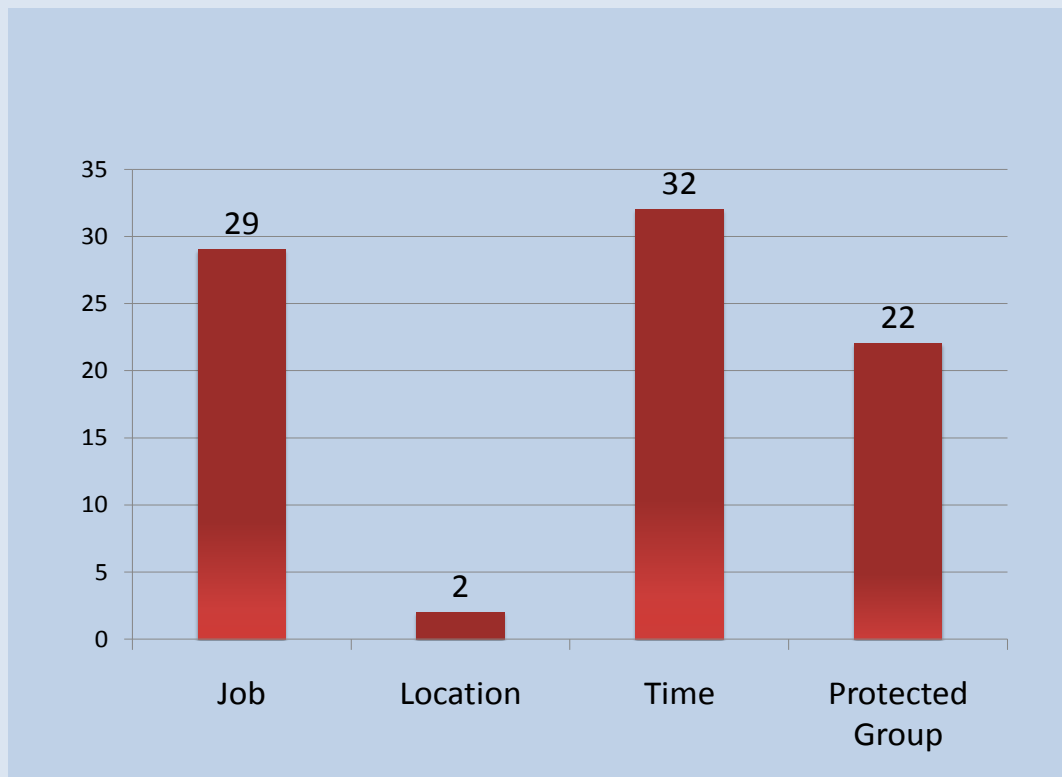
Figure 2.8 shows aggregation by different strata. In FY 2008, data were aggregated by time period in about 44% of settlements, by multiple jobs in about 40% of settlements, by covered group in about 30% of settlements, and by ‘establishment’ or location in about 3% of settlements. Although aggregation by location was found infrequently in settlements, this may be a critical trend to consider in the future. In the vast majority of cases, OFCCP conducts an audit of one establishment, which is intuitive given that federal contractors are required by regulations to create affirmative action plans for each establishment. However, in some cases OFCCP expanded the review to a regional or even national level if evidence suggested that a policy or practice is used at a larger scale

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<sup>27</sup> 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.

and may be discriminatory. Consequently, applicant pools and sample sizes may expand exponentially. In this context, such statistical significance tests as the Z test may be trivial when sample sizes are very large (e.g., in the tens of thousands), because any departure from identical selection rates will be statistically significant.

**Figure 2.8: Number of OFCCP Settlements by Aggregation Methods**



**Time Period Investigated, Length to Audit Closure, and Length of Agreement in Settlements** Table 2.2 shows descriptive statistics for time period investigated, length to audit closure, and length of actual conciliation agreement. These are quantitative variables (as opposed to frequencies and percentages) and thus means and standard deviations can be computed. The average time period that was analyzed in disparity analyses was about 17 months, while the median was 12 months (which is consistent with the notion of an annual affirmative action plan). The minimum time period analyzed was six months (because that was the only time frame in which data was collected by the federal contractor), while the maximum was 36 months.

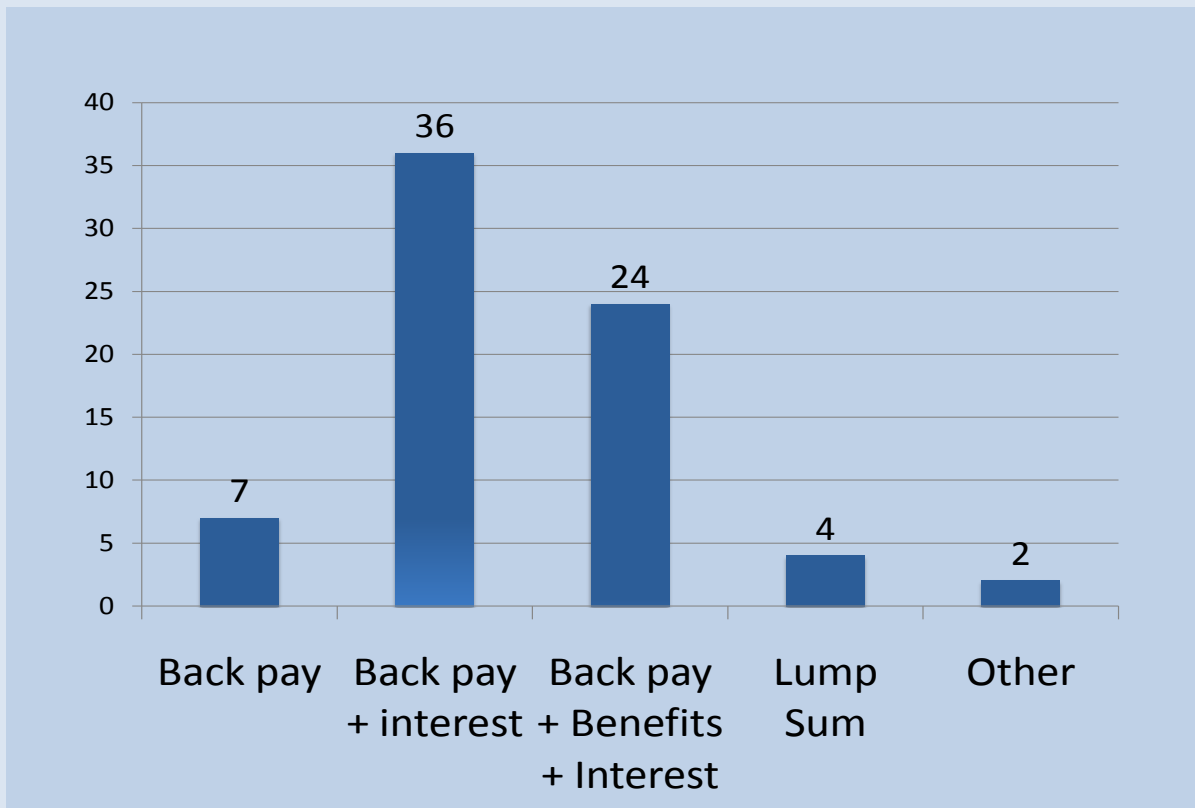
Another settlement outcome of interest is the average time to audit closure, which was measured as the time period between the date of the scheduling letter and the date the settlement was signed. The average length to closure was about 32 months, the median was 29 months and the standard deviation was 16 months. Thus, the ‘typical audit’ took about 2.7 years to close. However, there was substantial variability in this outcome. For example, the minimum length to conciliation was three months, while the maximum was 87 months (or just under eight years). As the next section shows, this is an important consideration for financial remedy calculations. The last column in Table 2.2 captures how long the conciliation agreement with the OFCCP was active. The average and typical length of agreement was about 20 months, with some as short as 5.5 months and others as long as 48 months.

**Table 2.2: Descriptive Statistics for OFCCP Settlements by Time Period Investigated, Length to Audit Closure, and Length of Conciliation Agreement**

	<b>Applicant flow time period (months)</b>	<b>Length to audit closure (months)</b>	<b>Length of conciliation agreement (months)</b>
<b>Mean</b>	16.90	31.75	20.39
<b>Median</b>	12	29	19.50
<b>Standard Deviation</b>	6.85	15.64	7.63
<b>Minimum</b>	6	3	5.50
<b>Maximum</b>	36	87	48

**OFCCP Settlements by Financial Remedy Calculation:** Figure 2.9 summarizes how financial remedies were computed in FY 2008 settlements. Based on the information provided in the settlements, OFCCP included back pay and interest in the vast majority of financial remedy calculations. Back pay alone was used as the financial remedy in about 10% of settlements. Back pay plus interest was the most frequently used calculation, and was found in about 49% of settlements. Benefits were added to back pay and interest in about 33% of settlements. In another 8% of the settlements, other financial remedy strategies were used (e.g., lump sum, seniority buyout, money set aside for training, etc.).

**Figure 2.9: Number of OFCCP Settlements by Financial Remedy Calculation**

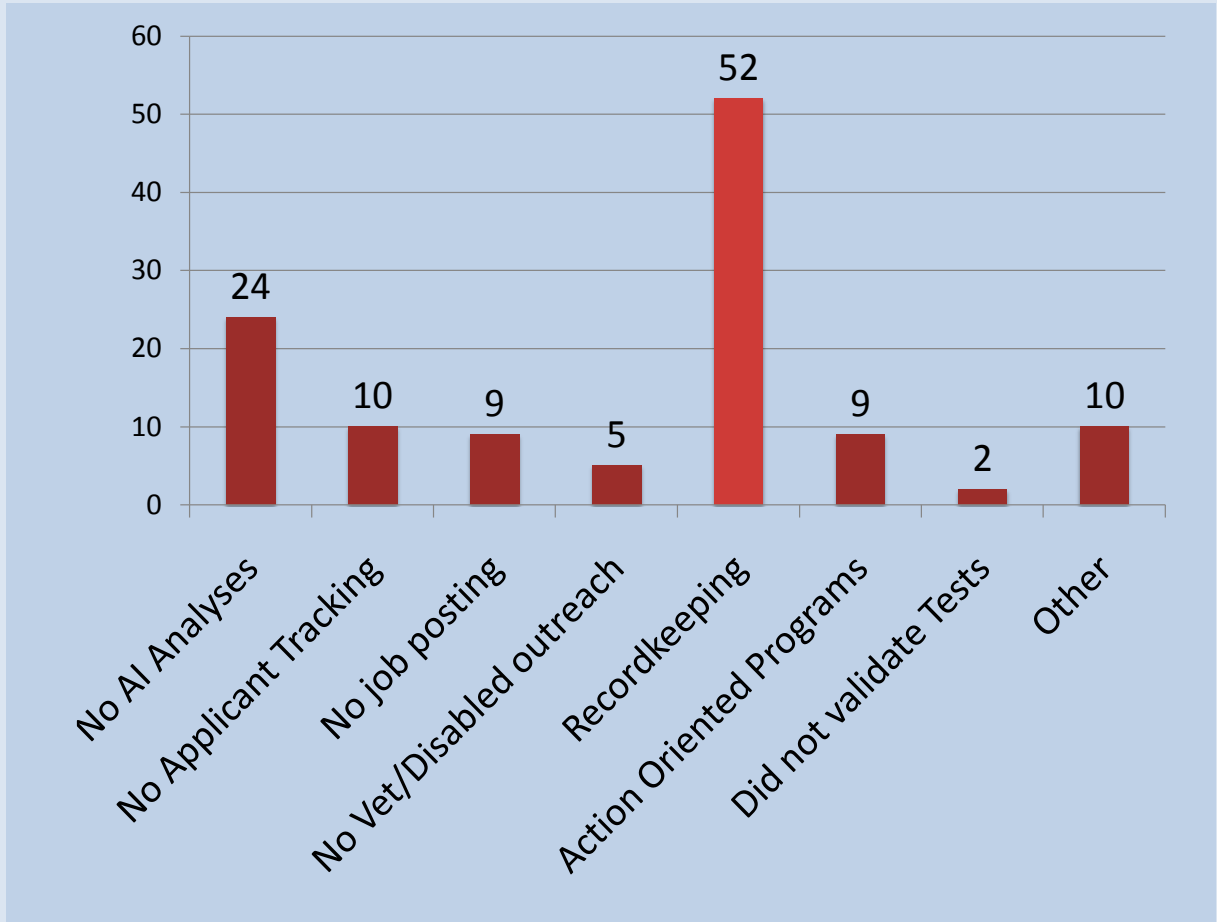




**Technical Violations Accompanying Allegations of Systemic Discrimination:** In many cases there were both systemic and technical violations in a settlement. Note that settlements that resulted from technical violations alone did not involve financial remedies and were resolved with the contractor's agreement to comply with the requirement in the future. These were not included in the current analysis, although it is important to keep in mind that past technical violations may be a component used in OFCCP's Federal Contractor Selection System (FCSS), and thus may increase the likelihood of a future OFCCP audit.

CCE was interested in identifying what technical violations accompanied allegations of systemic discrimination. Figure 2.10 presents this information. More than 70% of settlements also included a technical violation related to some form of record-keeping (e.g., failed to maintain personnel records, failed to collect race and gender of applicants, etc.). About one-third of settlements included a technical violation related to not conducting required adverse impact analyses (either for the bottom line applicant process or for particular steps in the process). About 13% of settlements included technical violations for (1) not having an applicant tracking system, (2) not posting jobs with state employment offices, and (3) not having action oriented programs (i.e. good faith efforts) to meet affirmative action goals. A smaller number of settlements included violations for inadequate veteran/disabled outreach (7%) and not validating employment tests that had adverse impact against a covered group (3%).

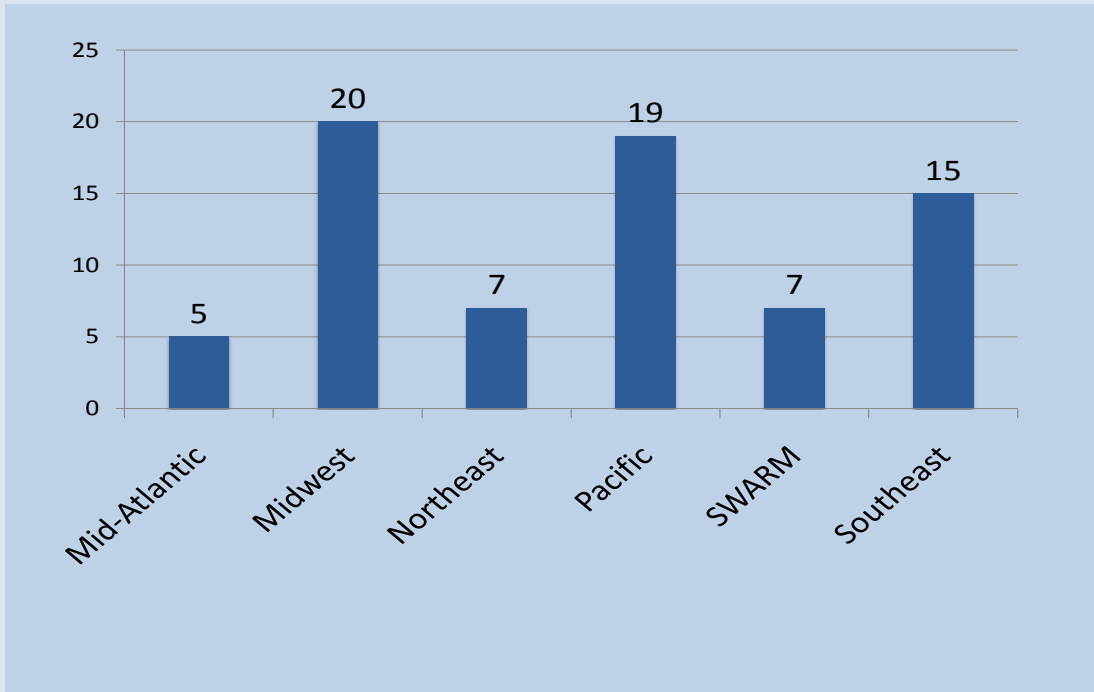
**Figure 2.10: Number of Technical Violations accompanying Allegations of Systemic Discrimination**



### SECTION 3: ANALYSES BY OFCCP REGION

***OFCCP Settlements by OFCCP Region:*** One question is whether there are any meaningful regional differences in OFCCP enforcement strategies. As an initial consideration toward that question, it is useful to evaluate the number of settlements by OFCCP region. Figure 3.1 shows the number of settlements by OFCCP region. As the Figure shows, the Midwest region produced the most settlements in FY 2008 (27% of all settlements), followed closely by the Pacific region (26% of all settlements). The Southeast produced about 21% of settlements in FY 2008. The Southwest (10%), Northeast (10%) and Mid-Atlantic (7%) regions produced the fewest settlements in FY 2007.<sup>28</sup> The following section presents some interesting enforcement differences by OFCCP region.

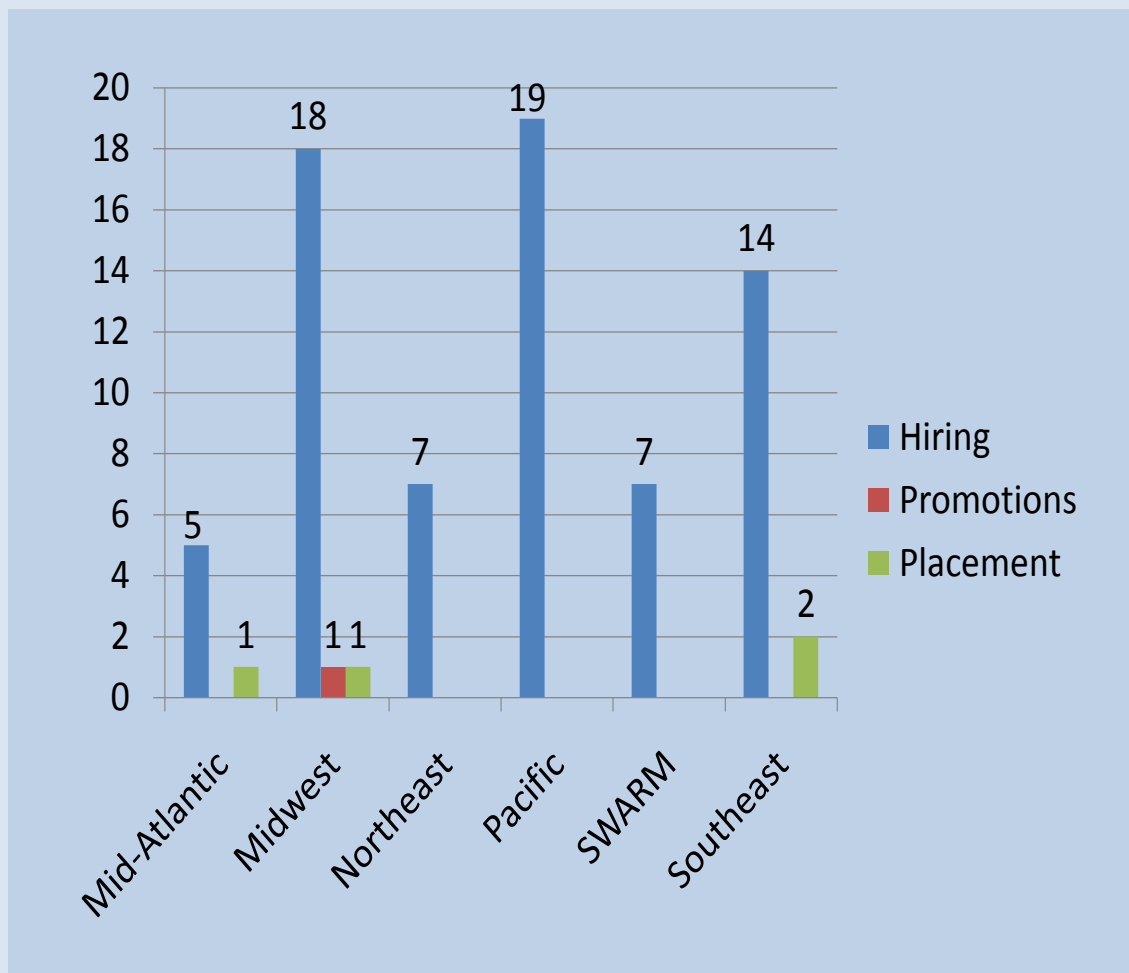
**Figure 3.1: OFCCP Settlements by OFCCP Region**



<sup>28</sup> It is important to note that these data by region may be explained by a number of factors. While it would be useful to consider the number of settlements by region in the context of (1) the total number of federal contractors in each region, (2) type of industries in each region, and/or (3) the number of audits conducted in a region, these data were not made available to CCE.

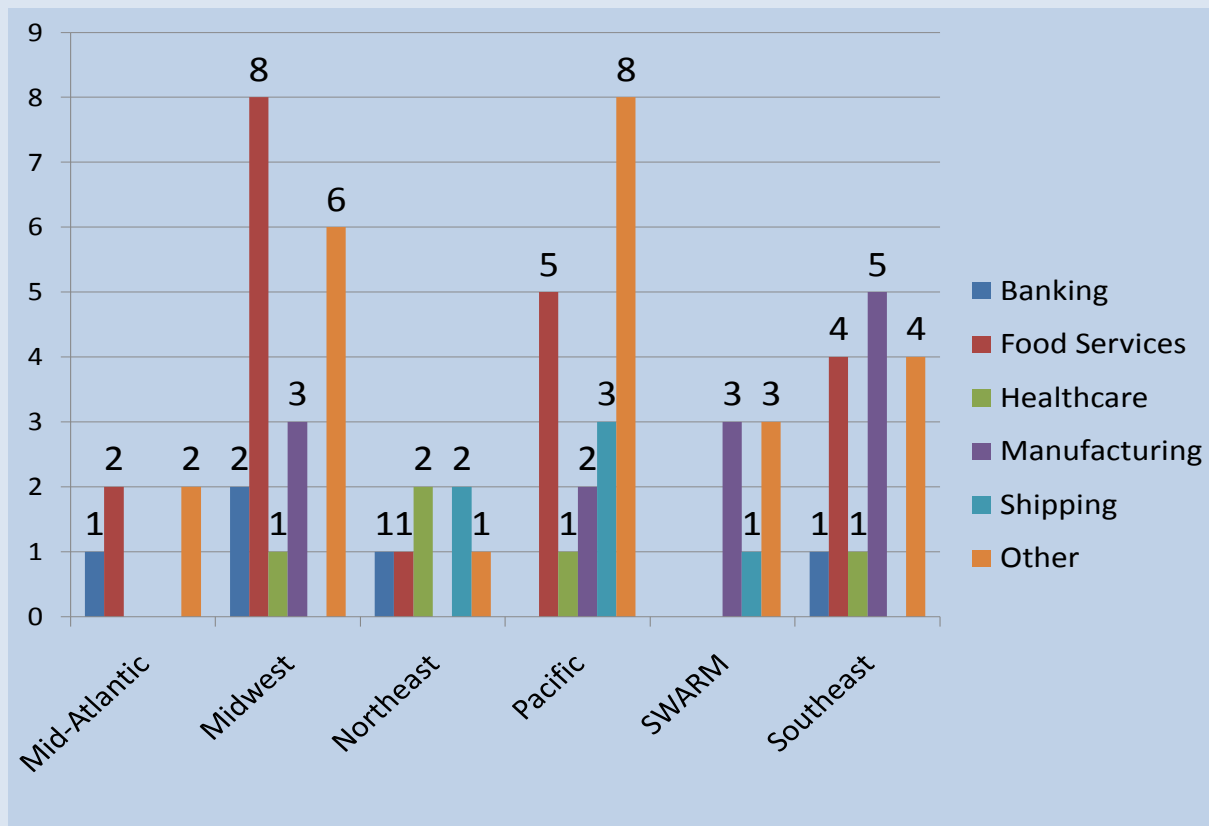
**Types of Systemic Discrimination in Settlements by OFCCP Region:** As described earlier in the report, the vast majority of settlements focused on systemic hiring discrimination regardless of OFCCP region. In fact, only the Midwest (one promotion settlement and one placement settlement) and Southeast (two placement settlements) regions had more than one settlement that was not a hiring case. The Northeast, Pacific, and SWARM regions settled only hiring cases in FY 2008.

**Figure 3.2: Allegations of Discriminatory Policies and Procedures in Settlements by OFCCP Region**



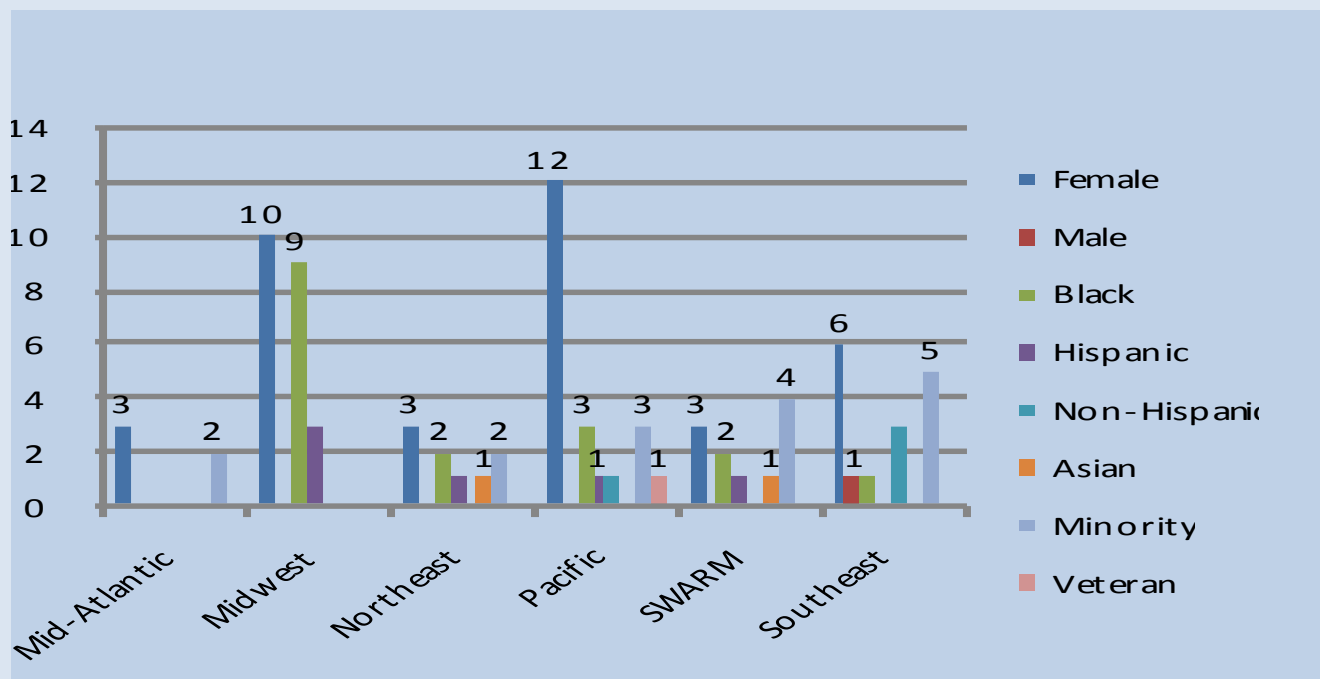
**Contractor Industries in Settlements by OFCCP Region:** As described earlier, contractors from the food service industry were found most often in settlements. However, industry representation did vary by region. Food service contractors made up 40% of the settlements in the Midwest and Mid-Atlantic regions. Additionally, the Midwest region produced the majority of settlements with banking contractors (40%). The Northeast region produced most settlements with healthcare contractors (40%). Settlements with manufacturing contractors made up most of the enforcement in the SWARM (43%) and Southeast (33%) regions. About 29% of the Northeast region settlements were with health care contractors. The Pacific region had settlements from a diverse set of federal contractor industries, and included shipping contractors and contractors from a variety of ‘other’ less common industries.

**Figure 3.3: Contractor Industries in Settlements by OFCCP Region**



**Covered Groups in Settlements by OFCCP Region:** Interestingly, some regions produced settlements that focused on specific covered groups.<sup>29</sup> For example, settlements from the Mid-Atlantic (60%) and Pacific (63%) regions most often included gender as a covered group. In fact, the Mid-Atlantic region did not settle a single case with a race/ethnicity subgroup (although two cases focused on a ‘Total Minority’ aggregate). Settlements from the Midwest region most often included female (50%) and Black applicants (45%), as did the Northeast region, where 43% of settlements included females and 29% included Black applicants. Settlements in the Southeast region included females (40%) and total minorities (33%) most often. Settlements in the SWARM region included a ‘Total Minority’ aggregate (57%) and females (43%) most often.

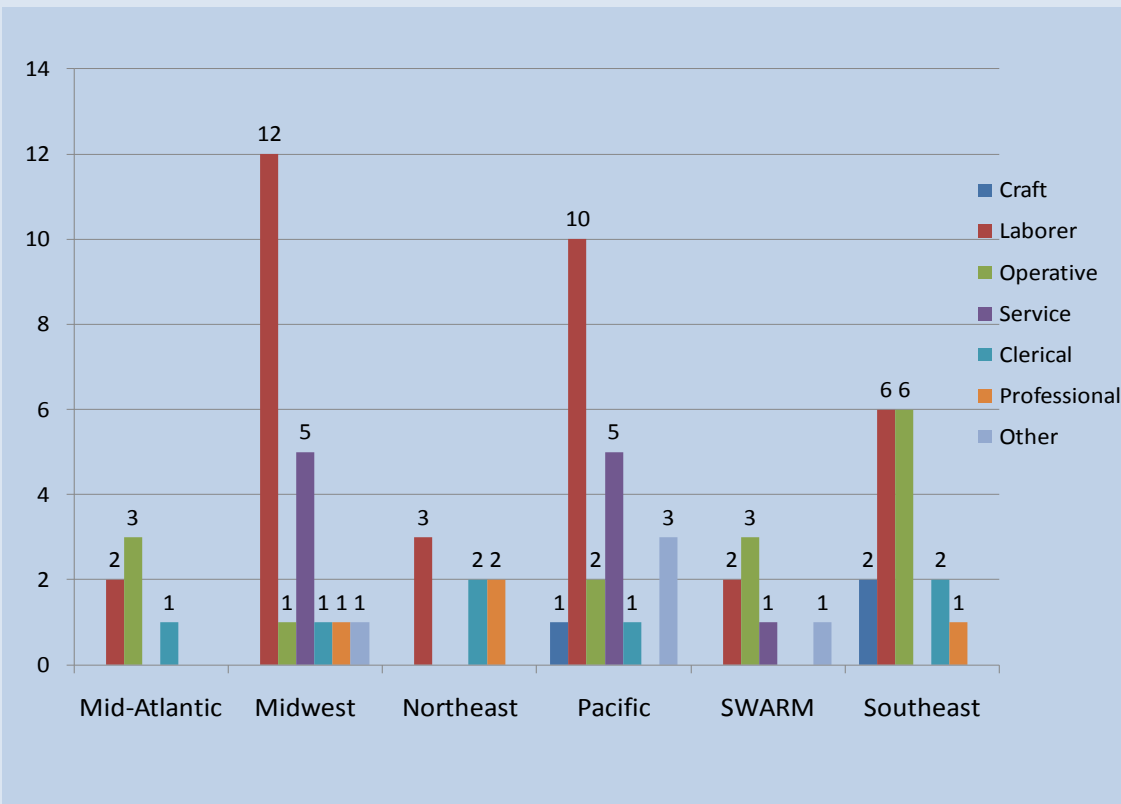
**Figure 3.4: Covered Groups in Settlements by OFCCP Region**



<sup>29</sup> Again, note that some settlements included multiple covered groups, and thus frequencies may not sum to 100 percent and the total number of covered groups within region may be more than the total number of settlements. This applies to the majority of tables and figures in this section.

**Types of Jobs Investigated in Settlements by OFCCP Region:** As described above, the majority of OFCCP Settlements in FY 2008 focused on Laborer jobs. This job category made up the majority of settlements in the Midwest (60%), Pacific (53%), and Northeast (43%) regions. Operative jobs made up the majority of settlements in the Mid-Atlantic (43%) and SWARM (43%) regions. Both Laborer (35%) and Operative (35%) jobs were found in most of the settlements from the Southeast region.

**Figure 3.5: Types of Jobs Investigated in Settlements by OFCCP Region**



**Level of Adverse Impact Analyses in Settlements by OFCCP Region:** Interestingly, some regional settlements included a majority of adverse impact analyses at the job title level, whereas other regional settlements included a majority of analyses at the broader job group level. For example, in settlements from the Southeast (81%) and Mid-Atlantic (60%) regions, the majority included analyses at the job group level. In settlements from the Northeast (100%), SWARM, (71%) Midwest (55%), and Pacific (63%) regions, the majority 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.

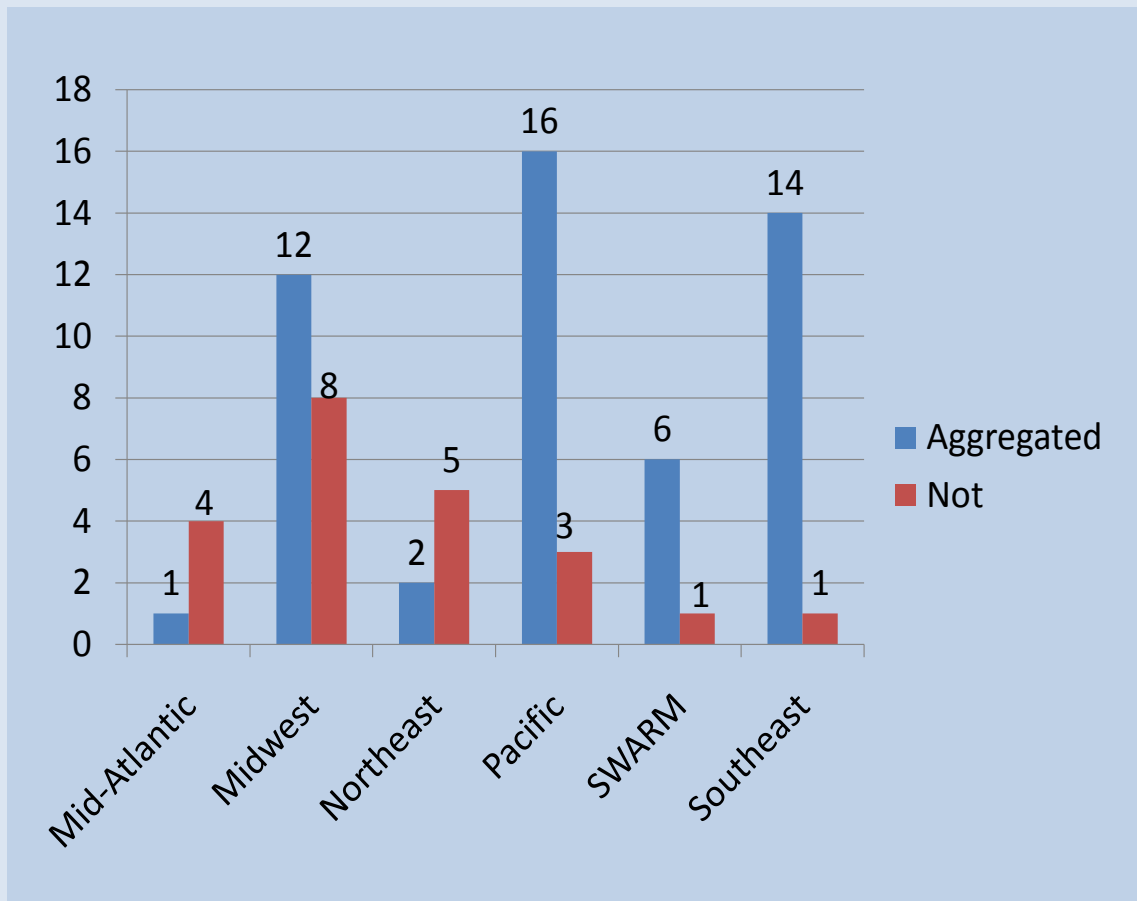
**Figure 3.6: Level of Adverse Impact Analyses in Settlements by OFCCP Region**





**Data Aggregation and Aggregation Methods in Settlements by OFCCP Region:** As described earlier in the report, data were aggregated in the majority of OFCCP settlements in FY 2008, and this can have consequences on the adverse impact analyses. The Southeast (93%), SWARM (86%), Pacific (84%) and Midwest (60%) regions aggregated data in some way in the vast majority of settlements. The Mid-Atlantic (20%) and Northeast (29%) regions aggregated data in only a small percentage of settlements.

**Figure 3.7: Data Aggregation in Settlements by OFCCP Region**



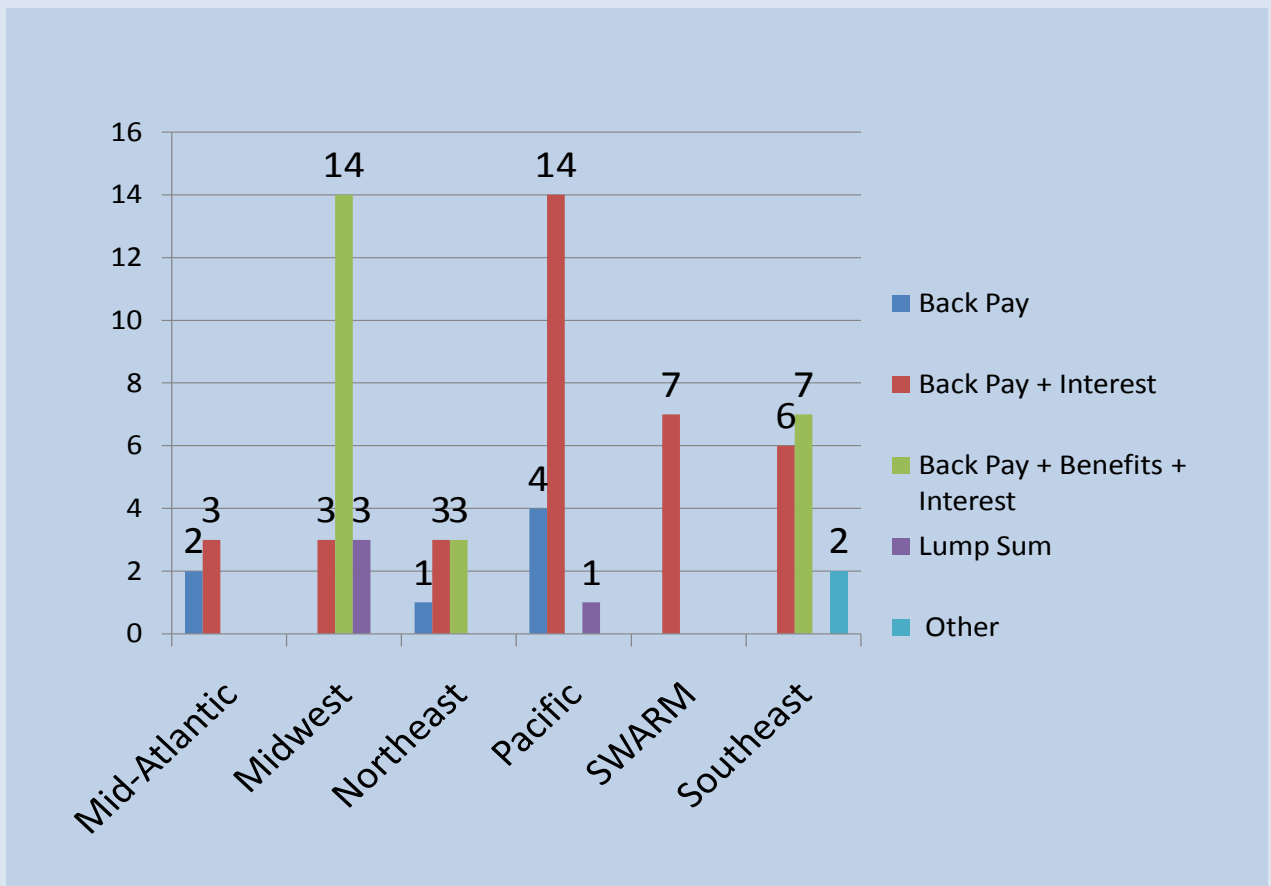
In settlements where OFCCP aggregated data, it is useful to know exactly how the data were aggregated. The Midwest region aggregated by job and by time period most often (66% of all aggregation within region). The Pacific (50% of all aggregation within region) and SWARM (100% of all aggregation within region) regions aggregated most often across time period. Interestingly, the Southeast (100% of all aggregation within region) aggregated across job most often, but also aggregated by time (62% of all aggregation within region) and covered group (69% of all aggregation within region). The Pacific (25% of all aggregation within region), Northeast (100% of all aggregation within region) and SWARM (66% of all aggregation within region) regions also aggregated across covered group in a substantial number of settlements.

**Figure 3.8: Data Aggregation Methods in Settlements by OFCCP Region**



**Financial Remedy Calculations by OFCCP Region:** As previous results suggested, on the basis of information provided in the settlements, almost all regional settlements included back pay and interest. However, there were some interesting differences across region. For example, in a majority of their settlements, the Pacific (74%), Mid-Atlantic (60%) and SWARM (100%) regions included back pay and interest in their remedy calculations. However, in all of their settlements, the Midwest (70%) and Southeast (47%) regions added benefits to the back pay plus interest model. The Northeast used both calculations in the same amount of settlements (43%). Back pay only was used in a small number of settlements in the Mid-Atlantic (40%), Northeast (14%), and Pacific (21%) regions. Note that the ‘Other’ category included such factors as lump sum payments, seniority buyout, and set asides for training.

**Figure 3.9: Financial Remedy Calculation by OFCCP Region**



**Length to Audit Closure Statistics by OFCCP Region:** As described earlier in the report, the typical (median) audit resulting in a settlement took 29 months to close. There were, however, some differences by OFCCP region. For example, the Mid-Atlantic (23 months) and Pacific (24 months) had the shortest median lengths to closure. The median lengths to closure for the other four regions ranged from 28 months (SWAM) to 31 months (Midwest & Northeast). When reviewing Table 3.1, note that in some cases there were a small number of very long audits that affected results, separating the mean from median, and inflating the standard deviation. These results are particularly noteworthy given that the OFCCP includes interest in the calculation of financial remedies.

**Table 3.1: Length to Closure Statistics by OFCCP Region**

<b>Region</b>	<b>Sample Size</b>	<b>Mean (months)</b>	<b>Median (months)</b>	<b>Std Dev (months)</b>	<b>Minimum (months)</b>	<b>Maximum (months)</b>
<b>Mid-Atlantic</b>	<b>5</b>	<b>22.8</b>	<b>23</b>	<b>6.7</b>	<b>13</b>	<b>29</b>
<b>Midwest</b>	<b>20</b>	<b>34.6</b>	<b>31</b>	<b>13.3</b>	<b>14</b>	<b>55</b>
<b>Northeast</b>	<b>7</b>	<b>34.6</b>	<b>31</b>	<b>9.0</b>	<b>26</b>	<b>52</b>
<b>Pacific</b>	<b>19</b>	<b>28.5</b>	<b>24</b>	<b>19.1</b>	<b>3</b>	<b>85</b>
<b>SWARM</b>	<b>7</b>	<b>28.0</b>	<b>28</b>	<b>3.5</b>	<b>22</b>	<b>33</b>
<b>Southeast</b>	<b>15</b>	<b>35.5</b>	<b>30</b>	<b>20.4</b>	<b>5</b>	<b>87</b>

**Time Period of Data Analyzed by OFCCP Region:** As described earlier, the average personnel activity time period analyzed in disparity analyses was about 17 months, with a median of 12 months. This was interesting, particularly given that federal regulations require federal contractors to develop annual affirmative action plans that included analyses of 12 months of data.<sup>30</sup> There were, however, some interesting differences across OFCCP region. For example, whereas the median time period analyzed was 12 months in four of the regions and 14 months in the Southeast region, the median time period for SWARM was 24 months.

**Table 3.2: Time Period Analyzed in the Settlement by OFCCP Region**

<b>Region</b>	<b>Sample Size</b>	<b>Mean (months)</b>	<b>Median (months)</b>	<b>Std Dev (months)</b>	<b>Minimum (months)</b>	<b>Maximum (months)</b>
<b>Mid-Atlantic</b>	<b>5</b>	<b>14.4</b>	<b>12</b>	<b>5.4</b>	<b>12</b>	<b>24</b>
<b>Midwest</b>	<b>20</b>	<b>16.9</b>	<b>12</b>	<b>6.1</b>	<b>12</b>	<b>26</b>
<b>Northeast</b>	<b>7</b>	<b>13.7</b>	<b>12</b>	<b>4.5</b>	<b>12</b>	<b>24</b>
<b>Pacific</b>	<b>19</b>	<b>17.5</b>	<b>12</b>	<b>8.3</b>	<b>9</b>	<b>36</b>
<b>SWARM</b>	<b>7</b>	<b>20.7</b>	<b>24</b>	<b>7.7</b>	<b>6</b>	<b>30</b>
<b>Southeast</b>	<b>15</b>	<b>16.7</b>	<b>14</b>	<b>6.7</b>	<b>11</b>	<b>36</b>

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<sup>30</sup> As part of a compliance evaluation, a contractor is required to submit 12 months of personnel activity data (i.e. applicants, promotions, terminations, and hires) unless they are six months or more into their affirmative action plan year on the date that the scheduling letter is received. In those situations the contractor is required to submit at least 18 months worth of personnel activity data.

**Length of conciliation agreement by OFCCP Region:** As described earlier, the average and typical length of the agreement between OFCCP and federal contractors during a conciliation agreement or consent decree settlement was about 20 months. There was little variability across OFCCP region with a few exceptions. For example, the Mid-Atlantic (24 months) and Southeast (26 months) had slightly longer conciliation periods than the other OFCCP regions, which were all close to the 20 month average.

**Table 3.3: Length of Agreement by OFCCP Region**

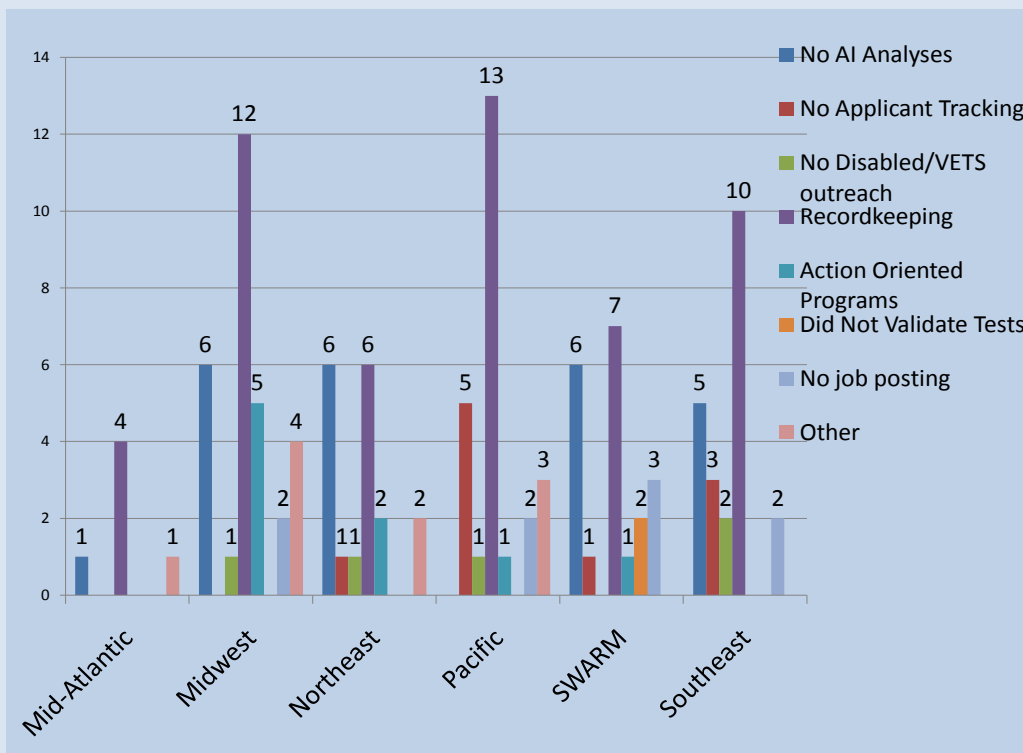
<b>Region</b>	<b>Sample Size</b>	<b>Mean (months)</b>	<b>Median (months)</b>	<b>Std Dev (months)</b>	<b>Minimum (months)</b>	<b>Maximum (months)</b>
<b>Mid-Atlantic</b>	<b>5</b>	<b>24.0</b>	<b>24</b>	<b>8.5</b>	<b>12</b>	<b>36</b>
<b>Midwest</b>	<b>19<sup>31</sup></b>	<b>20.0</b>	<b>18</b>	<b>7.9</b>	<b>12</b>	<b>48</b>
<b>Northeast</b>	<b>7</b>	<b>19.4</b>	<b>21</b>	<b>6.1</b>	<b>11</b>	<b>26</b>
<b>Pacific</b>	<b>16</b>	<b>16.0</b>	<b>14</b>	<b>6.2</b>	<b>5.5</b>	<b>31</b>
<b>SWARM</b>	<b>7</b>	<b>20.1</b>	<b>21</b>	<b>3.1</b>	<b>14</b>	<b>24</b>
<b>Southeast</b>	<b>15</b>	<b>25.9</b>	<b>28</b>	<b>7.8</b>	<b>14</b>	<b>40</b>

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<sup>31</sup> One settlement removed information about the length of the agreement.

**Technical Violations by OFCCP Region:** There were a wide variety of technical violations that accompanied systemic discrimination settlements in FY 2008, with record-keeping being the most common violation. This was the case across all OFCCP regions. For example, the Pacific (68%) Midwest (60%), Southeast (66%), SWARM (100%), Mid-Atlantic (80%), and Northeast (86%) regions all cited federal contractors for record-keeping violations in the vast majority of settlements. The Northeast (86%), SWARM (86%), and Southeast (33%) regions also cited contractors for not conducting adverse impact analyses in a meaningful percentage of regional settlements. The Pacific (26%) and Southeast (20%) regions cited contractors fairly often for not having applicant tracking systems.<sup>32</sup>

**Figure 3.10: Technical Violations by OFCCP Region**



<sup>32</sup> There is nothing in EO 11246, Section 503 of the Rehabilitation Act or the Vietnam Era Veterans Readjustment Act and its amendments that specifically requires a contractor to have an applicant tracking system. The only requirement is that all applicable applicant records are maintained for a period of not less than two years (one year for smaller contractors) from the creation of the record or from the personnel action, whichever occurs later.

#### **SECTION 4: OFCCP ENFORCEMENT ACROSS FISCAL YEARS 2007 AND 2008**

Fiscal Year 2008 marks the first year CCE had multiple years of OFCCP enforcement data to analyze. It is useful to trend OFCCP enforcement over time, particularly given the effect of such events as a new administration in Washington, D.C., new focus, and new regulations. This section compares OFCCP enforcement from FY 2007 with enforcement from FY 2008.

**Allegations of Discriminatory Policies and Procedures across Year:** Table 4.1 shows the policies and procedures alleged to be discriminatory across year. As expected, audits that focused on hiring processes made up the vast majority of settlements regardless of year. Interestingly, there were five settlements in FY 2007 that alleged discrimination in compensation; there were no settlements alleging discrimination in compensation in FY 2008. Similarly, in FY 2008 there were four audits that focused on employee placement into higher and lower paying jobs; there were none in FY 2007.

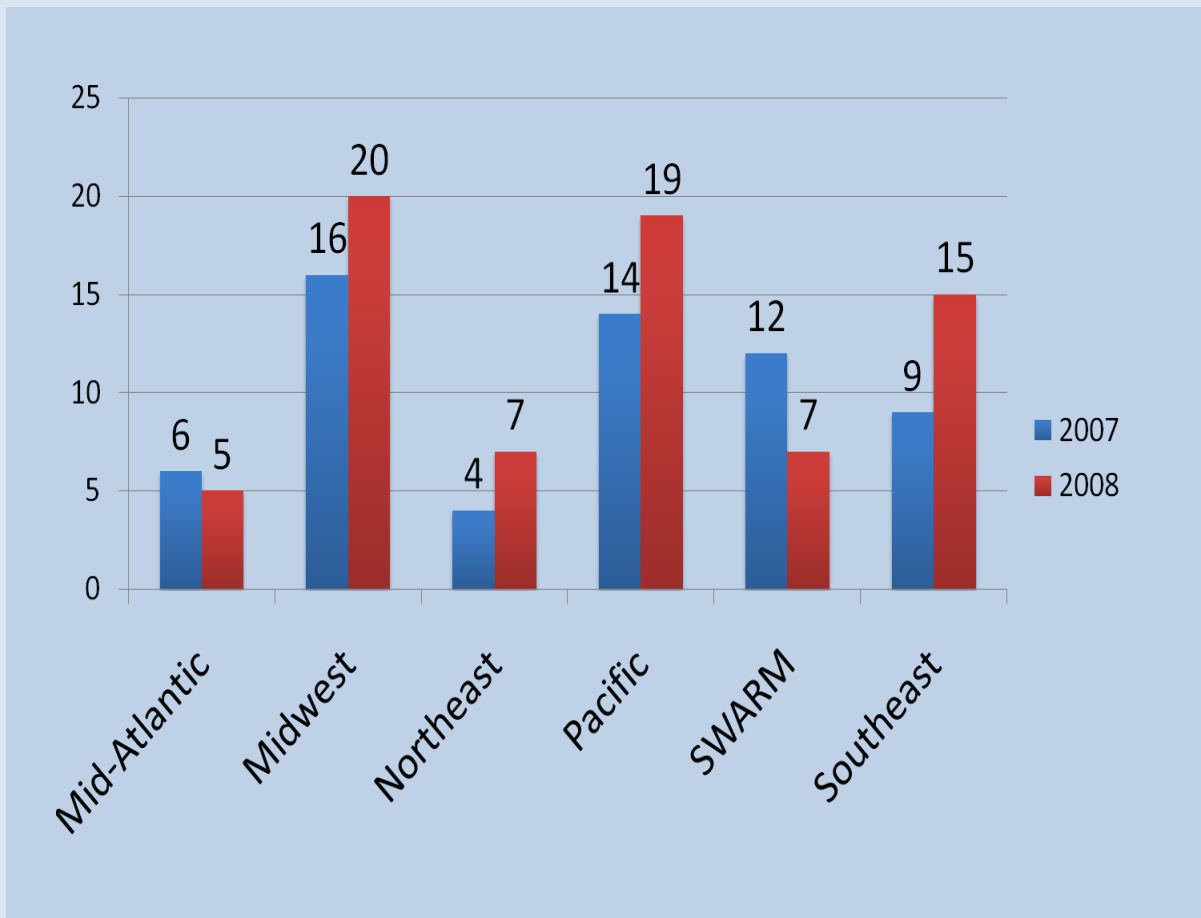
**Table 4.1: Allegations of Discriminatory Policies and Procedures across Year**

<b>Year</b>	<b>Hiring</b>	<b>Promotion</b>	<b>Placement</b>	<b>Compensation</b>
<b>2007</b>	56	0	0	5
<b>2008</b>	70	1	4	0



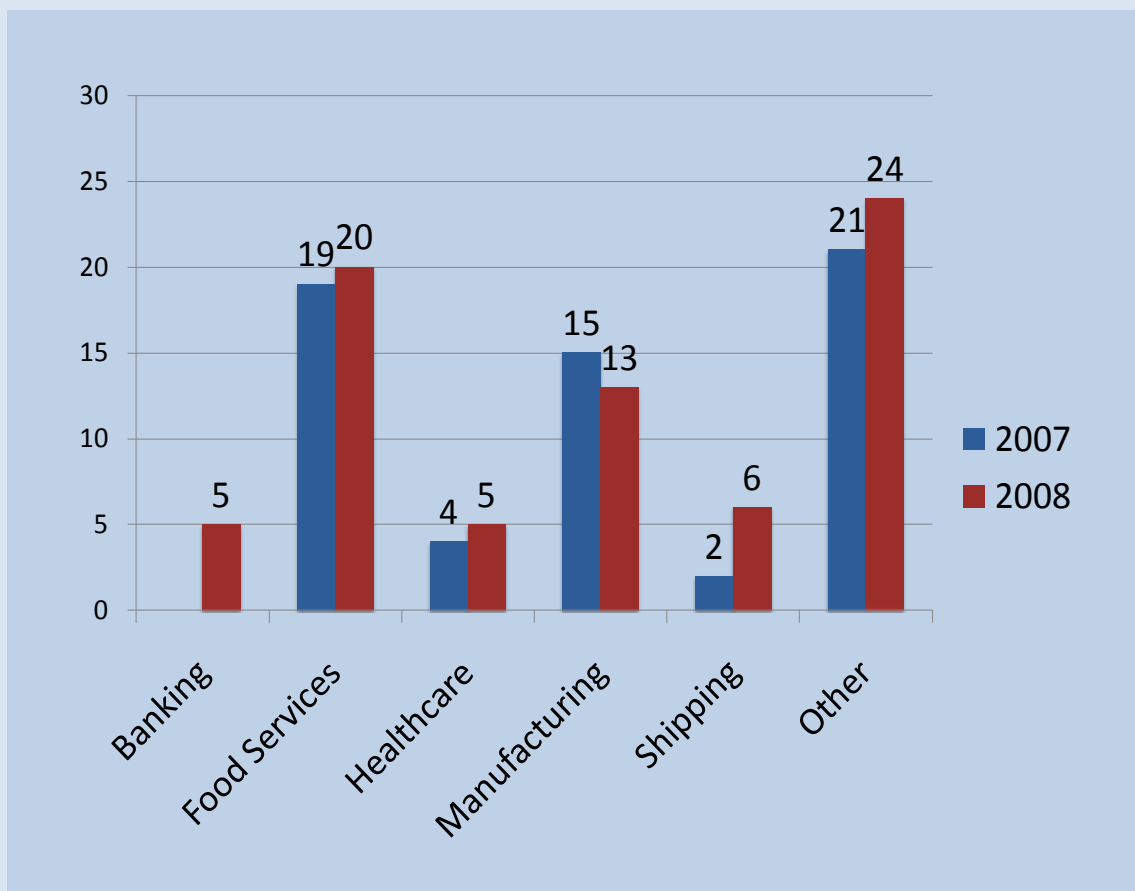
**Settlements by Region across Year:** Overall, there was an increase in the number of settlements in FY 2008 (73) relative to FY 2007 (61). However, general percentages across region stayed about the same. For example, the Midwest region settled the most cases in both years, followed by the Pacific region. The Southeast and SWARM regions generally settled the third or fourth most cases in each year. The Mid-Atlantic and Northeast generally settled the fewest number of cases regardless of year.

**Figure 4.1: Settlements by Region across Year**



**Settlements by Industry across Year:** Overall, settlements by industry did not change substantially by year. In both years, food services were the most common industry represented by contractors in settlements, followed closely by manufacturing contractors. Some changes over time are worth noting. For example, in 2008 more settlements focused on banking (five compared with zero) and shipping (six compared with two) than in 2007. Once again, about one-third of settlements focused on contractors from other industries.<sup>33</sup>

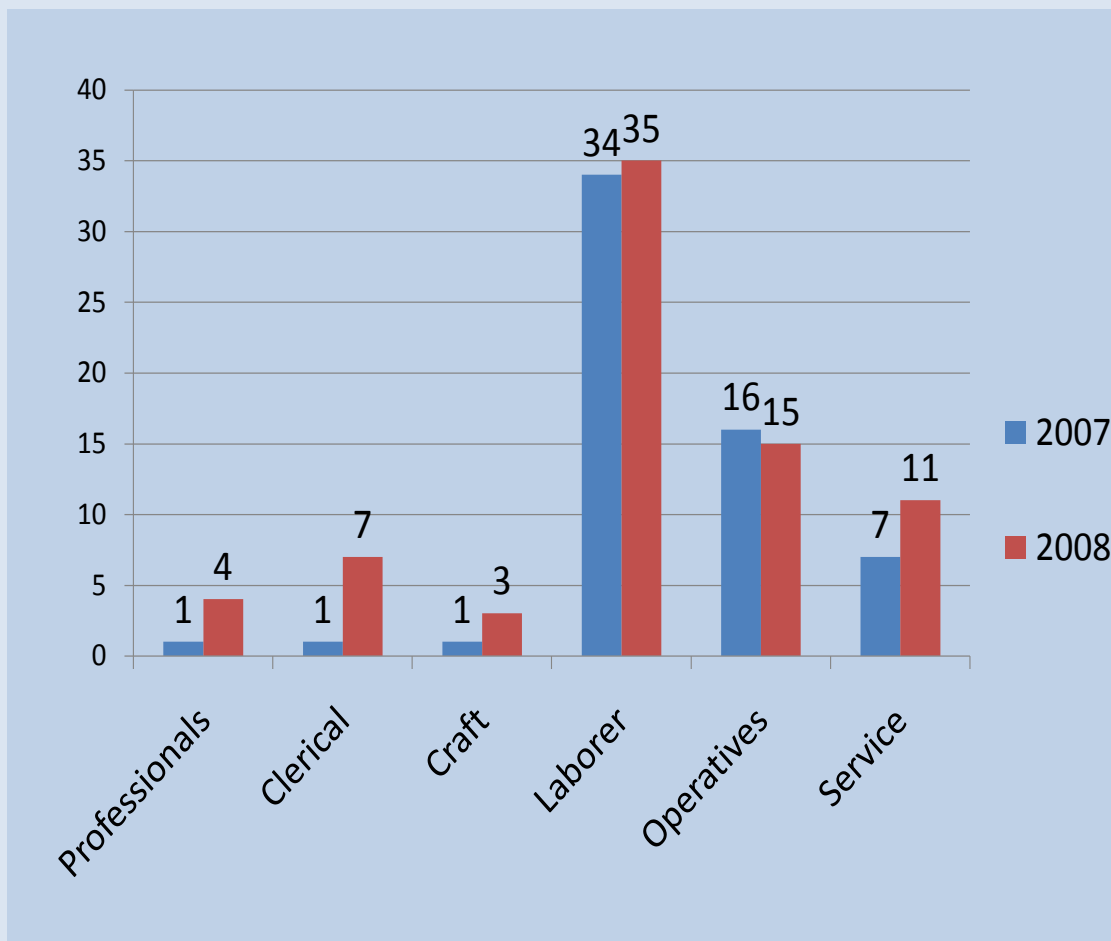
**Figure 4.2: Settlements by Industry across Year**



<sup>33</sup> In 2008, the ‘Other Industry’ category included the following industries aviation, biotech, charity, book wholesaler, communications, construction, correctional facility, education, electronics, energy, facility services, furniture, gardening, hospitality, packaging, and security.

**Settlements by Job Type across Year:** Overall, settlements by job type did not change substantially by year. In both years the focus was on entry level jobs; laborer jobs were the focus in a majority of settlements, followed closely by operative jobs, and then by service jobs. Once again, a few changes across year are worth noting. For example, in 2008 more settlements focused on clerical (seven compared with one) and professional (four compared with one) jobs than in 2007.

**Figure 4.3: Settlements by Job Type across Year**



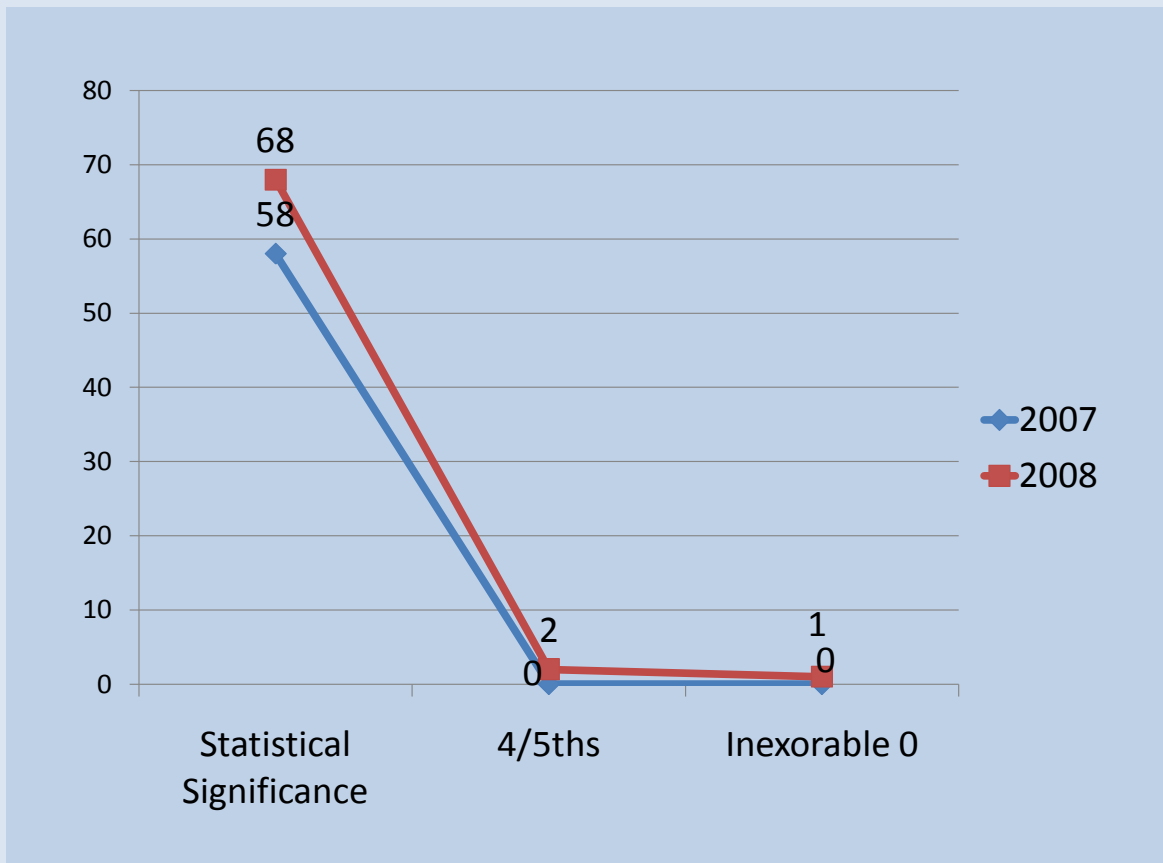
**Protected Groups by EEO Category in Settlements that Alleged Discrimination in Hiring across Year.** Table 4.2 shows the protected groups alleged to be discriminated against by EEO category for the settlements that included allegations of hiring discrimination in FY 2007 and 2008. Note that results stayed fairly consistent across year: settlements involving Professional, Clerical, Craft and Service jobs alleged discrimination against racial/ethnic groups in the majority of cases. Results for Operative jobs were interesting: in 2007 gender and race allegations were found in about the same number of cases (60% and 67%, respectively); in 2008 there were substantially more allegations of discrimination against females for these jobs compared to racial/ethnic groups (79% to 36%, respectively). Note that Operative and Laborer jobs made up the majority of cases across year. Finally, there were no cases alleging systemic discrimination at the Executive/Senior and First/Mid level Officials and Managers job categories in either year.

**Table 4.2: Protected Groups by EEO Category for Settlements that Alleged Discrimination in Hiring across Year**

Type of job	FY 2007			FY 2008		
	# Race / Ethnicity Cases	# Gender Cases	Total # Cases	# Race / Ethnicity Cases	# Gender Cases	Total # Cases
Professional	1 (100%)	0 (0%)	1	4 (100%)	0 (0%)	4
Clerical	1 (100%)	0 (0%)	1	6 (86%)	1 (14%)	7
Crafts	1 (100%)	0 (0%)	1	1 (50%)	1 (50%)	2
Operatives	10 (67%)	9 (60%)	15	5 (36%)	11 (79%)	14
Laborers	15 (45%)	21 (64%)	33	16 (48%)	20 (61%)	33
Service	4 (67%)	2 (33%)	6	7 (70%)	3 (30%)	10

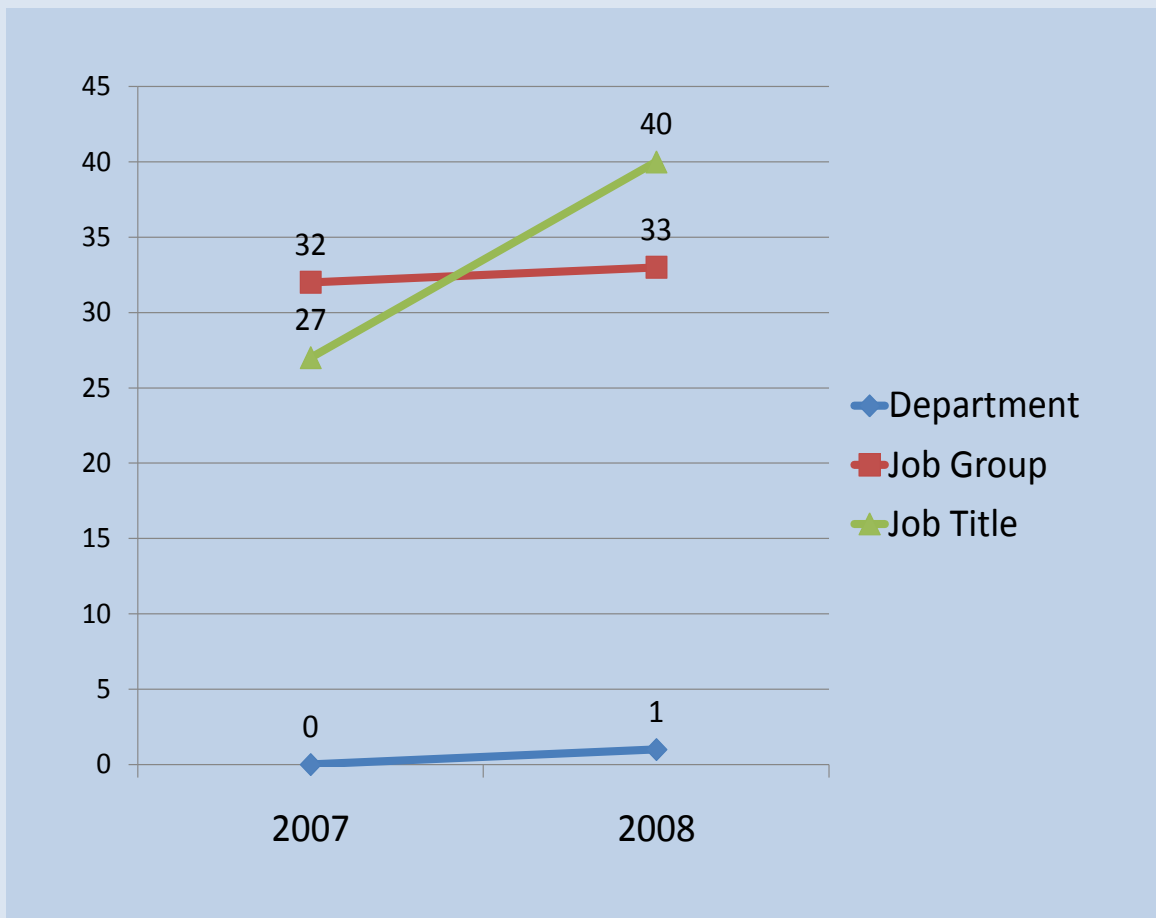
**Statistical Methods Assessing Adverse Impact used in Settlements across Year:** Overall, statistical significance tests were used as stand-alone evidence of disparities in an overwhelming majority of cases. In 2008, however, two other statistical methods were used as evidence of discrimination, albeit in a small number of cases. For example, the 4/5<sup>th</sup> rule, which is found in both the UGESP and in the OFCCP compliance manual, was used in two settlements. Additionally, the fact that zero veterans were hired by one federal contractor (which we refer to as an ‘inexorable zero’) was used as evidence of discrimination regardless of statistical significance or the 4/5<sup>th</sup> rule. Interestingly, there were no settlements that discussed a combination of statistics (e.g., pairing a statistical significance test with the 4/5<sup>th</sup> rule). In both years there were a small number of settlements that did not discuss disparity analyses at all.

**Figure 4.4: Statistical Methods Assessing Adverse Impact across Year**



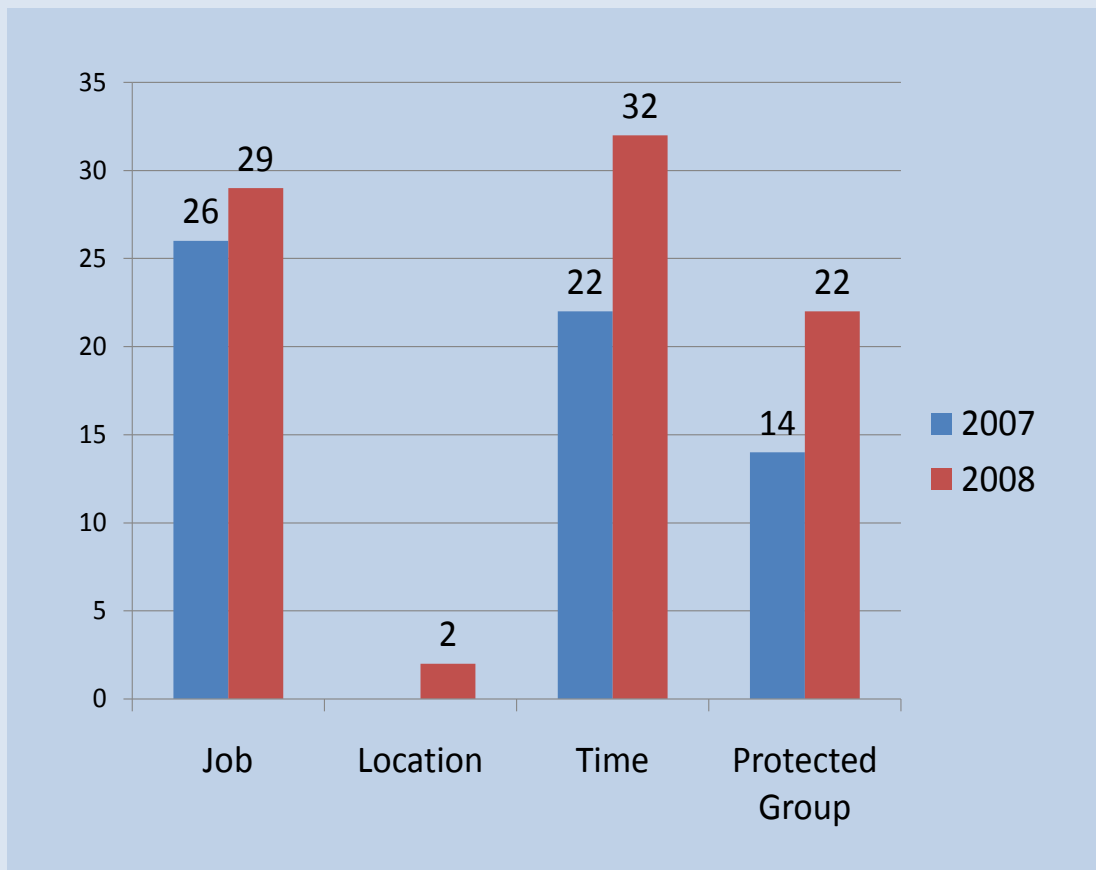
**Level of Adverse Impact Analysis in Settlements across Year:** As described earlier in the report, the level of adverse impact analysis can have important implications for the consequences of results as well as mirroring the reality of personnel selection systems. One interesting finding across year was that in 2007, the majority of analyses were conducted by job group (job title was the second most often used level); whereas in 2008, the majority of analyses were conducted by job title (job group was the second most often used level).

**Figure 4.5: Frequencies for Level of Adverse Impact Analysis across Year**



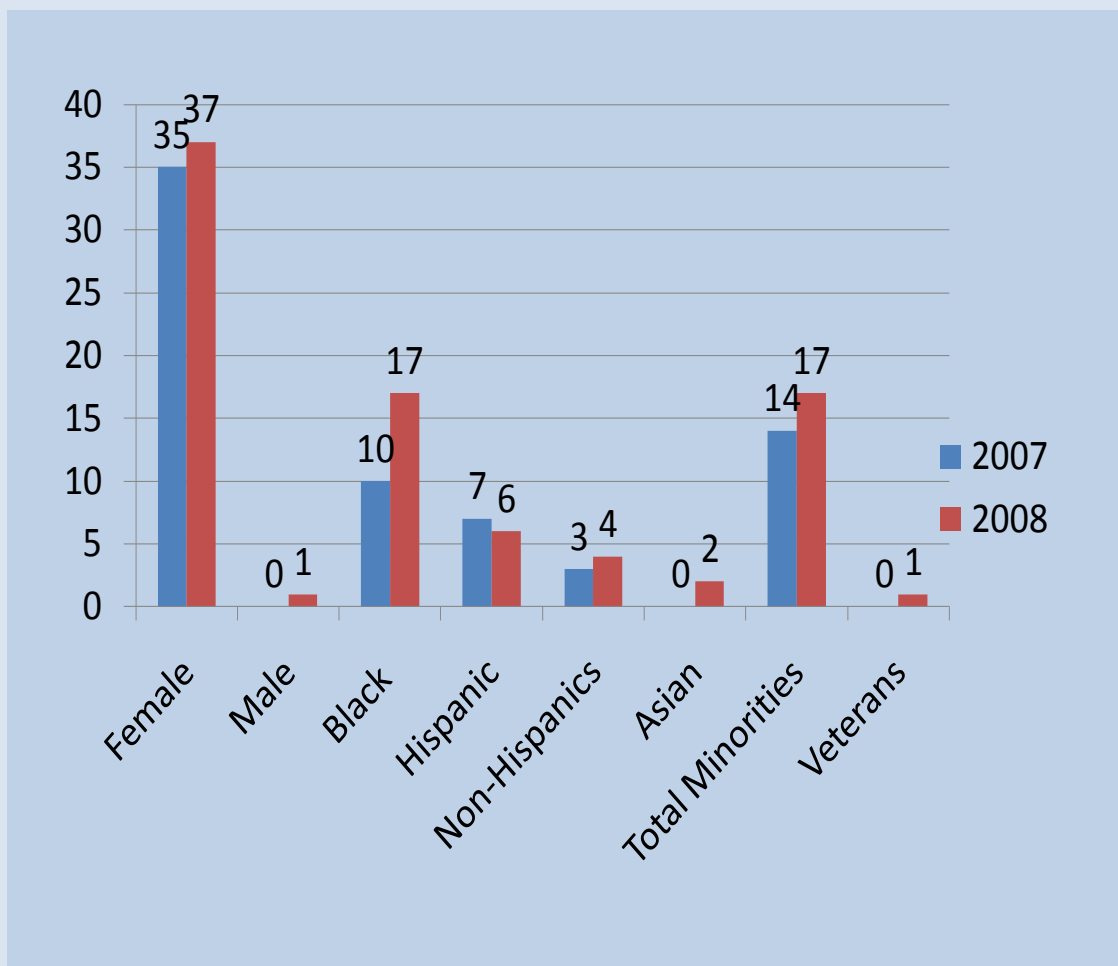
**Data Aggregation in Settlements across Year:** Overall, data was aggregated in a higher percentage of settlements in 2008 as compared with 2007. Additionally, there were some interesting strata differences across year as well. For example, in 2007, aggregation across job was the most common aggregation strategy followed closely by aggregation over time, whereas in 2008, aggregation over time was the most commonly used strategy, followed closely by aggregation across job. Two other points are worth noting. First, aggregation across multiple covered groups was a more frequent strategy in 2008 than in 2007 regardless of the fact that ‘Total Minority’ is technically not a covered group. Additionally, in 2008 there were two settlements that aggregated data across location, there were no settlements in 2007 that used this strategy. This may become a more frequently used strategy if OFCCP identifies questionable policies and procedures that are standardized across location, and may trigger a regional or even nationwide focused review.

**Figure 4.6: Data Aggregation Methods across Year**



**Covered Groups in Settlements across Year:** Overall, covered group representation in settlements was similar across year. In both years, females and members of racial/ethnic groups were found in about the same percentage of cases. Additionally, in both years, settlements on behalf of ‘Total Minority’ and ‘Non-Hispanic’ victims made up a meaningful number of settlements. In 2008 two settlements were made on behalf of Asian victims of discrimination, whereas no settlements were made in 2007 on behalf of Asians.

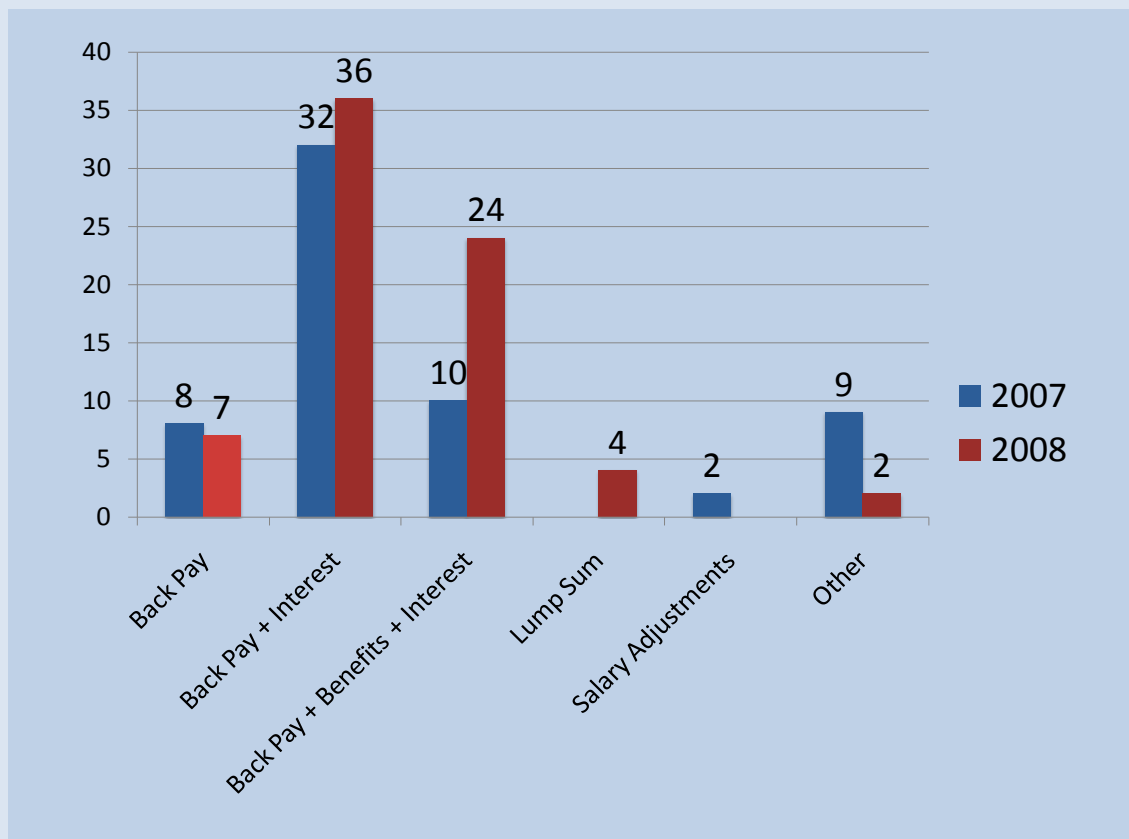
**Figure 4.7: Settlements by Covered Groups across Year**





***Financial Remedy Calculations in Settlements across Year:*** Overall, financial remedy computations were similar across year. In both 2007 and 2008, a back pay plus interest model was the most frequently used computation. In 2008, however, there were substantially more remedies that included employee benefits as compared with 2007. Likewise, in 2007, some remedies were essentially pay adjustments in cases where compensation was the alleged discriminatory practice; obviously this remedy was a non-issue in 2008 where there were no compensation settlements.

**Figure 4.8: Financial Remedy Calculations across Year**



**Length to Audit Closure across Year:** One last comparison of interest across year concerns regional differences in the length of time it took for an audit to close with a settlement. Overall, the average and typical length to closure was similar across year (between two-and-a-half years and three years). However, there were some interesting differences across year. For example, the Mid-Atlantic region had the longest typical length to closure in 2007, but the shortest in 2008. Likewise, the SWARM region had one of the shorter lengths to closure in 2007 and one of the longest in 2008. The Midwest region had one of the longer lengths to closure in each year. Table 4.3 also shows that long audits are fairly common, and can happen in all regions. For example, in 2007, the Mid-Atlantic and Midwest regions had audits lasting at least 84 months, while in 2008 the Pacific and SWARM regions had audits lasting at least 85 months.

**Table 4.3: Length to Closure across OFCCP Region and Year**

	FY 2007				FY 2008			
	Mean	Median	Minimum	Maximum	Mean	Median	Minimum	Maximum
Mid-Atlantic	46	40	24	84	23	23	13	29
Midwest	42	39	21	93	35	31	14	55
Northeast	29	28	18	43	35	31	26	52
Pacific	18	18	11	28	28	24	3	85
Southeast	29	34	4	50	28	28	22	33
SWARM	22	21	14	30	36	30	5	87

## **SECTION 5: SOME SETTLEMENT TRENDS IN NARRATIVE FORM**

Based on this review of OFCCP's FY 2008 settlements, systemic discrimination in *employee selection* continues to be the major focus of the agency's enforcement efforts. More than ninety percent of the settlements focused on hiring discrimination in FY 2008. Some of these settlements focused on unstructured hiring systems that could not be meaningfully broken down into separate steps. This scenario probably most appropriately mirrors a 'pattern or practice' approach to discrimination, where intentional discrimination occurs, in part, via subjective decision making. In this scenario, anecdotal evidence of discrimination appears most often in OFCCP settlements via broad hiring criteria (e.g., relevant work experience) that are not applied in a uniform fashion, or are so ambiguous that it isn't clear what the criteria really are.

In these scenarios the identification of applicants who were hired when they did not meet these criteria, and/or other applicants who were not hired even though they met these criteria, are commonly seen in OFCCP settlements. The contractor is burdened with showing that decisions were made in a legitimate and non-discriminatory fashion, and that criteria were applied in a fair and standardized way. 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.

### Discrimination in Hiring via Specific Selection Procedures

In other settlements, a specific step in the hiring process was identified by OFCCP. This step was often 'facially neutral' but produced substantial disparity against members of a covered group. In this scenario, the contractor is burdened with demonstrating that the step of interest is job related and/or of business necessity, often via validation research.

In FY 2008, ten OFCCP settlements provided some details concerning the specific employment practices evaluated in the OFCCP audit, and why those practices were alleged to be discriminatory. Three settlements included allegations of discriminatory physical ability tests that had impact against female applicants. Two settlements included

allegations of discriminatory applicant screens (e.g., resume review; ratings of training, experience, and education), and one settlement focused on a discriminatory employment interview. Five settlements focused on discriminatory ‘paper and pencil’ tests. Key points from these settlements include the following:

- In three of the audits, the federal contractor did not conduct validity research to support the job-relatedness of a test that produced adverse impact. These settlements demonstrate that the absence of a validation study equates to a discriminatory employment practice when adverse impact exists.
- Two settlements specifically mentioned that the validity research that was conducted by the federal contractor did not meet the requirements of UGESP; UGESP were the only technical authority used to assess whether the validity evidence associated with an employment practice was adequate.
- Five other settlements identified a discriminatory test, but did not discuss whether validity research had been conducted or the adequacy of that research.<sup>34</sup>
- At least two settlements focused on paper and pencil employment tests that measured such cognitive ability dimensions as verbal reasoning and math ability; these assessments often have adverse impact against minority applicants.
- One settlement required that the federal contractor conduct a new job analysis on the jobs of interest as the foundation for revising a physical ability test that caused the adverse impact.
- Another settlement focused on the common practice of administering a post-job offer physical ability test. This settlement demonstrates that post-offer assessments may be challenged by OFCCP, and may be alleged to be discriminatory.
- One contractor used a two-part test that measured verbal reasoning and a ‘hands on’ work simulation. Apparently this test produced impact against female, Black, and Asian applicants.

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<sup>34</sup> Once again, CCE suggests that this information is critical in understanding common problems OFCCP identifies in federal contractor selection, and in better understanding OFCCP enforcement.

## Discrimination in Employee Placement

Four settlements provided details on the placement systems that discriminated against applicants. Key points from these settlements include the following:

- Females were alleged victims in all four settlements.
- In one settlement, a key aspect of the remedy included immediate movement into higher paying jobs.
- One interesting settlement collected financial remedies based on allegations of systemic discrimination against both male and female victims. In this case, OFCCP alleged that females were placed into lower paying laborer jobs more often than men when analyses were conducted at the job title level. However, when analyses were conducted comparing placements into exempt vs. non-exempt job classifications (a different level of analysis from job title), results showed that males were less likely to be placed into more attractive non-exempt jobs. Thus, both males and females were alleged victims of systemic discrimination in the same year. This case exemplifies the potential problems and consequences of data aggregation.
- One settlement focused on the fact that the organization considered all applicants for multiple jobs (as opposed to applicants being considered for one specific job). This allowed OFCCP to conduct statistical analysis in a variety of ways, including a comparison of who was placed into what job.

## SECTION 6: GENERAL SUMMARY OF FINDINGS

Systemic discrimination: The OFCCP continues to use a ‘systemic’ paradigm of enforcement, where compliance evaluations target employment policies and practices that can discriminate against a large group of potential victims.

Increased enforcement: In FY 2008 OFCCP settled substantially more cases (73 cases) than it did in 2007 (61 cases).

Discrimination in Hiring Practices: Hiring discrimination was the major focus in FY 2007 and FY 2008 enforcement, making up over 95% of settlements in each year.

Discrimination in Placement and Promotion Practices: In 2008 there were a handful of settlements that focused on employee placement into higher paying jobs and promotion. In 2007 there were no settlements that focused on either practice. It will be interesting to monitor this potential trend over time.

Discrimination in Compensation and Termination: Compensation was not an identified issue in FY 2008 settlements. In fact, there was not a single compensation settlement in 2008 (recall that compensation cases made up about 5% of settlements in FY 2007). No settlements alleged discrimination in terminations.

Entry Level Jobs and Industries: Certain lower level jobs (e.g., laborers and operative positions) appear most often in OFCCP settlements, as do certain federal contractor industries (e.g., food service and manufacturing industries were found in more than 50% of settlements).

Females and Minorities: Female and minorities continue to be covered groups in about the same number of settlements.

‘Total Minority’ and ‘Non-Hispanic’ (including Whites) groups: Settlements were made on behalf of a ‘Total Minority’ aggregate group in a meaningful number of settlements. Additionally, settlements were also made on behalf of ‘Non-Hispanics’ (including Whites).

Veterans: In one settlement, veterans were alleged victims of systemic discrimination based upon the fact that the contractor did not hire any covered veterans during an affirmative action plan year.

Statistical Significance Tests: Statistical significance tests were the clear method of enforcement for OFCCP analyses of adverse impact.

4/5<sup>th</sup> Rule: The 4/5<sup>th</sup> rule was found in only two settlements, but that is two more than in settlements from FY 2007.

Data Aggregation: The OFCCP aggregated data (across job, year, etc.) in the vast majority of settlements, and used various aggregation strategies (e.g., combining data across year, job, covered group, and location).

Length of Audit: The typical audit took about 2.5 years to conciliate.

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.

Interest on Financial Remedies: The vast majority of financial remedy calculations included interest. More settlements in 2008 included benefits as compared with settlements in 2007.

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;
- covered groups that were alleged victims of discrimination;
- methods used to calculate financial remedies; and
- length of conciliation to settlement.

## **Other Considerations When Interpreting Results**

Some Settlement Trends May Not Reliably Predict Future OFCCP Enforcement: It is important to note that trends found in the FY 2007 and 2008 settlement data may not reliably predict OFCCP's future enforcement strategies. First, many FY 2008 settlements stem from OFCCP compliance evaluations that were initiated in 2005 and 2006, before new enforcement initiatives were implemented.<sup>35</sup>

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<sup>35</sup> The average length of time from the start of the compliance evaluation to the settlement was about 2.5 years.

Second, it is important to note that the change of administration in Washington, D.C. will have implications on OFCCP enforcement. In fact, in September of 2009 Patricia Shiu was named the new politically-appointed Director of the OFCCP under the Obama Administration. Thus, the results from FY 2008 represent the last full year OFCCP was directed by Charles James, the politically appointed Director under the Bush Administration. Fiscal Year 2009 enforcement, which will likely be presented in a similar report next fall, essentially represent the ‘in-between’ year after Charles James’ appointment ended.

If OFCCP policies and procedures, enforcement initiatives, audit selection processes, technical staff, and focus areas of discrimination/affirmative action change with a new administration, this may not be apparent until FY 2010 at the earliest. It will be interesting to see if FY 2009 enforcement looks any different than previous years, simply because OFCCP did not have politically appointed leadership for most of 2009.

### **Closing Recommendations**

Once again, CCE views information presented in this report as very useful to the federal contractor and EEO community. Everyone benefits from understanding what contemporary forms of non-compliance and discrimination look like, and how OFCCP enforces equal employment opportunity and affirmative action requirements. CCE once again recommends that 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. *Types of Systemic Discrimination Uncovered*: What types of systemic discrimination were identified in settlement agreements (e.g., compensation, hiring, promotion, terminations, disability)?



2. Covered groups Benefited in Settlement Agreements: Which covered groups of current and former employees and potential hires are most commonly identified in settlement agreements as victims of discrimination?
3. 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?
4. Duration of Compliance Evaluations through Settlement: How long did it take OFCCP to begin a compliance evaluation and close it with a settlement agreement?
5. Differences between OFCCP Regional Offices: What are the differences between OFCCP regional offices in their investigatory approach and resultant settlements?
6. 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; and
  - Financial remedy models used in settlement agreements.

**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 that explain their enforcement results, the public will continue to be denied information that it needs to understand the agency's operations and decisions.

CCE recognizes that 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. CCE encourages the OFCCP to become transparent in the reporting of its enforcement results.