



# Federal Court Provides 5-Step Roadmap For Ensuring Your Pay Equity Audits Are Confidential

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Employers conducting internal pay equity audits now have a roadmap for ensuring that their pay equity audits remain confidential in the wake of pay equity litigation. Thanks to a recent federal court ruling from an Oregon federal court, you can now feel more comfortable knowing the steps you should take when conducting an internal pay equity audit.

## The Lawsuit Basics

*Cahill et al. v. Nike, Inc.*, decided last month in an Oregon federal court, is a putative class and collective action case brought by several female Nike employees. The employees allege that their employer systematically discriminates against them and similarly situated female employees in salary and promotions. Prior to initiation of the lawsuit, Nike retained outside counsel to advise on the company's pay practices and to develop statistical models to analyze their compensation to assess potential legal liabilities.

As part of pre-certification discovery in their lawsuit, the plaintiffs filed a motion asking the court to force Nike to turn over its pay equity and promotions analyses. Nike had refused to voluntarily produce them on the basis that they were covered by the attorney-client and work-product privileges.

## Court Ruling Favors Employers

The court sided with Nike for multiple reasons. First, the judge found that Nike's failure to produce a privilege log within 30 days of the document request did not result in a waiver of privilege because of the sheer magnitude of the production. Second, Nike's retention of outside counsel was for legal purposes – to assess the risks associated with Nike's pay and promotion policies and potential discrepancies – not for business purposes, so the attorney-client privilege applied. In fact, the law firm's statistical vendor used in the audit was also pulled under the attorney-client privilege.

Third, the audit documents were prepared by outside counsel to evaluate the possibility of litigation, thus work-product privilege also applied. Finally, Nike was able to use the referenced privileges as a shield in this matter because it did not assert reliance on advice of counsel as a defense against potential liability in the instant lawsuit. Therefore, the court held that the privileges were not waived and Nike's audit should remain confidential.

## 5-Step Roadmap To Success

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This ruling is a win for employers because it provides five clear steps you can follow to ensure your pay equity audits remain confidential. If Nike can “just do it,” so can you – by following these five steps:

1. **Plan.** Involve attorneys at the outset of your company’s audit process so that the attorney-client and work-product privileges attach as early as possible in the audit process. These privileges cannot be applied retroactively, so if you conduct any portion of an audit before engaging counsel, your pre-engagement work may not be considered confidential.
2. **Purpose (legal, not business).** If your company has a legal arm, leave the investigation for potential exposure and liability to them. If you do not, retain outside counsel as soon as possible. The *Nike* case turned on the fact that the audit was viewed to be for legal purposes, not business purposes. Asserting the privileges for in-house counsel may be more challenging because in-house counsel’s advice is sometime business-focused rather than legal in nature. Therefore, if you are using an in-house legal team, document clearly to identify the legal, non-business purpose of the audit.
3. **Protect.** Keep your circle of trust small. Limit the number of individuals who are in contact with outside counsel regarding audits to ensure your company does not run the risk of inadvertent disclosure that would break the attorney-client and work-product privileges.
4. **Preserve.** Work closely with outside counsel to identify what and how much information you intend to report externally so that your company does not run the risk of waiving attorney-client and work-product privileges. This is relevant when a company conducts audits for purposes of state law compliance and to qualify for the safe harbor that some states require. States like Oregon and Colorado (as of January 1, 2021) offer a safe harbor to employers that perform pay audits and remedy any discrepancies within a prescribed time period, thereby eliminating liquidated damages liability. Reporting outside counsel’s audit processes and results without any limitations can lead to a waiver of attorney-client and work-product privileges.
5. **Pick Wisely.** In the event of a lawsuit, be mindful of defenses asserted. A company generally cannot use attorney-client and work-product privileges as both a shield and a sword. If you intend to rely on advice of counsel as an affirmative defense to liability, the contents of the audit become the subject of the lawsuit and the audit materials may no longer be deemed confidential.

The lesson for employers is simple – engage counsel as early as possible and let them help you keep your pay equity audits privileged.

## Related People





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