



Federal Contractor Pay Equity Audits Under the New OFCCP Directive

Insights

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Beware the Ides of March, as they say. On March 15, 2022, the Office of Federal Contract Compliance Programs (OFCCP) released [Directive 2022-01](#), which, according to the agency, aims to clarify OFCCP's perceived authority to access and review federal contractor's pay equity audits conducted pursuant to the contractor's compliance requirements.

What Are Contractors' Regulatory Compliance Obligations?

Federal contractors are familiar with their regulatory compliance obligations under Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 with regard to affirmative action. Included in those compliance obligations, at [41 C.F.R. § 60-2.17\(b\)\(3\)](#), is the requirement that federal contractors evaluate their compensation systems to determine whether there are gender, race, or ethnicity-based disparities.

Often, these compensation analyses, which OFCCP calls "pay equity audits" in the Directive, are conducted with counsel and are protected by the attorney-client privilege. The attorney-client privilege covering compensation analyses proved key in the recent pay discrimination case, *Cahill et al v. Nike, Inc.* There, a federal district court ruled that Nike did not have to produce its pay equity and promotion analyses that had been conducted prior to the commencement of litigation because the analyses were conducted for a legal purpose, under the advice of counsel, rather than for a business purpose. The *Nike* case was seen as a big win for employers and their privileged pay analyses.

However, with Directive 2022-01, OFCCP appears to be trying to circumvent the finding in the *Nike* case by arbitrarily determining that pay equity audits conducted for affirmative action compliance and in conjunction with counsel are *not* subject to the attorney-client privilege. While the agency has noted that Directive 2022-01 supersedes any conflicting procedures in the Federal Contract Compliance Manual (FCCM) and any prior guidance, it also recognizes that OFCCP directives do not change the laws or regulations governing OFCCP's programs, do not establish any legally enforceable rights or obligations, and Directive 2022-01 will not have the force and effect of law. Instead, Directive 2022-01 is merely providing guidance on how the agency hopes to evaluate compliance with the applicable regulations and laws.

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Directive 2022-01 aims primarily at the federal contractor's obligation to perform its own compensation self-audits to comply with the applicable affirmative action requirements. According to OFCCP, during its compliance audits, it will look broadly across a contractor's workforce (across "job titles, levels, roles, positions and functions") to identify patterns of segregation by race, ethnicity, and gender, which may result from assignment, placement, or upgrading/promotion barriers that drive pay disparities. If the desk audit reveals that there are disparities in compensation, the agency may request follow-up and additional information regarding the contractor's compensation practices. OFCCP provided four (4) examples where it may need follow-up information:

1. pay disparities or other evidence of pay discrimination among similarly-situated employees based on race, ethnicity and/or gender;
2. employee complaints of pay discrimination or other anecdotal evidence of discrimination;
3. inconsistencies in how the contractor is applying its pay policies; and/or
4. statistical analyses or other evidence that a group of workers is disproportionately concentrated in lower paying positions or pay levels within a position based on a protected characteristic.

According to OFCCP, it is entitled to review a complete copy of the contractor's pay equity audit(s), including all groupings that were evaluated, all variables used, and the results of the analyses, as well as any disparities found. OFCCP also contends it is entitled to request any model statistics used in the analyses as well as the frequency of the audits, the communications to management, and how the results were used to rectify disparities based on gender, race, and/or ethnicity.

OFCCP now contends it has authority to make such requests because contractors must maintain and make available to OFCCP documentation of their compliance with OFCCP regulations. The agency further states that federal contractors may not withhold these documents by invoking the attorney-client privilege or the attorney work product doctrine, even where these reports were completed under the direction of counsel. OFCCP further contends that failure to provide the compensation analyses during an audit will be considered an admission of non-compliance with the regulatory requirements.

Directive 2022-01 further contends that even contractors who are in litigation with OFCCP may not withhold pay equity and compliance records by invoking the work-product doctrine. The agency has arrived at this curious conclusion by reasoning that "[b]ecause the detailed requirements of 41 CFR § 60-2.17(b) mean that the documents would have been prepared in a substantially similar form in the *absence* of litigation, the work-product privilege does not apply to them."

Importantly, OFCCP's current position has not been evaluated by a court of law, and Directive 2022-01 admittedly does not have the force of law.

Regardless, Directive 2022-01 leaves open the possibility that contractors can continue to conduct

compensation self-audits that retain the attorney-client privilege protection. The Directive notes that if, during an audit, the contractor produces to OFCCP a pay equity audit and compliance records sufficient to comply with 41 CFR § 60-2.17(b)(3), OFCCP “generally” will not seek additional privileged analyses where the contractor demonstrates that it also conducted a properly privileged pay equity process with an attorney.

How Should Contractors Comply with Their Obligations While Still Conducting Privileged Pay Audits?

Contractors have important decisions to make under Directive 2022-01. The conservative approach would be to consider conducting two compensation audits – one privileged and one that is not privileged. Contractors should work with their legal counsel to evaluate the best approach to completing a privileged audit and a non-privileged audit. Contractors may also consider conducting an additional privileged pay-equity audit, not in conjunction with their affirmative action requirements, to maintain the attorney-client privilege or attorney work product protection. The *Nike* case described above provided some helpful guidance for this approach.

Contractors may also consider doing away with privileged compensation audits altogether, understanding that the compensation analyses it conducts to meet its regulatory requirements will be subject to being provided in their entirety and “as is” to OFCCP, regardless of the results. However, such an approach could expose the contractor to liability under other federal, state, or local laws. Contractors should work closely with their legal counsel to determine the best approach with regard to their compliance obligations and Directive 2022-01. Contractors should also ensure that their approach complies with any other state or local pay equity laws that may be applicable.

Conclusion

We will continue to monitor developments on this topic. Make sure you are subscribed to [Fisher Phillips’ Insight System](#) to get the most up-to-date information direct to your inbox. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Pay Equity group](#).

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