

4 STEPS TO STAY IN COMPLIANCE WITH OFCCP'S NEW AFFIRMATIVE ACTION COMPENSATION ANALYSIS REQUIREMENTS

Insights
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When government officials released new guidance last week explaining how they will evaluate federal contractors' compliance with new compensation analysis obligations, they calmed the nerves of the contractor community by confirming they would not require employers to turn over attorney-client privileged material. The August 18 release by the Office of Federal Contract Compliance Programs (OFCCP), which revised [Directive 2022-01](#), also provided further guidance on the agency's authority to access and review contractor compensation analyses during an audit. What do you need to know about this shift in OFCCP's approach to privileged information – and what are the four steps you should take to stay in compliance with the new affirmative action compensation analysis requirements?

Former Attorney-Client Privilege Guidance Created Swirl of Controversy

As part of their affirmative action obligations, supply and service federal contractors are required to perform an analysis of their compensation systems to determine whether there are gender, race, or ethnicity-based compensation disparities among employees. During an audit, OFCCP investigators often seek information regarding the contractor's compensation systems and internal analyses. Like many employers, federal contractors often conduct these analyses with counsel.

[When OFCCP released its initial version of Directive 2022-01 in March 2022](#) to provide shape to this process, the Directive was met with significant criticism by the contractor

Related People



Sheila M. Abron

Partner

[803.740.7676](tel:803.740.7676)

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community. Specifically, many were troubled given the prior Directive's position that contractors could not claim that their compensation analyses conducted to satisfy their regulatory requirements were confidential or protected by the attorney-client privilege.

Instead, the prior version of Directive 2022-01 explicitly stated that OFCCP would take the position that federal contractors would have to disclose their compensation analyses to the agency during audits to demonstrate compliance with the applicable regulations regardless of claims of attorney-client privilege.

OFCCP Walks Back Position on Attorney Client Privilege

The good news is that OFCCP issued a revised version of [Directive 2022-01](#) to walk back this controversial position.

But under the revised Directive, the agency provided further guidance regarding the scope and supporting documentation it will seek during an audit to assess a contractor's evaluation and remediation of the contractor's compensation.

According to the revised Directive, the agency will review a contractor's workforce broadly "to identify patterns of segregation by race, ethnicity, and gender, which may result from assignment, placement, or upgrading/promotion barriers that drive pay disparities." OFCCP confirmed it will also use regression and other systemic analyses to look for disparities in patterns of assignment or in salary paid across similar functions and positions.

If OFCCP's initial review during the desk audit phase reveals disparities in pay or "concerns about the contractor's compensation practices," the agency may request additional information to investigate the contractor's compliance. The revised Directive provides four instances where the Agency may seek follow-up information:

- **Pay disparities** or other evidence of potential pay discrimination among similarly situated employees based on race, ethnicity, and/or gender;
- **Employee complaints** of pay discrimination or other anecdotal evidence of discrimination;
- **Inconsistencies** in contractor's application of pay practices; and

- **Statistical analyses** or other evidence that a group of workers is disproportionately concentrated in lower paying positions or pay levels with a position based on a protected characteristic.

As the contractor community has seen, the agency often seeks additional compensation data, compensation interviews, additional records, and the contractor's compensation analysis when it issues requests for additional information. However, according to the revised Directive, "the most useful form of documentation is a contractor's full compensation analysis because it allows OFCCP to understand how the contractor evaluates its compensation systems in practice." The agency contends this leads to a more efficient compliance review.

What if You Conducted Your Compensation Analysis Under Attorney-Client Privilege or Work Product Protection?

The revised Directive provides several alternatives you can take to demonstrate compliance with OFCCP's regulatory requirements if your compensation analysis is subject to the attorney-client privilege or work product protection. You can:

- Make available a **redacted version** of your compensation analysis, provided that the non-redacted portions contain relevant facts regarding the analysis (addressed below);
- Conduct a **separate analysis** during the relevant AAP period that does not implicate privilege concerns and provide that analysis to OFCCP in full; or
- Generate a **detailed affidavit** that sets forth relevant facts but does not contain privileged information.

Regardless of the approach you take, the information you provide must contain the following facts:

- When the compensation analysis was completed;
- The number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;
- Which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis;

- That compensation was analyzed by gender, race, and ethnicity; and
- The method of analysis employed by the contractor.

In addition to what the revised Directive terms as “required” facts, the agency “recommends” you also include the following information to demonstrate that your compensation analysis satisfies your obligations to evaluate your compensation systems:

- All employee pay groupings evaluated;
- An explanation of how and why employees were grouped for the analysis;
- Which, if any, variables, factors, measures, or controls were considered and how they were incorporated in the analysis; and
- The model statistics for any regressions or global analyses for race, ethnicity, and gender-based variables.

The revised Directive specifically notes the agency recognizes that contractors may consider aspects of these four recommended pieces of information privileged. It also specifically states that the revised directive is not intended to encourage waiver of privilege. Instead, it serves to inform contractors that making non-privileged information available to OFCCP during an audit can lead to a more effective compliance evaluation.

What is Not Privileged?

The revised Directive still maintains the agency’s curious position with regard to the applicability of the attorney-client privilege and work product doctrine as they relate to the contractor’s compensation analyses. OFCCP’s position is that documentation of compliance is not inherently privileged or subject to work product protection.

Rather, the agency contends that compensation analysis documentation is not “confidential” and the attorney-client privilege does not attach to it because contractors are aware when they prepare documentation that they must make it available to OFCCP. The revised Directive further contends that facts regarding what a contractor did to comply with its compensation analysis obligations are not “communications” covered by the attorney-client privilege.

OFCCP said it believes that contractors should be able to produce documentation of the compensation analysis it conducted without disclosing privileged information.

The agency also warns that contractors will not be found in compliance with their compensation analysis obligations if they invoke privilege and do not provide OFCCP with sufficient documentation of compliance.

What Happens When Your Analysis Identifies a Problem Area?

The revised Directive reminds contractors that the regulations require you to develop and execute action-oriented programs that “consist of more than following the same procedures which have previously produced inadequate results” if you identify any problem areas in your compensation analyses. Thus, the revised Directive states that OFCCP may request documentation demonstrating that you engaged in good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.

During an audit, you should expect the agency to require you to provide documentation that demonstrates, at a minimum:

- The nature and extent of any pay disparities found, including the categories of jobs for which disparities were found, the degree of the disparities, and the groups adversely affected;
- Whether you investigated the reasons for any pay disparities found;
- That you have instituted action-oriented programs designed to correct any problem areas identified;
- The nature and scope of these programs, including the job(s) for which the programs apply and any changes (e.g., pay increases, amendments to compensation policies and procedures) you made to the compensation system; and
- How you intend to measure the impact of these programs on employment opportunities and identified barriers.

4 Steps to Compliance

To comply with the revised Directive, here are the four steps you should take to ensure you meet your compensation analysis obligations:

1. **Communicate with your legal counsel** to determine best steps to comply with the regulations and OFCCP's revised directive.
2. Ensure you have a **planned and consistent method of analyzing your compensation** (e.g., multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, etc.);
3. Maintain an **organized record** of all information OFCCP may request during an audit, working with legal counsel to determine privilege and work product considerations; and
4. Consider conducting **two different analyses of compensation**, one subject to privilege and one non-privileged.

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 [Affirmative Action and Federal Contract Compliance Group](#).