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OFCCP Guidance on Privilege Assertions Over Pay Equity Audit Materials

Client Alert | April 12, 2022

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Since President Biden took office in January 2021, employers' compensation and nondiscrimination practices have been under increasing scrutiny by the federal government. For example, the recently issued Directive 2022-01—the Office of Federal Contract Compliance Programs (OFCCP) of the United States Department of Labor's first directive since President Biden took office—directly underscores that pay equity is a priority of the new administration.[1] This Directive, among other mandates, makes clear that OFCCP intends to challenge whether employers can rely on the attorney-client privilege and work product doctrine to protect internal pay equity audits from being produced when requested by OFCCP as part of its investigations into regulatory compliance. As a result, companies should be particularly mindful of how they conduct internal pay equity analyses going forward. This is especially important considering OFCCP Director Jenny Yang has recently declared that going forward, it is "redoubling its efforts to remove barriers to pay equity."[2]

Recent Legal Developments

The Directive, which was issued on March 15, 2022, attempts to clarify federal contractor affirmative action obligations under 41 C.F.R. § 60-2.17(b)(3), which requires that federal contractors analyze their compensation systems for gender, race, or ethnicity-based disparities to ensure fair compensation policies and practices. While the Directive does not create new legal rights or requirements, it is an example of the federal government's increased attention to pay equity. The Directive provides insight on how OFCCP will evaluate the "in-depth" pay equity audits required by federal affirmative action regulations. According to the Directive, OFCCP can evaluate federal contractors' compliance during a "desk audit," during which OFCCP will "look broadly at a contractor's workforce (across job titles, levels, roles, positions, and functions) to identify patterns of segregation by race, ethnicity, and gender . . . that drive pay disparities."[3] While the Directive does not make clear exactly what methods OFCCP will use in making this assessment, "where possible," OFCCP will use "regression and other systemic analyses" to identify potential pay disparities in either patterns of assignment or in salary paid across similar functions and positions.[4] If this audit reveals disparities in pay, OFCCP may seek additional information, such as additional compensation data, and conduct follow-up interviews. OFCCP may also request additional information if the audit reveals employee complaints of pay discrimination, other anecdotal evidence of discrimination, or inconsistencies in how the contractor is applying its pay policies.

Importantly, the Directive makes clear that OFCCP can request production of the employer's pay equity audit required under 41 C.F.R. § 60-2.17(b)(3), as well as any materials and communications related to that audit. Employers often conduct privileged, internal audits on pay equity to proactively assess potential legal issues and to receive legal guidance. Employers typically have resisted production of these privileged studies on attorney-client privilege and work product grounds.

The Directive emphasizes federal contractors "must maintain and make available to OFCCP documentation of their compliance with OFCCP regulations," and that it "has the authority under its regulations to request the analyses the contractor has conducted to

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comply with OFCCP regulations."[5] OFCCP may also request information relating to the frequency of pay equity audits, the communication to management, and how the results were used to rectify disparities based on gender, race and/or ethnicity. The Directive takes the position that since federal contractors have an independent, regulatory duty to provide such information to OFCCP, they cannot withhold it on the basis of attorney-client privilege or pursuant to the attorney work product doctrine.[6] OFCCP has made clear that its position is that this obligation "defeats any expectation" that the company's pay equity audit findings and compliance records prepared by or with the assistance of counsel would remain confidential. *Id*.

Notwithstanding this broad position, the Directive suggests that so long as federal contractors produce a pay equity audit and compliance records sufficient to comply with 41 C.F.R. § 60-2.17(b)(3), OFCCP "generally will not seek [production of] additional privileged analyses" conducted for any other purpose.[7]

While OFCCP's application of this new position remains to be seen, it suggests that a prudent course for government contractor employers may be to conduct separate pay audits—one for the sole purpose of obtaining privileged legal advice, and a second, potentially non-privileged audit for demonstrating regulatory compliance. Employers that conduct a single audit run a risk that OFCCP could challenge the audit as conducted, at least in part, for regulatory compliance purposes, making communications and other records regarding the exercise subject to disclosure. Additionally, while it is unclear at this time how far OFCCP will go in contesting any privilege assertions over pay equity audit records, if OFCCP's recent aggressive actions (such as its proposed changes to the pre-enforcement notice and conciliation procedures, *see supra* note 1) serve as an indication, OFCPP could become more insistent on challenging an employer's assertions of privilege. If in fact OFCCP takes an aggressive approach towards challenging these privilege assertions, the boundaries of OFCCP's position and the contours of privilege in this context will likely have to be resolved through litigation. Employers should thus be prepared to vigorously defend any assertions of privilege in this context and to minimize risk of waiver.

Conclusion and Next Steps

In light of OFCCP's increasing focus on pay equity, employers subject to OFCCP requirements should take care to ensure compliance with the pay equity obligations established by 41 C.F.R. § 60-2.17. This means conducting regular audits of compensation systems, as well as implementing action-oriented programs designed to correct identified problem areas. To the extent employers wish to conduct audits for the purposes of legal advice and to maintain privilege over such materials, it is important to establish clear separation between privileged audits conducted solely for the purpose of legal advice, and audits conducted for the purpose of complying with federal regulations. Blurring the lines between those purposes could risk waiver of the privileged materials. Furthermore, if employers choose to conduct separate pay equity audits, they should be mindful of potential differences in the data utilized for the privileged and non-privileged audits as there could be inconsistent outcomes between audits. Employers subject to OFCCP requirements should seek the advice of counsel to ensure appropriate processes and guardrails are in place to meet these federal obligations.

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[1] This is not the only evidence of the government's recently increased scrutiny on nondiscrimination in general, however. On March 21, 2022, OFCCP announced newly proposed amendments to its current rules governing its pursuit of potential discrimination violations. OFCCP issued rules entitled "Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination" on December 10, 2020. The rules were purportedly designed to provide transparency into OFCCP's process for evaluating nondiscrimination compliance and clarity for contractors in understanding the substantive requirements for OFCCP to issue

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discrimination findings. However, OFCCP's proposed amendments, if implemented, would have the effect of eliminating certain evidentiary and procedural safeguards that are currently in place (and which tend to protect contractors under a more flexible framework). *See* Pre-Enforcement Notice and Conciliation Procedures, 87 Fed. Reg. 16138 (proposed March 22, 2022) (to be codified at 41 C.F.R. § 60).

[2] Press Release, U.S. Department of Labor, U.S. Department of Labor Announces Pay Equity Audit Directive for Federal Contractors to Identify Barriers to Equal Pay (Mar. 15, 2022), https://www.dol.gov/newsroom/releases/ofccp/ofccp20220315.

[3] Directive 2022-01.

[4] *Id*.

[5] *Id*.

[6] *Id*.

[7] *Id*.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, any member of the firm's Labor and Employment or Government Contracts practice groups, or the following:

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