

OFCCP Directive on Internal Pay Equity Audits Takes on Privilege Claims

Federal contractors who conduct pay equity audits under attorney-client and work product privileges face increased risks under a new directive by the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP). On March 15, 2022, OFCCP issued [Directive 2022-1](#) stating that under certain circumstances, its compliance officers have the authority to seek pay equity audits conducted by federal contractors even if those audits were conducted pursuant to well-established privileges. While this directive is subregulatory guidance and does not have the effect of a regulation, it follows the rigorous tactics noted in this previous [update](#).

About Directive 2022-1

The starting point for understanding Directive 2022-1 is the regulatory language at 41 CFR 60-2.17(b). In pertinent part, this regulation requires contractors to "evaluate [their] [c]ompensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." OFCCP has not detailed the precise method a contractor may use to evaluate compensation. This lack of detail created a tension between contractors and the agency, where the agency sought to investigate compliance with this provision while contractors performed their own self-analysis under privilege. In practice, this has led to standoffs where the agency has consistently taken a dim view of privilege claims.

Directive 2022-1 represents the agency's attempt to resolve this tension and take privilege claims head on. Directive 2022-1's policy section begins by tracing the steps of a compliance audit which begins with a scheduling notice, the submission of documents by contractors in response to the notice, and OFCCP's desk audit of those documents. Desk audits include a review of the contractor's affirmative action plans and other data including compensation data provided by a contractor. At this stage, OFCCP may close the matter with no substantive findings or seek to gather additional information if there are indicators of statistical disparities in any covered employment practice (usually hires, promotions, terminations, and compensation). It is also at this stage that Directive 2022-1 asserts that OFCCP has the authority to seek a contractor's compensation study including "all pay groupings that were evaluated, any variables used, and the results of the analyses, including any disparities found."

In a nod to contractors' frequent objections, OFCCP recognizes that contractors may conduct these audits under attorney-client privilege. However, OFCCP has responded to those objections by stating that (1) it has the authority to seek internal audits under its general investigative power and (2) the attorney-client privilege does not apply to audits conducted for compliance purposes. The directive allows contractors the ability to conduct a "second" privileged audit. However, the agency claims that it can seek that second audit if the contractor has not adequately verified that the audit was conducted under privilege.

Legal and Procedural Issues

In general, the directive appears to raise Paperwork Reduction Act concerns by adding a category of documents the agency can seek without the required clearance by the U.S. Office of Management and Budget (OMB). In addition, it is difficult to square Directive 2022-1 with the agency's 2016 rulemaking to revise its sex discrimination guidelines. The rulemaking not only is silent as to any requirement that contractors conduct detailed pay equity audits, but it also makes clear that contractors have "substantial discretion to decide how to evaluate their compensation systems to comply with the regulations." See 81 Fed. Reg. 115, 39126 (2016). Moreover, Directive 2022-1 does not include any discussion of on-point federal court decisions that pay equity audits are privileged. See e.g., *Cahill v. Nike* 2020 WL 5989202 (D. Or. 2020) (Attorney-client and work product privileges apply to internal pay equity audit).

Another area of vagueness is what type of verification would suffice to establish that the contractor performed the audit under recognized privileges. Perhaps most importantly, while the directive took effect March 15, 2022, nothing shields the agency from seeking audits conducted prior to the effective date. As such, audits conducted two years ago appear to be fair game for the agency's compliance officers.

Takeaways

Directive 2022-1 distinctly complicates the landscape for federal contractors who conduct pay equity audits under privilege. Steps contractors can take to mitigate increased risks include the following:

- Working with experienced counsel to ensure robust protection of their audits.
- Ensuring that audits are performed in a manner that mitigates any inadvertent waiver of privileges.
- Considering OFCCP's option of conducting a second audit.
- Preparing to defend established privileges during a compliance audit.

It is likely that the agency's next step will be to threaten and, eventually, bring denial of access complaints against contractors who have not adequately preserved privileges and refuse to provide internal audits.

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