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OFCCP Clarifies Stance on Evaluation of Federal Contractor Analysis of Pay

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On August 18, 2022, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (the "OFCCP") issued a [revised Directive](#) clarifying how the Agency intends to review contractors' compliance with the regulatory requirement "to determine whether there are gender-, race-, or ethnicity-based disparities." 41 C.F.R. § 60-2.17(b)(3). This is a significant retreat from the more aggressive approach described in the earlier March 2022 Directive, which suggested the potential for substantial disputes over contractors' ability to rely on the confidential advice of counsel to evaluate compliance with equal opportunity laws concerning pay.

[Earlier this year](#), the OFCCP announced it would increase scrutiny of federal contractors' approach to satisfying a longstanding obligation to analyze pay of employees, specifically taking aim at attorney-client privilege and the work-product doctrine. The revised Directive reaffirms the Agency's commitment to scrutinizing compliance, provides greater clarity on the types of documentation the Agency expects to review, and sets forth a moderated approach regarding attorney-client privilege and the work-product doctrine.

Contractors' Obligation to Review Pay

As part of their Affirmative Action Programs, covered contractors are required to "perform in-depth analyses of [their] total employment process to determine whether and where impediments to equal employment opportunity exist." Specifically, contractors must analyze their compensation system(s) "to determine whether there are gender-, race-, or ethnicity-based disparities." 41 C.F.R. § 60-2.17(b)(3). The regulations do not (and the OFCCP historically has not attempted to) prescribe the form that this "in-depth analysis" must take. With increasing frequency, contractors retain counsel to direct attorney-client privileged analyses of pay outcomes to evaluate legal risks, and, in some cases, to satisfy this regulatory obligation. Courts have recognized that, when done properly, an analysis of pay outcomes can be protected by the attorney-client privilege. In anticipation of litigation, the work-product doctrine may also provide confidentiality protection for this important self-critical analysis.

OFCCP Compliance Evaluations Scrutinize Pay

During a compliance evaluation, contractors must provide the OFCCP with individual employee compensation data, which the Agency analyzes to evaluate whether the contractor is abiding by its nondiscrimination obligations. The Agency often relies on regression and other statistical analyses to evaluate whether there are gender, race, or ethnicity disparities. If that review "reveals disparities in pay or other concerns about the contractor's compensation practices," the Directive states, the "OFCCP

may request additional information,” including, but not limited to, “additional compensation data, follow-up interviews, and additional records and information from the contractor, including [the contractor’s] compensation analysis conducted pursuant to 41 C.F.R. § 60-2.17(b)(3).”

The OFCCP’s Relaxed Stance with Respect to Privilege

Earlier this year, the OFCCP took a strong stance with respect to the collection of contractors’ compensation analyses, stating that contractors “may not withhold” such analyses or related records “by invoking attorney-client privilege or the attorney work-product doctrine.” The OFCCP now has relaxed its position on this point. It now (1) *acknowledges* that contractors’ compensation analyses may contain privileged attorney-client communications or attorney work product; (2) expressly *reaffirms* that OFCCP will not require the production of privileged attorney-client communications or attorney work product”; and (3) proposes a number of *alternatives* for contractors to fulfill their regulatory obligations by making available to the OFCCP other, specific types of non-privileged documentation that it has conducted the requisite analyses.

Specifically, the revised Directive suggests that, in lieu of providing privileged compensation analyses to the OFCCP, contractors subject to compliance reviews may instead:

- “make available a redacted version of its compensation analysis, provided that the non-redacted portions include the required facts described below”;
- “conduct a separate analysis during the relevant [Affirmative Action Program] period that does not implicate privilege concerns and provide that analysis to OFCCP in full”; or
- “generate a detailed affidavit that sets forth the required facts described below but does not contain privileged material.”

The OFCCP further clarifies that, regardless of which alternative a contractor pursues, for the OFCCP to determine that a contractor has satisfied its obligations under 41 C.F.R. § 60-2.17(b)(3), contractors must provide documentation that demonstrates at least 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 (e.g., base pay alone, base pay combined with bonuses, etc.);
- that compensation was analyzed by gender, race, and ethnicity; and
- the method of analysis employed by the contractor (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.).”

Though not required, the OFCCP recommends that contractors provide documentation that also demonstrates the following facts, as applicable:

- “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 (e.g., tenure, education, structural groupings, performance ratings, prior experience) were considered and how they were incorporated in the analysis; and
- the model statistics for any regressions or global analyses conducted (e.g., b-coefficients, significance tests, F-tests, etc.) for race, ethnicity, and gender-based variables.”

A Final Caution on Invoking Privilege

Despite the Agency’s relaxed position as to privileged pay studies, it cautions that contractors cannot “simply invoke privilege and provide OFCCP with no or insufficient documentation of compliance.” Contractors who do so “will not be found in compliance with their compensation analysis obligations.” Contractors who choose not to waive privilege over privileged compensation studies are therefore encouraged to provide to the OFCCP documentation of their compensation analyses and Affirmative Action Programs by one or more of the alternative means described above.

What this Means for Federal Contractors

The implications of the OFCCP’s August 18 Directive are twofold. First, federal contractors subject to compliance reviews can expect more detailed inquiries from the OFCCP on the method, model, and results of any pay equity study performed to satisfy the regulatory obligation to evaluate pay. The revised Directive therefore reinforces the importance of documenting and retaining the evaluation of compensation systems to determine whether there are gender-, race-, or ethnicity-based disparities, as provided in 41 C.F.R. § 60-2.17(b)(3).

Second, in order to protect the sensitive self-critical and privileged analyses from production, contractors performing the evaluation under the attorney-client privilege should develop alternative means of satisfying the regulatory obligation. Performing a separate, non-privileged study that can be provided to the OFCCP is one of the approaches endorsed by the revised Directive, as is identifying an internal subject matter expert who could attest to the nature of the study by way of affidavit. An affidavit disclosing aspects of a privileged pay analysis should be carefully crafted, however, to avoid waiver.

Paul Hastings is monitoring these developments and will provide updates when they are available.



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