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OFCCP Issues Revised Compensation Data Directive

Federal contractors should remain vigilant in how they structure and conduct internal pay equity audits to ensure compliance with newly revised federal guidance. On August 18, 2022, the U.S. Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) revised its recent directive related to compliance obligations on evaluating compensation and how the agency may seek to gain access to that data during a compliance audit.

The initial directive, discussed at length in our previous [Update](#), essentially took aim at the well-established privileges for conducting internal pay equity audits and set forth an aggressive approach to obtain compensation analysis conducted by a contractor. The revised directive steps back in some respects as OFCCP now clearly acknowledges that many contractors conduct internal audits pursuant to attorney-client and work product privileges. To account for the privileges, OFCCP provides various options for contractors to meet their compliance obligations including allowing contractors to provide a separate audit or affidavit explaining its review of its compensation systems. However, OFCCP continues to insist that it is entitled to information on contractors' efforts to remedy any compensation disparities. As remediation efforts are often the result of legal advice, OFCCP's guidance continues to present risks to well-established privileges, and contractors should carefully consider any request for such data if audited by OFCCP.

Initial Directive 2022-1

Our previous Update explained the background and detailed the requirements of OFCCP's March 15, 2022, directive. OFCCP's regulations require contractors to "evaluate [their] [c]ompensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." 41 CFR 60-2.17(b). OFCCP has consistently allowed contractors to take a flexible approach to how they may comply with this provision. For example, in OFCCP's revision to its sex discrimination guidelines in 2016, the agency stated 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). OFCCP's directive earlier this year represented a departure from that flexibility by asserting that contractors needed to conduct a detailed pay equity audit to comply with the regulations and that OFCCP would take an aggressive approach to a contractor's assertion that a contractor's audit was conducted under privilege. This change of direction raised significant legal and regulatory questions including concerns that it expanded the substantive obligations for contractors without going through the appropriate regulatory steps and that the directive ignored clear legal authority protecting from disclosure audits conducted under the privilege.

Revised Directive 2022-1

The revised directive addresses many of these concerns. However, there seems to be limited protection for contractors who conduct audits, discover disparities, and hope to work with their counsel to resolve those disparities.

Name change. The revised directive drops the reference to "pay equity audits" in the title and throughout the document. OFCCP now refers to the obligation as a "compensation analysis." This change in nomenclature is significant as it more closely aligns with the language in the regulation which requires an "in-depth analysis" of "compensation systems." While "compensation systems" is a broader term than a specific compensation

"analysis," OFCCP's change goes a long way towards resolving the confusion that OFCCP intended to require contractors to perform a specific pay equity audit.

Privilege acknowledgment. The revised directive squarely states that OFCCP will respect well-established privileges. As such, contractors conducting detailed pay equity audits under an attorney's direction have some reassurance that OFCCP will not press to disclose the entirety of the audit, apart from the requirement to report information regarding disparities, which is discussed below.

Alternative submissions. OFCCP lays out several methods for contractors to establish compliance with the obligation to evaluate their compensation systems. First, contractors can provide a redacted version of their analyses conducted under privilege. Second, contractors may conduct a separate analysis and provide it to OFCCP. A third method allows a contractor to provide an affidavit that details the timing of the analysis, the employees and categories of employees covered by the analysis, the type of compensation analyzed, the protected classes evaluated, and the statistical or nonstatistical tests used in the analysis.

Recommended submissions. OFCCP has recommended that contractors provide additional information related to how the contractor evaluated employee groupings, an explanation of the groupings, the structural variables in the analysis, and the results of the analysis. This data will not be required, but OFCCP believes that it would assist in its evaluation of a contractor's efforts.

Reporting on disparities. The revised directive states OFCCP's intention to require contractors to provide information regarding the disparities uncovered in any analysis, how the contractor investigated the disparities, the method to correct and adjust any "problem areas," any changes including "pay increases," and "how the contractor intends to measure the impact of these programs on employment opportunities and identified barriers." The directive relies on regulatory language requiring contractors to develop "action-oriented programs" to address problem areas as support for this obligation.

Contractor Takeaways

OFCCP's revisions to the directive address many of the concerns raised in the March 2022 version. It acknowledges the regulatory requirement that contractors evaluate their compensation systems in a flexible manner and recognizes that well-established privileges exist. In addition, it allows several options for contractors to provide evidence of their compliance with the broad regulatory provision.

However, the revised directive should raise concerns for contractors. Contractors conducting audits at the direction of and under the supervision of counsel, greatly value discussions regarding resolving disparities. However, OFCCP's intent to require contractors to provide that information appears to not acknowledge that those discussions are protected under the attorney-client and work product privileges.

OFCCP takes the position that the regulations support its stance. OFCCP, however, relies on a generic regulatory provision in 41 CFR 60-2.10(c) regarding contractors' obligation to make available documentation of their affirmative action plans. In many respects, the government and OFCCP have broad authority to obtain information, but it remains to be seen whether this unique reading of the affirmative action plan requirements would clearly support turning over privileged information as to how a contractor remedied any compensation disparities.

Conclusion

The revised directive provides some clarity to contractors but also presents some continued risks. Contractors should work closely with experienced counsel to ensure that all internal analyses of compensation and pay equity audits are protected by well-established privileges. Further, should OFCCP open a compliance audit, contractors should make certain that they understand the complexities and nuances of the revised directive to ensure compliance with the regulations while upholding their privilege claims.

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