

NEW OFCCP DIRECTIVE SHINES SPOTLIGHT ON FEDERAL CONTRACTORS' PAY EQUITY AUDIT OBLIGATIONS

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On March 15, 2022 – National Pay Equity Day in the US - the Office of Federal Contract Compliance Programs (“OFCCP”) issued its first directive under the Biden administration, Directive 2022-01 (the “Directive”). The Directive outlines federal contractors’ new obligation to produce pay equity audits to the OFCCP and confirms earlier signals that the agency will have a renewed and aggressive focus on pay discrimination under the Biden administration.

To begin, the Directive reinforces contractors’ obligations under 41 CFR 2.17 to “perform in-depth analyses” of their “compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities.” The Directive refers to these analyses as “pay equity audits.” Although federal regulations do not outline specific requirements as to how contractors perform these pay equity audits, if the audit reveals that an impediment to equal employment opportunity exists, 41 CFR 2.17 requires the contractor to “develop and execute action-oriented programs designed to correct any problem areas.”

As a result of these obligations, the Directive concludes that the OFCCP has the authority to review contractors’ pay equity audits “to understand the methodology used and verify compliance with” 41 CFR 2.17. As such, pursuant to the Directive, if a desk audit reveals disparities in pay or “other concerns about the contractor’s compensation practices,” the OFCCP will request additional information from the contractor, including copies of its pay equity audits “covering a period beginning two years before the date the contractor received” the audit scheduling letter.

Recognizing that legal counsel is often involved in the performance of these pay equity audits, the Directive makes the OFCCP’s position clear that neither the attorney-client work privilege nor the attorney work-product doctrine will shield contractors from producing their pay equity audits to the OFCCP. An exception, however, is made for audits that are performed separately and for the purpose of obtaining privileged legal advice, rather than for the purpose of demonstrating compliance with OFCCP regulations. In these situations, the separate pay equity audit need not be produced, provided the contractor can verify that the audit was conducted under privilege. If a pay equity audit is conducted to satisfy two purposes (i.e., both to demonstrate compliance with OFCCP regulations and to seek other legal advice), then the privilege will not likely apply under the Directive.

Importantly, the Directive highlights that failure to “provide the required pay equity audit will be considered by the OFCCP as an admission of noncompliance with . . . regulatory requirements.”

Given its scope, the Directive is likely to significantly impact contractors as they continue to comply with their obligations under the OFCCP regulations. Now more than ever, it is vital that contractors ensure that they are taking the appropriate measures to protect their analyses and demonstrate their compliance, including:

- Evaluating their compliance with the OFCCP’s requirement that a pay equity analysis be conducted
- Reviewing any pay equity analyses that are in progress to determine the applicability of the attorney-client or other privilege;
- Reviewing any complete pay equity analyses to ensure that they are protected to the extent possible; and
- Considering how to address the OFCCP’s concerns regarding “dual purpose” audits to best protect privileged analyses.

Bryan Cave Leighton Paisner LLP has a team of knowledgeable lawyers and other professionals prepared to help employers comply with their obligations as federal contractors or subcontractors. If you or your organization would like more information or assistance on these topics, please contact an attorney in the Labor and Employment practice group or your regular Bryan Cave Leighton Paisner LLP contact.

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