

LABOR AND EMPLOYMENT LAW

INFORMATION MEMO

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OFCCP's Pay Equity Directive Takes Aim at Federal Contractors

On March 15, 2022, the U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP) issued a new directive addressing pay equity audits. [The new Directive 2022-01](#) sets forth what OFCCP views as its apparent authority to obtain access to and review federal contractors' pay equity audits that are conducted in connection with contractors' compliance mandates.

Under affirmative action regulations issued pursuant to Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, federal contractors are required to "perform in-depth analyses of its total employment process to determine whether and where impediments to equal opportunity exist" and, specifically, to evaluate their compensation systems to determine whether there are gender, race or ethnicity-based disparities 41 CFR § 60-2.17(b)(3). Despite the lack of any guidance about the scope of this regulatory requirement, it is this regulatory provision that OFCCP refers to in its new directive when discussing federal contractors' pay equity audit obligations.

OFCCP's directive highlights that it will request and closely scrutinize these pay equity audits during its compliance evaluations. OFCCP noted certain circumstances that would trigger a request for a contractor's pay equity analysis, including pay disparities or other evidence of potential pay discrimination among similarly-situated employees, employee complaints of pay discrimination or other anecdotal evidence of discrimination, inconsistencies in how the contractor is applying its pay policies and/or statistical analyses or other evidence that a group of workers is disproportionately concentrated in lower paying positions or pay levels within a position based on a protected characteristic. Based on the analysis put forth in Directive 2022-01, OFCCP is entitled to a broad scope of information related to a contractor's pay equity audit, including all pay groupings that were evaluated, any variables used, the results of the analyses (including any revealed disparities), the frequency of pay equity audits, communications to management and how, if at all, the pay audit results were used to rectify disparities based on gender, race and/or ethnicity. OFCCP's directive notes that "[f]ailure to provide the required pay equity audit will be considered by OFCCP as an admission of noncompliance with these regulatory requirements."

An alarming aspect of the pay equity directive is that OFCCP has taken an aggressive position that many pay equity audits conducted in connection with affirmative action compliance and in conjunction with counsel will not be deemed by OFCCP as exempt from disclosure despite a contractor's attempt to invoke the attorney-client privilege. In the new directive, OFCCP makes it clear that federal contractors cannot withhold such pay analyses, despite the fact that they may have been conducted with the assistance of legal counsel. OFCCP suggests that contractors could conduct two pay equity audits, one for the purpose of obtaining privileged legal advice (copies of which would generally not be subject to disclosure to OFCCP) and another "separate" pay equity audit in order to demonstrate compliance with the AAP regulations (copies of which would be disclosed to OFCCP upon request).

The pay equity directive signals that OFCCP will be initiating a renewed focus on pay equity enforcement. While pay equity audits have been widely considered a best practice to identify potential areas of pay disparities that could lead to litigation, such audits are now a mandate under the OFCCP directive for all federal contractors. Contractors should work closely with their legal counsel to evaluate the best approach to completing pay equity audits, which could be to have one audit that encompasses a privileged pay audit and a separate one that is considered to be in conjunction with their affirmative action obligations and not privileged.

If you have any questions about the information presented in this memo, please contact [Christa R. Cook](#), [Monica C. Barrett](#), any attorney in our [Labor and Employment practice](#) or the attorney at the firm with whom you are regularly in contact.

