

# OFCCP Will Start Demanding Contractors' Internal Pay Equity Audits

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On March 15, 2022, the OFCCP issued its first directive since President Biden took office. [Directive 2022-01](#) (the "Directive") addresses contractors' obligations to analyze their compensation systems and to turn over such analyses when under audit.

The Directive begins by highlighting contractors' obligations under [41 C.F.R. § 2.17\(b\)](#). That regulation provides that contractors "must perform in-depth analyses" of their "compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities." The regulation does not prescribe what such analyses must entail, only that they must "determine whether and where impediments to equal employment opportunity exist." Where such impediments exist, contractors are required to "develop and execute action-oriented programs designed to correct any problem areas." [41 C.F.R. § 217\(c\)](#).

The Directive then "clarifies OFCCP's authority to access and review contractors'" compensation system analyses, which it defines as "pay equity audits." The Directive indicates OFCCP will request such analyses when a desk audit "reveals disparities in pay or other concerns about the contractor's compensation practices." The Directive asserts OFCCP has the "authority" to obtain such materials "to understand the methodology used and verify compliance with" 41 C.F.R. § 2.17. OFCCP states that that it

**will request** that the contractor provide a **complete copy** of the pay equity audit(s) conducted pursuant to [41 C.F.R. §] 2.17(b)(3) that shows all pay groupings that were evaluated, any variables used, and the results of the analyses, including any disparities found. For compensation regression or statistical analysis results, OFCCP may request the model statistics (such as b-coefficients, significance tests, R-squared, adjusted R-squared, F-tests, etc.) for all variables or comparisons in the model. OFCCP may also request information relating to the frequency of pay equity audits, the communication to management, and how the results were used to rectify disparities based on gender, race and/or ethnicity.

(emphases added). The Directive states the OFCCP may request such analyses “covering a period beginning two years before the date the contractor received the Scheduling Letter.”

The final portion of the Directive anticipates contractors’ assertion of attorney-client privilege over their pay equity audits. OFCCP essentially rejects any claim that attorney-client privilege shields the production of internal pay equity audits to the agency:

OFCCP notes, however, that federal contractors must maintain and make available to OFCCP documentation of their compliance with OFCCP regulations. Contractors cannot withhold these documents by invoking attorney-client privilege or the attorney work-product doctrine. OFCCP has the authority under its regulations to request the analyses the contractor has conducted to comply with OFCCP regulations.

The Directive, after discussing the scope of the attorney-client privilege and contending the privilege does not apply to compensation analyses conducted for the purpose of complying with OFCCP’s regulations, concludes with a warning to contractors who refuse to turn over their internal pay equity analyses:

in cases where the desk audit reveals disparities in pay or other concerns about the contractor’s compensation practices, OFCCP will continue to request the related pay equity audit that a contractor conducts of its employment processes in order to meet the regulatory requirements of 41 CFR 60-2.17(b). **Failure to provide the required pay equity audit will be considered by OFCCP as an admission of noncompliance with these regulatory requirements.**

(emphasis added). The Directive, however, also indicates that where the contractor turns over a pay equity analysis, OFCCP will not seek other privileged pay equity analyses a contractor may have conducted – provided the contractor can establish privilege exists:

Provided that the contractor produces to OFCCP a pay equity audit and compliance records sufficient to comply with 41 CFR 60-2.17(b)(3) in the course of its evaluation, OFCCP generally will not seek additional privileged analyses where the contractor demonstrates that it also conducted a properly privileged pay equity process with an attorney.

The Directive is the first formal declaration that OFCCP under Director Yang will be aggressive in exploring compensation issues during audits. Contractors have now been warned that OFCCP will not accept assertions of privilege as bases for resisting requests for pay equity analyses and should adapt their processes, with the assistance of counsel, to account for this development and ensure they can demonstrate compliance with regulatory requirements while also protecting privileged compensation analyses.

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- **Guy Brenner**

Partner