

# OFCCP DIRECTIVE SEEKS TO ADDRESS PAY DISPARITIES, IMPOSES NEW REQUIREMENTS

March 15, 2022 was Equal Pay Day, the day which marks on average how far into the year women must work to be paid what men were paid over the previous year. In honor of Equal Pay Day, the Office of Federal Contract Compliance Programs (OFCCP), the agency within the U.S. Department of Labor responsible for enforcing government contractor and subcontractor compliance with affirmative action and nondiscrimination obligations, issued [Directive 2022-01](#), titled Pay Equity Audits (for purposes of this Advisory, we refer to both federal government contractors and subcontractors as “contractors”). Styled as a clarification of “existing requirements under the law or agency policies,” rather than a change in the law, the Directive goes well beyond existing requirements and seeks to impose new requirements on government contractors that may prove onerous to contractors.

By way of background, regulations implementing contractors’ affirmative action obligations require contractors to perform an in-depth analysis of their compensation systems, to determine whether there are gender-, race- or ethnicity-based disparities. 41 CFR § 60-2.17(b)(3). Previously, OFCCP performed its own compensation analysis while auditing contractors’ compliance by reviewing “pay analysis groupings” (PAGs), comprised of comparable employees, then statistically controlling for structural differences among members of the PAG and individual employee characteristics.

Going forward under the new Directive, OFCCP will look outside of PAGs to the contractor’s entire workforce, seeking “to identify patterns of segregation by race, ethnicity, and gender, which may result from assignment, placement, or upgrading/promotion barriers that drive pay disparities.” To aid in its comprehensive review across job titles, levels, roles, positions and functions, OFCCP “will request that the contractor provide a complete copy of the pay equity audit(s) conducted pursuant to [applicable regulation] that shows all pay groupings that were evaluated, any variables used, and the results of the analyses, including any disparities found.” OFCCP may also request additional information, such as the statistical model used, as well as how the results of pay equity audits were communicated to management and used to rectify disparities based on gender, race and/or ethnicity.

Of particular interest is the Directive’s stated position with respect to pay

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equity audits and related documentation prepared with the assistance or under the direction of counsel. Specifically, the Directive states contractors cannot withhold pay equity audit-related documents on the basis of attorney-client privilege or the work product doctrine; even if the contractor has conducted two separate audits, one for OFCCP compliance and the other for the purpose of obtaining privileged legal advice, OFCCP may seek production of the privileged audit unless the contractor can produce an “acceptable” pay audit and can verify that the privilege applies. To the extent a contractor conducts a “dual-purpose” pay equity audit, which implicates legal concerns and OFCCP compliance, OFCCP may request these documents in “appropriate circumstances.” Moreover, according to the Directive, “a contractor engaged in litigation against OFCCP may not withhold its pay equity audit and compliance records by invoking the work-product doctrine.” Attempts to negate the protections offered by the long-standing attorney-client privilege and work product doctrine are of grave concern and are likely to be challenged.

The Directive’s goals, as set forth in a [bulletin](#) published by OFCCP, are laudatory. Specifically, OFCCP seeks to close significant gender and racial pay gaps, which persist almost 60 years after passage of laws intended to close these gaps and which were exacerbated by the COVID-19 pandemic. Nevertheless, the Directive represents a significant overreach, and is sure to face legal challenge.

Armstrong Teasdale will continue to monitor any developments and challenges related to Directive 2022-01. If you have any questions, please contact your regular Armstrong Teasdale attorney or one of the authors listed below. You may also sign up or update your email preferences to receive legal and event information from Armstrong Teasdale related to this and other timely topics.