

## OFCCP Takes Aim at Pay Equity Audits in New Directive

Article By:

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In the first internal agency directive during Jenny Yang's tenure as director, the Office of Federal Contract Compliance Programs (OFCCP) issued [Directive 2022-01](#), entitled "Pay Equity Audits" on March 15, 2021.

OFCCP's directive informs contractors that the regulatory requirement in 41 C.F.R. Section 60-2.17(b) to "perform in-depth analyses of ... [c]ompensation systems to determine whether there are gender-, race-, or ethnicity-based disparities" requires annual quantitative "pay equity audits." The agency goes further in claiming that "contractor transparency" requires that contractors provide these pay equity audits to OFCCP upon request.

Highlights of Directive 2022-01 include the following:

- A reminder that when an OFCCP compliance evaluation is scheduled, contractors must provide OFCCP with the compensation information and data requested in the Itemized Listing attached to OFCCP's Scheduling Letter. This includes employee-level compensation for all employees in the establishment or functional affirmative action program (FAAP) organization audited, as well as documentation and policies related to the contractor's compensation practices.
- When the agency's desk audit reveals disparities in pay or other concerns about the contractor's pay practices, OFCCP may request additional information to investigate the contractor's compliance. This includes the contractor's "pay equity audit," which is not specifically defined, but which the directive claims is a mandatory component of the contractor's regulatory compliance obligations.
- OFCCP will request "a complete copy" of the contractor's pay equity audit conducted under 60-2.17(b) including "all pay groupings that were evaluated, any variables used, and the results of the analyses, including any disparities found." OFCCP may also seek "information relating to the frequency of pay equity audits, the communication to management, and how the results were used" to address gender-, race-, and/or ethnicity-based pay disparities.
- OFCCP recognizes that contractors may conduct pay equity audits for purposes unrelated to demonstrating compliance with OFCCP regulations. If the contractor produces a pay equity audit allegedly required by the affirmative action regulations, OFCCP "will not require" the

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contractor to produce other pay equity audits if it “can verify that they were conducted under privilege.” But if a contractor conducts a “dual-purpose pay equity audit”—“i.e., one that implicates both legal concerns and OFCCP compliance”—OFCCP said it may request this information.

- “[A] contractor engaged in litigation against OFCCP may not withhold its pay equity audit and compliance records by invoking the work-product doctrine.”

## Key Takeaways

Having been stung in recent litigation involving the discoverability of contractors’ pay practices and analyses, OFCCP’s new directive indicates that the agency will continue its efforts to closely examine contractors’ quantitative assessments of pay practices. While the concept that 60-2.17(b) *requires* an annual quantitative pay data analysis is novel at best, OFCCP fully intends to press the envelope by requesting pay analyses in compliance evaluations under the auspices of transparency and investigatory efficiency. While OFCCP’s directive does not have the force of law, does not change the affirmative action regulations governing federal contractors, and does not establish legal obligations, contractors may want to consider the implications of this new directive on any quantitative pay equity analyses that they conduct.

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