

Office of Federal Contract Compliance Programs

Directive (DIR) 2022-01



U.S. DEPARTMENT OF LABOR Office of Federal Contract Compliance Programs

A Directive (DIR) is intended to provide guidance to OFCCP staff and/or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and/or regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations. The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended to provide clarity to the public regarding existing requirements under the law or agency policies.

Effective Date: March 15, 2022

1. **SUBJECT:** Pay Equity Audits
2. **PURPOSE:** To provide guidance on how OFCCP will evaluate federal contractors' compliance with pay equity audit obligations and clarify OFCCP's authority to access and review pay equity audits conducted pursuant to 41 CFR 60-2.17(b)(3).¹
3. **REFERENCES:** This DIR references the following:
 - a. Executive Order 11246, as amended;
 - b. Section 503 of the Rehabilitation Act of 1973, as amended (Section 503);
 - c. Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA);
 - d. 41 Code of Federal Regulations (CFR) Chapter 60, Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor;
 - e. DIR 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation (Aug. 24, 2018);
 - f. Federal Contract Compliance Manual (FCCM) (Dec. 2019, last updated Jan. 7, 2021);
 - g. Supply and Service Contractors Technical Assistance Guide (Nov. 2020); and
 - h. Educational Institutions Technical Assistance Guide (Oct. 2019).
4. **AFFECTED POLICY:** The policies and procedures described in this DIR supersede any conflicting procedures in the FCCM or other previously issued guidance to the extent they could be read to conflict.
5. **BACKGROUND:** The Office of Federal Contract Compliance Programs (OFCCP) is committed to ensuring pay equity in the workplace. OFCCP is also committed to facilitating a transparent and efficient process to identify and remove barriers to opportunity, including pay discrimination and occupational segregation. Hiring barriers, steering, and assignment patterns can contribute to occupational segregation, which is a driver of persistent pay disparities. As part of their affirmative action obligations, supply and service contractors are required to perform an in-depth analysis of their total employment practices to determine whether and where impediments to equal employment opportunity exist.² This includes conducting an in-depth analysis of their compensation systems to determine whether there are gender-, race-, or ethnicity-based disparities, as provided in 41 CFR 60-2.17(b)(3).³ This analysis, hereafter referred to as a "pay equity audit," is an important component of the contractor's affirmative action program. By proactively conducting this pay equity audit, contractors can determine whether impediments to pay equity exist and develop action-oriented programs to address these problems, as provided in 41 CFR 60-2.17(c). Where OFCCP identifies potential pay concerns, contractor transparency in providing to OFCCP the pay equity audits conducted to comply with OFCCP regulations enables OFCCP to accomplish its work more efficiently by

understanding the contractor's analysis of its pay.

This directive explains how OFCCP reviews contractors' compliance with their obligations to conduct an in-depth compensation analysis under 41 CFR 60-2.17(b)(3). This directive also clarifies OFCCP's authority to access and review contractors' pay equity audits conducted pursuant to 41 CFR 60-2.17(b)(3).

6. **ROLES AND RESPONSIBILITIES:**

Regional and Field Managers: It is the responsibility of regional and district managers to ensure that regional and field staff conduct compliance evaluations consistent with the policies and procedures stated in this DIR.

Regional and Field Staff: It is the responsibility of compliance officers and other employees responsible for conducting or assisting with compliance evaluations to conduct compliance evaluations consistent with the policies and procedures stated in this DIR.

National Office: It is the responsibility of OFCCP's national office to implement this directive and act in accordance with the policies and procedures stated in this DIR.

7. **POLICY AND PROCEDURES:**

a. Desk Audit

During a compliance evaluation, a supply and service contractor is required to provide OFCCP with the information and data described in OFCCP's Scheduling Letter and Itemized Listing. OFCCP will review this information to determine whether the contractor is meeting its affirmative action and nondiscrimination obligations. This includes, but is not limited to, OFCCP conducting an analysis of the contractor's compensation practices as provided in DIR 2018-05, *Analysis of Contractor Compensation Practices During a Compliance Evaluation*. OFCCP will also look broadly at a contractor's workforce (across job titles, levels, roles, positions, and functions) to identify patterns of segregation by race, ethnicity, and gender, which may result from assignment, placement, or upgrading/promotion barriers that drive pay disparities. Where possible, OFCCP will use regression and other systemic analyses to look for disparities in patterns of assignment or in salary paid across similar functions and positions.

If the desk audit reveals disparities in pay or other concerns about the contractor's compensation practices, OFCCP may request additional information to investigate the contractor's compliance.⁴ This additional information may include, but is not limited to, additional compensation data, follow-up interviews, and additional records and information from the contractor, including its pay equity audit conducted pursuant to 2.17(b)(3).⁵ OFCCP may also request data relating to understanding compensation practices and disparities, such as factors that are not provided to OFCCP in the Item 19 submission including, but not limited to, information on prior experience or education, or other factors that may affect compensation, such as promotion, assignment or steering patterns.

Examples of circumstances where OFCCP may need follow-up information include, but are not limited to:

1. pay disparities or other evidence of potential pay discrimination among similarly situated employees based on race, ethnicity, and/or gender;
2. employee complaints of pay discrimination or other anecdotal evidence of discrimination;
3. inconsistencies in how the contractor is applying its pay policies; and/or
4. 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.

DIR 2018-05 provides an overview of how OFCCP assesses compensation during compliance reviews. In addition to this guidance, OFCCP has issued a Supply and Service Contractors Technical Assistance Guide and an Educational Institutions Technical Assistance Guide to assist contractors with better understanding their obligations.

b. Pay Equity Audit Documentation

As discussed below, OFCCP has the authority to review the contractor's pay equity audit conducted pursuant to 2.17(b)(3) to understand the methodology used and verify compliance with this requirement. OFCCP will request that the contractor provide a complete copy of the pay equity audit(s) conducted pursuant to 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.

c. OFCCP's Authority to Review Contractors' Pay Equity Audits

OFCCP recognizes that federal contractors often retain counsel to assist with the preparation of the pay equity audit and compliance records required by OFCCP's regulations. 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 contractor may conduct a separate pay equity audit for the purpose of obtaining privileged legal advice, and not for demonstrating compliance with OFCCP regulations. Where the contractor has produced to OFCCP an acceptable pay equity audit sufficient to demonstrate compliance with 2.17(b)(3), OFCCP will not require production of these separate pay equity audits, to the extent that the contractor can verify that they were conducted under privilege. In the event a contractor conducts a dual-purpose pay equity audit or analysis of employment processes – *i.e.*, one that implicates both legal concerns and OFCCP compliance – OFCCP may request those records in appropriate circumstances.⁶

The attorney-client privilege attaches to confidential communications made between an attorney and client for the purpose of obtaining legal advice. See *Fisher v. United States*, 425 U.S. 391, 403 (1976). A communication is not confidential if it is intended to be disclosed to a third party. See *United States v. (Under Seal)*, 748 F.2d 871, 874 (4th Cir. 1984). Federal contractors have a regulatory obligation to provide the pay equity audit and compliance records to OFCCP. See 41 CFR 60-2.10(c) ("Contractors must maintain and make available to OFCCP documentation of their compliance with §§ 60-2.11 through 60-2.17"); 41 CFR 60-2.32 ("The contractor must make available to [OFCCP], upon request, records maintained pursuant to § 60-1.12 . . . and written or otherwise documented portions of [affirmative action programs] maintained pursuant to § 60-2.10"); see also 41 CFR 60-1.12(b) (a contractor "must maintain its current [affirmative action program] and documentation of good faith effort . . ."); 41 CFR 60-1.40 (specifying which nonconstruction contractors and subcontractors must develop and maintain a written affirmative action program). This obligation defeats any expectation that the pay equity audit and compliance records prepared with the assistance of counsel would remain confidential. See, e.g., *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680, 682–83, (S.D. Cal. 1996) (where the relevant statute (31 U.S.C.A. § 3730(b)(2)) required a "written disclosure of substantially all material evidence and information" in the plaintiff's possession, the court held that "the communications contained in the documents were not made for the purpose of seeking legal advice."); *U.S. ex rel. Stone v. Rockwell Int'l Corp.*, 144 F.R.D. 396, 399 (D. Colo. 1992) (attorney-client privilege did not apply where counsel had "merely acted as a conduit in taking factual material supplied by the client and relaying that material to the government"). Moreover, courts recognize the attorney-client privilege only to the extent it facilitates the provision of legal services. See *Upjohn Co. v. United States*, 449 U.S. 383, 389, 396 (1981); see also *Fares Pawn, LLC v. Indiana*, 2012 WL 3580068, *5 (S.D. Ind. 2012) ("[s]imply communicating with in-house counsel is not enough to assert attorney-client privilege."). The principle that a party that attempts to shield otherwise discoverable evidence by conveying it to an attorney is not seeking legal services and cannot avail itself of the attorney-client privilege is thus well-established. See *Fisher*, 425 U.S. at 403-404; *Equal Employment Opportunity Commission v. BDO USA, L.L.P.*, 876 F.3d 690, 694 (5th Cir. 2017). In the absence of such a principle, contractors could frustrate OFCCP's enforcement efforts by delegating the preparation of all pay equity audit and compliance records to their attorneys, an outcome that is contrary to the clear text of Executive Order 11246 and the implementing regulations.⁷

Finally, a contractor engaged in litigation against OFCCP may not withhold its pay equity audit and compliance records by invoking the work-product doctrine. The purpose of the work-product doctrine is to preserve the fairness of litigation. See, e.g., *Allen v. Chi. Transit Auth.*, 198 F.R.D. 495, 500 (N.D. Ill. 2001) (explaining that the intent of the work-product doctrine "is to protect the adversarial process by providing an environment of privacy" and ensure "that the litigator's opponent is unable to ride on the litigator's wits"). Because the detailed requirements of 41 CFR 60-2.17(b) mean that the documents would have been prepared in a substantially similar form in the absence of litigation, the work-product privilege does not apply to them. See *United States v. Adlman*, 134 F.3d 1194, 1195 (2d. Cir. 1998); *In re Grand Jury*, 23 F.4th 1088, 1093 (9th Cir. 2021).

In line with these well-established legal principles, 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.⁸ 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.⁹

8. **INTERPRETATION:** This DIR does not create new legal rights or requirements or change current legal rights or requirements for contractors. Executive Order 11246, Section 503, VEVRAA, OFCCP's regulations at 41 CFR Chapter 60, and applicable case law are the official sources for contractors' compliance responsibilities. Nothing in this DIR is intended to change otherwise applicable laws, regulations, or other guidance or to restrict or limit OFCCP's ability to perform compliance reviews, request data, or pursue enforcement of any issue within its jurisdiction. Noncompliance with voluntary standards will not, in itself, result in any enforcement action. This DIR is not intended to have any effect on pending litigation or alter the Agency's basis for litigating pending cases.

SIGNATURE:

Jenny R. Yang

Director

Office of Federal Contract Compliance Programs

1. In this directive, the terms "contractor" and "federal contractor" are used to refer to contractors and subcontractors with direct federal contracts, unless otherwise expressly stated.
2. Supply and service contractors with 50 or more employees and a contract of \$50,000 or more are subject to the requirements of 41 CFR part 60-2, including the 41 CFR 60-2.17(b) requirements.
3. While this directive focuses on the in-depth compensation analysis required by Executive Order 11246 regulations at 41 CFR 60-2.17(b)(3), the regulations at 60-2.17(b) more broadly require a contractor to perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. In addition, Section 503 of the Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) also require federal contractors to review and analyze personnel processes and data. 41 CFR 60-4.3(a) also requires construction contractors to monitor their compensation practices and policies. Additionally, 41 CFR 60-2.10(a)(2) requires federal contractors to monitor and examine their employment decisions and compensation systems to evaluate the impact of those systems on women and minorities.
4. As provided in 41 CFR 60-2.10(c), contractors must maintain and make available to OFCCP documentation of their compliance with §§ 60-2.11 through 60-2.17. 41 CFR 60-2.32 also provides that a contractor must make certain affirmative action records available to OFCCP upon request.
5. OFCCP may ask for pay data and additional documentation covering a period beginning two years before the date the contractor received the Scheduling Letter. See FCCM, 1C04 Additional Data Requests.
6. In evaluating whether the attorney-client privilege applies, courts typically look at whether the primary purpose of the communication is to give or receive legal advice. See *In re Grand Jury*, 23 F.4th 1088, 1092 (9th Cir. 2021). Thus, if a contractor conducts an audit or analysis for the primary purpose of complying with OFCCP regulations, it will not be subject to the attorney-client privilege, even if it also implicates legal matters. See *id.*, 23 F.4th 1088, 1092 (9th Cir. 2021) (applying the primary-purpose test to dual-purpose communications, and finding that certain dual-purpose communications were not privileged because the "primary purpose" of the documents was to obtain non-legal advice); *Alomari v. Ohio Dep't of Pub. Safety*, 626 F. App'x 558, 570 (6th Cir. 2015) (citing *In re County of Erie*, 473 F.3d 413, 420 (2d Cir. 2007)) (same).
7. The attorney-client privilege is interpreted narrowly so as to "appl[y] only where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403. In line with this well-settled principle and the broad investigatory authority given to agencies, courts have indicated that the privilege should be granted sparingly in the context of agency investigations. See *F.T.C. v. TRW, Inc.*, 628 F.2d 207, 211 (D.C. Cir. 1980); see also *Cavallaro v. United States*, 284 F.3d 236, 245-46 (1st Cir. 2002) (quoting *United States v. Arthur Young & Co.*, 465 U.S. 805, 816 (1984)) (noting "the doctrine of construing the privilege narrowly, which has particular force in the context of IRS investigations given the 'congressional policy choice in favor of disclosure of all information relevant to a legitimate IRS inquiry.'").

8. Further, OFCCP's regulations provide that where the contractor has failed to preserve records, including its affirmative action program and documentation of good faith efforts, as required, "there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor" if the contractor cannot show that the destruction of failure to provide records is due to circumstances outside of the contractor's control. 41 CFR 60-1.12(e).

9. The party with a claim of privilege bears the burden of asserting it and proving that it applies. See, e.g., *Tornay v. United States*, 840 F.2d 1424, 1426 (9th Cir. 1988). Accordingly, the mere possibility that additional analyses may be covered by privilege does not preclude OFCCP from requesting them initially or, if OFCCP believes that the claim of privilege is legally deficient, seeking to compel their disclosure. Further, OFCCP may seek records related to any or all of a contractor's analyses, in accordance with applicable law and regulations, if the Office of the Solicitor of Labor initiates enforcement proceedings.

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