U.S. DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

Directive (DIR) 2022-01 Revision 1

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Effective Date: August 18, 2022

1. **SUBJECT:** Advancing Pay Equity Through Compensation Analysis[1]

2. **PURPOSE:** To provide guidance on how OFCCP will evaluate federal contractors' compliance with compensation analysis obligations and clarify OFCCP's authority to access and review documentation of compensation analyses conducted pursuant to 41 CFR 60-2.17(b)(3).[2]

3. **REFERENCES:** This Directive 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);
   h. Educational Institutions Technical Assistance Guide (Oct. 2019); and
   i. DIR 2022-02, *Effective Compliance Evaluations and Enforcement* (Mar. 31, 2022)

4. **AFFECTED POLICY:** This Directive revises and renames DIR 2022-01, *Pay Equity Audits*. The policies and procedures described in this Directive 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 processes, including their compensation systems, to determine whether and where impediments to equal employment opportunity exist.[3] The analysis of compensation must include, at minimum, an evaluation of the contractor's compensation systems to determine whether there are gender-, race-, or ethnicity-based disparities, as provided in 41 CFR 60-2.17(b)(3).[4] This evaluation, hereafter referred to as a "compensation analysis," is an important component of the contractor's affirmative action program (AAP).[5] By proactively conducting this compensation analysis, contractors can

determine whether impediments to equal employment opportunity in pay exist and "develop and execute action-oriented programs designed to correct any problem areas," as provided in 41 CFR 60-2.17(c).

The regulations at 41 CFR 60-2.10(c) require contractors to "maintain and make available to OFCCP documentation of their compliance with" 41 CFR 60-2.11 through 60-2.17, which include the obligations to conduct a compensation analysis (41 CFR 60-2.17(b)(3)) and to implement action-oriented programs to address any problem areas identified pursuant to that analysis (41 CFR 60-2.17(c)). This documentation allows OFCCP to accomplish its work more efficiently and to assess, among other things, whether a contractor has performed a sufficient evaluation and whether it "has made good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results." 41 CFR 60-2.17(c).

This Directive explains how OFCCP reviews contractors' compliance with their obligation to conduct a compensation analysis under 41 CFR 60-2.17(b)(3). This Directive also clarifies OFCCP's authority to access and review documentation of contractors' compensation analyses conducted pursuant to 41 CFR 60-2.17(b)(3). Finally, this Directive reaffirms that OFCCP will not require the production of privileged attorney-client communications or attorney work product.[6]

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 Directive.
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 Directive.
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 Directive.

7. **POLICIES 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. 41 CFR 60-2.10(c), 60-2.32; DIR 2022-02, *Effective Compliance Evaluations and Enforcement.* 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 compensation analysis conducted pursuant to 41 CFR 60-2.17(b)(3).[7] OFCCP may also request data relating to understanding compensation practices and disparities, such as factors that are not provided to OFCCP in the Scheduling Letter and Itemized Listing 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:

i. pay disparities or other evidence of potential pay discrimination among similarly situated employees based on race, ethnicity, and/or gender;
ii. employee complaints of pay discrimination or other anecdotal evidence of discrimination;
iii. inconsistencies in how the contractor is applying its pay policies; and/or
iv. 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. Compensation Analysis Documentation

As discussed further below, contractors "must maintain and make available to OFCCP documentation of their compliance with …[41 CFR] 60-2.17" pursuant to 41 CFR 60-2.10. OFCCP has the authority to review documentation of a contractor's compensation analysis to confirm that the contractor has evaluated its compensation systems for race-, gender-, or ethnicity-based disparities. For OFCCP's purposes, the most useful form of documentation is a contractor's full compensation analysis because it allows OFCCP to understand how the contractor evaluates its compensation systems in practice, leading to a more efficient compliance review.[8] Contractors are therefore encouraged to make their full compensation analyses available where OFCCP identifies concerns during a compliance evaluation.

If a contractor believes its full compensation analysis contains privileged attorney-client communications or attorney work product, the contractor may fulfill its regulatory obligations by making available to OFCCP other documentation that it has conducted the compensation analysis required under 41 CFR 60-2.17(b)(3). This can be accomplished in several ways. First, a contractor may make available a redacted version of its compensation analysis, provided that the non-redacted portions include the required facts described below. Alternatively, a contractor may conduct a separate analysis during the relevant AAP period that does not implicate privilege concerns and provide that analysis to OFCCP in full. Finally, a contractor may generate a detailed affidavit that sets forth the required facts described below but does not contain privileged material. Regardless of which alternative a contractor pursues, for OFCCP to determine that a contractor has satisfied its obligations under 41 CFR 60-2.17(b)(3), OFCCP requires that contractors provide documentation that demonstrates at least the following:

i. when the compensation analysis was completed;
ii. the number of employees the compensation analysis included and the number and categories of employees the compensation analysis excluded;[9]
iii. which forms of compensation were analyzed and, where applicable, how the different forms of compensation were separated or combined for analysis (*e.g.*, base pay alone, base pay combined with bonuses, *etc.*);[10]
iv. that compensation was analyzed by gender, race, and ethnicity; and
v. the method of analysis employed by the contractor (*e.g.*, multiple regression analysis, decomposition regression analysis, meta-analytic tests of z-scores, compa-ratio regression analysis, rank-sums tests, career-stall analysis, average pay ratio, cohort analysis, *etc.*).

OFCCP will review this documentation to verify that the contractor has satisfied its obligation to evaluate its "compensation system(s) to determine whether there are gender-, race-, or ethnicity-based disparities," as part of the contractor's "in-depth analyses of its total employment process" required by 41 CFR 60-2.17(b)(3). As described further below in section 7(c), this documentation of compliance is not inherently privileged or subject to work product protection.

In addition to the required information described above, to assist OFCCP in understanding how contractors evaluate their compensation systems in practice, OFCCP recommends that contractors provide the following information, as applicable:[11]

i. all employee pay groupings evaluated;
ii. an explanation of how and why employees were grouped for the analysis;
iii. which, if any, variables, factors, measures, or controls (*e.g.*, tenure, education, structural groupings, performance ratings, prior experience) were considered and how they were incorporated in the analysis; and
iv. the model statistics for any regressions or global analyses conducted (*e.g.*, b-coefficients, significance tests, F-tests, *etc.*) for race, ethnicity, and gender-based variables.

OFCCP recognizes that some contractors may consider aspects of these four categories of information privileged, and this Directive is not intended to encourage waiver of privilege. Rather, this Directive informs contractors that, where they maintain this information in non-privileged form, making it available can assist OFCCP in conducting a more efficient compliance evaluation.

If a contractor's compensation analysis identifies any problem areas (including gender-, race-, or ethnicity-based pay disparities), the regulations at 41 CFR 60-2.17(c) require the contractor to develop and execute action-oriented programs to correct them. OFCCP may request documentation demonstrating that the contractor did so. 41 CFR 60-2.17(c), 60-2.10(c). To allow OFCCP to determine whether the contractor's action-oriented programs "consist of more than following the same procedures which have previously produced inadequate results" and to evaluate the contractor's "good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results," (*id.*), OFCCP will require documentation that demonstrates, at a minimum:

i. the nature and extent of any pay disparities found, including the categories of jobs for which disparities were found, the degree of the disparities, and the groups adversely affected;

ii. whether the contractor investigated the reasons for any pay disparities found;

iii. that the contractor has instituted action-oriented programs designed to correct any problem areas identified;

iv. the nature and scope of these programs, including the job(s) for which the programs apply and any changes (*e.g.*, pay increases, amendments to compensation policies and procedures) the contractor made to the compensation system; and

v. how the contractor intends to measure the impact of these programs on employment opportunities and identified barriers.

c. OFCCP's Authority to Review Documentation of Contractors' Compensation Analyses

OFCCP recognizes that federal contractors often retain counsel to assist with the preparation of pay studies, including the compensation analysis and related compliance records required by OFCCP's regulations.

As described above, federal contractors have a regulatory obligation to provide documentation of their compensation analyses and affirmative action programs 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").[12]

Contractors will not be found in compliance with their compensation analysis obligations if they simply invoke privilege and provide OFCCP with no or insufficient documentation of compliance. Documentation that contractors have complied with their regulatory obligations is not inherently privileged.[13] Specifically, facts regarding what a contractor did to comply with 41 CFR 2.17(b)(3) are not "communications" covered by the attorney-client privilege. *See, e.g., In re Vioxx Prods. Liab. Litig*., 501 F. Supp. 2d 789, 805 (E.D. La. 2007) ("when a corporate executive makes a decision after consulting with an attorney, his decision is not privileged whether it is based on that advice or even mirrors it"); *Stout v. Illinois Farmers Ins. Co*., 150 F.R.D. 594, 611 (S.D. Ind. 1993), *aff'd*, 852 F. Supp. 704 (S.D. Ind. 1994) (citation omitted) ("[t]he attorney-client privilege is not so broad as to cover all of a client's actions taken as a 'result[ ] of communications between attorney and client.'"). Thus, a contractor may generate, maintain, and produce to OFCCP documentation of the compensation analysis it conducted without disclosing privileged attorney-client communications.

Additionally, because contractors are aware, when they prepare documentation of their compliance with 41 CFR 60-2.17(b)(3), that they must make it available to OFCCP (*see* 41 CFR 60-2.10(c)), this documentation is not "confidential," and the privilege does not attach to it. *See Fisher v. United States*, 425 U.S. 391, 403 (1976) (The attorney-client privilege attaches to confidential communications made between an attorney and client for the purpose of obtaining legal advice); *United States v. (Under Seal),* 748 F.2d 871, 874 (4th Cir. 1984) (A communication is not confidential if it is intended to be disclosed to a third party).[14]

In sum, if a contractor does not provide OFCCP with documentation sufficient to demonstrate its compliance with 41 CFR 2.17(b)(3) on the basis that the required categories of information outlined in Section 7(b) are subject to the attorney-client privilege or work-product doctrine, OFCCP will find the contractor has not satisfied its obligations under 41 CFR 60-2.17(b)(3) and 41 CFR 60-2.10(c). OFCCP will not require the production of privileged attorney-client communications or attorney work product.

8. **INTERPRETATION:** This Directive 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 Directive 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 Directive is not intended to have any effect on pending litigation or alter the Agency's basis for litigating pending cases.

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Director

Office of Federal Contract Compliance Programs

1. *Directive 2022-01 was first issued on March 15, 2022. OFCCP has revised and reissued the Directive to update and clarify its guidance. This revised Directive explicitly reaffirms OFCCP's position that it will not require the production of privileged communications or attorney work product.*

2. *In this Directive, the terms "contractor" and "federal contractor" are used to refer to contractors and subcontractors with direct federal contracts or subcontracts, unless otherwise expressly stated.*

3. *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.*

4. *In addition, Section 503 and VEVRAA 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.*

5. *The original Directive used the phrase "pay equity audit" to refer to contractors' obligations under 41 CFR 60-2.17(b)(3). This updated Directive uses the term "compensation analysis" instead of "pay equity audit" to avoid any confusion regarding the nature of a contractor's obligations under 41 CFR 60-2.17(b)(3). OFCCP notes that the phrase "compensation analysis" is not meant to encompass all compensation studies performed by contractors—only those performed in whole or in part for purposes of compliance with 41 CFR 60-2.17(b)(3).*

6. *OFCCP notes that, if the Solicitor of Labor initiates enforcement proceedings, this Directive in no way precludes the Solicitor from seeking records related to a contractor's pay studies, in accordance with applicable law and regulations and subject to valid claims of privilege. See, e.g., Tornay v. United States, 840 F.2d 1424, 1426 (9th Cir. 1988) (the party with a claim of privilege bears the burden of asserting it and proving that it applies).*

7. *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*

8. *See DIR 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation (where appropriate, OFCCP will attempt to design its analysis based on the compensation hierarchy and job structure the contractor provides).*

9. *How excluded "categories" are defined may differ based on the composition of a contractor's workforce and other factors, but could include, for example, small and unique groups of workers that are not comparable to the other groups analyzed within an AAP.*

10. *As defined in 41 CFR 60-1.3, "compensation" includes "any payments made to, or on behalf of, an employee or offered to an applicant as remuneration for employment, including but not limited to, salary, wages, overtime pay, shift differentials, bonuses, commissions, vacation and holiday pay, allowances, insurance and other benefits, stock options and awards, profit sharing, and retirement."*

11. *This recommendation relates only to contractors' compliance with 41 CFR 60-2.17(b)(3). Nothing in this Directive is intended to limit OFCCP's ability to request or obtain information and data about contractors' compensation systems outside the scope of 2.17(b)(3) compliance, consistent with other OFCCP regulations and federal law.*

12. *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).*

13. *Likewise, a contractor may not withhold its compensation analysis documentation during a compliance evaluation by invoking the work-product doctrine. The work-product doctrine protects material that was prepared in anticipation of litigation. See Allen v. Chi. Transit Auth., 198 F.R.D. 495, 500 (N.D. Ill. 2001); In re Grand Jury, 23 F.4th 1088, 1093 (9th Cir. 2021). It does not protect materials that would have been created in substantially similar form in the absence of litigation (e.g., because their creation is otherwise required by regulation). See United States v. Adlman, 134 F.3d 1194, 1195 (2d. Cir. 1998).*

14. *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."). It is well established 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. 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). Accordingly, contractors cannot shield their compensation analysis documentation from OFCCP by simply delegating its preparation to their attorneys.*

Office of Federal Contract Compliance Programs

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