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On August 18, 2022, the US Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) made two significant announcements affecting federal contractors. First, the agency issued Directive 2022-01: Advancing Pay Equity Through Compensation Analysis, which replaces its original directive from March 2022 to clarify guidance regarding contractors' compliance with compensation analysis obligations.

Second, the agency announced it received a Freedom of Information Act (FOIA) request for all Type 2 Consolidated EEO-1 Reports filed by federal contractors from 2016 to 2020. The agency stated that the information sought could be protected from disclosure, but suggested skepticism over whether such protections were warranted. Covered contractors have until September 19, 2022, to object to the disclosure of their Type 2 EEO-1 Consolidated Reports. We discuss these two developments in detail below.

Revised compensation analysis directive

All federal contractors are required, as part of their annual affirmative action obligations, to "perform an in-depth analysis" of their compensation systems to determine whether there are gender, race or ethnicity-based disparities. Many employers retain outside counsel to assist in conducting privileged pay analyses. The revised directive marks a significant change in the OFCCP's prior position on whether contractors are required to disclose such privileged analyses, and it makes clear that the agency "will not require the production of privileged communications or attorney work product" in reviewing compliance with these compensation analysis obligations. In addition, as outlined below, the revised directive clarifies the types of documentation the agency expects to review and reminds contractors that they are required to develop and execute action-oriented programs to address any disparities.

Requesting additional information

The OFCCP confirms that it may request additional information regarding compliance if a contractor's audit reveals disparities in pay, including additional compensation data, follow-up interviews, and additional records and information. The agency notes, however, that the "most useful form of documentation" is the contractor's full compensation analysis.

Alternative options and documentation

As noted above, the OFCCP confirms that it will not require production of attorney-client privileged communications or attorney work product. If a contractor's full compensation analysis contains privileged information, the OFCCP now proposes that contractors may do one of the following:

1. Provide a redacted version of the compensation analysis.
2. Conduct a separate, nonprivileged analysis during the relevant audit period and provide that analysis to the OFCCP in full.
3. Provide a detailed affidavit setting forth facts that demonstrate compliance.

Regardless of which alternative a contractor pursues, contractors will be required to provide the following information to enable the OFCCP to assess whether a contractor has satisfied its obligations:

- When the compensation analysis was completed.
- The number of employees that the compensation analysis **included**, and the number and categories of employees that the compensation analysis **excluded**.
- Which forms of compensation were analyzed, and how different forms of compensation were separated or combined for the analysis (e.g., base pay alone, base pay combined with bonuses, etc.).
- Confirmation that compensation was analyzed by gender, race and ethnicity.
- The method of analysis employed by the contractor (e.g., type of statistical test conducted).

The agency also identified other information that is **not required** but it has deemed helpful in understanding how

contractors evaluate their compensation systems, including all employee pay groupings evaluated, an explanation of how and why employees were grouped for the analysis, and which, if any, variables were considered in the analysis.

Developing 'action-oriented programs' to address disparities

Contractors must develop and execute "action-oriented programs" if their compensation analyses identify gender, race or ethnicity-based pay disparities. The OFCCP could request documentation demonstrating that a contractor investigated the reasons for the pay disparities. It also could require documentation regarding the nature and scope of the program(s) that the contractor implemented to address such problem areas, as well as how the contractor intends to measure "the impact of these programs on employment opportunities and identified barriers."

FOIA request for contractors' EEO-1 reports

The Type 2 Consolidated EEO-1 Report is an annual report that multi-establishment employers must file, which includes demographic data for all employees of a company, categorized by race/ethnicity, sex and job category. The OFCCP received a FOIA request asking for a spreadsheet of these Type 2 Consolidated EEO-1 Reports "for all federal contractors, including first-tier subcontractors, from 2016-2020." The OFCCP clarified that compensation information is not included as part of the request.

As noted above, the agency believes the requested information **could** be protected from disclosure under FOIA Exemption 4, which protects against the disclosure of "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." However, the OFCCP is inviting companies with concerns over disclosure to provide objections substantiating the basis for withholding such information. According to the OFCCP, any objection submitted by a contractor must address the following questions to enable the OFCCP to determine whether the information should be withheld or disclosed:

1. What specific information from the EEO-1 report does the contractor consider to be a trade secret or commercial or financial information?
2. What facts support the contractor's belief that this information is commercial or financial in nature?
3. Does the contractor customarily keep the requested information private or closely held? What steps have been taken by the contractor to protect the confidentiality of the requested data, and to whom has it been disclosed?
4. Does the contractor contend that the government provided an express or implied assurance of confidentiality? If no, were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?
5. How would disclosure of this information harm an interest of the contractor protected by Exemption 4 (such as by causing foreseeable harm to the contractor's economic or business interests)?

Covered employers – which the OFCCP believes includes approximately 15,000 contractors – may file their objections to the broad request through an online portal the agency developed to collect and track such objections, or by email to OFCCPSubmitterResponse@dol.gov. The OFCCP also has developed FAQs regarding the request.

Objections will be independently evaluated by the OFCCP. If the OFCCP determines that it will disclose the information over an objection, it will provide written notice to the contractor with the reason the objection was not sustained, a description of the information that will be disclosed and a specified disclosure date. **Employers should note, however, that if a covered contractor fails to respond to the notice by September 19, the OFCCP "will assume that the company has no objection to disclosure and will begin the process of sending the contractor's Type 2 EEO-1 Report data to the FOIA requester."**

Next steps

Employers who submitted a Type 2 Consolidated EEO-1 Report between 2016 and 2020 should consider objecting to its release in response to the FOIA request, if they believe those reports contain confidential and proprietary business information. Those who fail to object should assume that their reports will be disclosed.

Contractors should navigate compensation analyses carefully in light of the revised directive. Although the

OFCCP walked back its prior position on privilege, it also cautioned that contractors will not be found in compliance if they "simply invoke privilege and provide OFCCP with no or insufficient documentation of compliance." Contractors should consider the benefits of conducting two different analyses as now sanctioned by the OFCCP: one subject to privilege and one not subject to privilege (which can be submitted to the OFCCP).

If you have any questions about OFCCP developments, please reach out to a member of the Cooley employment team.

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