



Pay Equity Studies

A Guide for Federal Contractors

Authors: Joanna Colosimo, M.A. & Jana Garman, M.A.

An Increasingly Complex Puzzle for Federal Contractors

As a federal contract or subcontractor, employers are required to perform in-depth analyses of their total employment processes, including their compensation systems, to determine whether gender-, race-, or ethnicity-based disparities¹ may exist. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) enforces the regulations that oversee these requirements for federal contractors and subcontractors.

In 2018, OFCCP issued a sub-regulatory directive, *Analysis of Contractor Compensation Practices During a Compliance Evaluation*², which outlines OFCCP's standard operating procedures for reviewing contractor compensation practices during a compliance evaluation. This directive outlined OFCCP's pay-related enforcement proceedings and how they intended to conduct evaluations of contractor compensation practices.

In 2022, OFCCP issued another directive, as revised, designed to clarify how OFCCP would evaluate federal contractors' compliance with compensation analysis obligations and documentation requirements³. This directive is focused on how OFCCP would evaluate compliance with meeting the obligations of conducting an analysis per the regulations at 41 CFR 60-2.17(b)(3), which is a nuanced difference between the evaluation and findings related to potential pay discrimination, as outlined in the 2018 directive. Where the 2018 directive provided insight into OFCCP's intended methodologies to find and enforce pay disparities within compliance evaluations, the 2022 directive provides guidance to contractors and subcontractors on how to meet the minimum standards of materials submission for demonstrating compliance.

Between the regulatory requirement to perform an in-depth analysis of compensation and the two aforementioned directives issued by OFCCP, contractors and subcontractors are left to wonder how to meet pay equity standards, avoid OFCCP scrutiny, and ensure equity in their workplaces. This guide parses through the requirements and outlines practices to meet regulatory requirements and address pay equity concerns within a federal contractor's organization. There are three primary goals or purposes described here that should be considered by federal contractors.

Goal 1: Conduct a Robust Analysis to Drive Better Compensation Decisions

Benefits:

- ✓ Can help drive increased pay equity in an organization
- ✓ Can satisfy OFCCP's compensation evaluation requirement
- ✓ Assists with identifying pay barriers or claims that may arise outside of an OFCCP context

Drawback:

- X Submission of this type of analysis to OFCCP can increase risk or waive legal privileges

Title VII of the Civil Rights Act of 1991 prohibits employment discrimination based on race, color, religion, sex, and national origin. A Title VII analysis is typically conducted company-wide and serves the purpose of taking a deeper dive into identifying pay equity challenges and problem areas within the organization. Employers may create groupings by business unit or other factors in determining pay. It is recommended that this

¹ 41 CFR 60-2.17(b)(3).

² DIR 2018-05, *Analysis of Contractor Compensation Practices During a Compliance Evaluation*, <https://www.dol.gov/agencies/ofccp/directives/2018-05>.

³ DIR 2022-01 Revision 1, *Advancing Pay Equity Through Compensation Analysis*, <https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1>.

type of analysis is conducted under attorney-client privilege and that the employer performs appropriate investigations and remedies based on the results. This type of analysis is also useful in proactively addressing pay equity concerns from an OFCCP enforcement perspective, as OFCCP's stated approach to enforcement is consistent with Title VII principles. See *Figure 1* for more on OFCCP's approach to pay equity analyses.

OFCCP's directive 2018-05 outlines the following principles that OFCCP will utilize when assessing whether an audited contractor has indicators of systemic pay discrimination:

- Use of statistical and other evidence to examine findings and make conclusions
- Examination of similarly situated analysis groupings in pay
- Use of multiple linear regression
- Separately analyze base pay and total compensation and components of compensation (e.g., bonus, commission, overtime, shift differentials)
- Analyze statistical outliers for indicators of potentially inappropriate pay analysis groupings
- Use of control variables in regression, such as tenure, education, potentially using age as a proxy for prior experience or use actual experience, control for job level or grade, evaluate market surveys if available, and potentially control for performance ratings
- Test of statistical variables to omit control variables that may be tainted by discrimination for the statistical analysis.

Figure 1

This type of robust analysis can be conducted under attorney-client privilege to help protect the results of the study and allow the organization to engage in remediation. Although OFCCP requires documentation for compliance with their regulations, Directive 2022-01 makes it clear that 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. Specifically, OFCCP states in this directive that although contractors must provide evidence in a compliance review that they have conducted an evaluation of their compensation systems, OFCCP will not request the results of an employer's privileged analysis if their submitted evaluation documentation is sufficient to demonstrate regulatory compliance.

Engaging in a proactive and privileged robust pay equity study utilizing Title VII standards is a best practice for all organizations, including federal contractors, as it mirrors how both the Equal Employment Opportunity Commission (EEOC) and OFCCP will enforce and view pay equity issues in the organization, and assists organizations with identifying and remediating pay equity issues prior to being audited.

Goal 2: Meet OFCCP Regulatory Standards for Compensation Evaluations

Benefit:

- ✓ Meets OFCCP's regulatory requirements for conducting a compensation evaluation

Drawback:

- X Not necessarily helpful for compensation decisions or remediating pay disparities that could exist for those in similar groups

As noted, the regulations discuss the requirement for supply and service contractors to perform an analysis of compensation, and must include, at minimum, an evaluation of the contractor's compensation systems to determine whether gender-, race-, or ethnicity-based disparities may exist, as provided in 41 CFR 60-2.17(b)(3). Additionally, 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)).

Per their guidance in Directive 2022-01, Revision 1, OFCCP is expecting some evidence and documentation provided by the contractor of such an evaluation. Thus, DCI recommends that contractors conduct a non-privileged evaluation of their compensation system separate from their pay equity study to satisfy the compliance requirements set forth by OFCCP. Additionally, contractors should be prepared to turn over these compensation-focused compliance documents to OFCCP in a compliance evaluation, per the agency's requirements in their audit scheduling letter and guidance.

This separate, non-privileged compensation analysis can take form in many ways. In OFCCP's 2020 Supply and Service Technical Assistance Guide (TAG)⁴, they state *"OFCCP does not dictate a particular method of analysis for meeting this regulatory requirement,"* referencing 41 CFR 60-2.17(b). See Figure 2 for more on methods to comply with OFCCP's compensation system evaluation requirements.

Strategies that could be considered to meet OFCCP's compensation evaluation requirement include:

- A qualitative analysis of the compensation system at the audited establishment or functional affirmative action plan (FAAP)
- A Pay Evaluation Report analyzing the overall compensation averages or ratios by gender and race/ethnicity for the audited establishment or FAAP
- Some combination of both
- A high-level average salary comparison by job
- Or something else

Figure 2

Whatever the contractor chooses, it should consider the appropriate level of risk tolerance of the organization and the type of information being provided to an enforcement agency. Additionally, OFCCP will expect an evaluation statement or conclusion on what the contractor found in their review to meet compliance requirements on the analysis of compensation.

Goal 3: Proactively Prepare for an OFCCP Audit

Benefits:

- ✓ Can help drive increased pay equity in an organization's establishment or FAAP
- ✓ Can help find potential issues before an OFCCP compliance review
- ✓ Can satisfy OFCCP's compensation evaluation requirement

⁴ OFCCP Supply and Service Contractors Technical Assistance Guide: https://www.dol.gov/sites/dolgov/files/OFCCP/SupplyService/files/508_OFCCP_SS_TAG.pdf

Drawback:

- X Submission of this type of analysis to OFCCP can increase risk or waive legal privileges.

At times, federal contractors like to assess their pay risk by understanding what OFCCP may see in an audit situation in alignment with their enforcement protocols noted in Directive 2018-05. This type of analysis leverages pay equity principles, but instead of evaluating data organization-wide, can be conducted at the affirmative action plan (AAP) establishment- or FAAP-level, in alignment with how OFCCP currently audits contractors. Additionally, the pay grouping may not be as robust as an organization-wide similarly situated grouping but could leverage something like what OFCCP may utilize initially in a compliance review. The goal of this type of analysis is to replicate what OFCCP may see in their analysis during a compliance evaluation. Other considerations related to this type of analysis include the following:

- Utilizing the AAP roster snapshot date, like the data that would be submitted to OFCCP in an audit
- Depending on the risk tolerance of the organization, it could also be conducted under attorney-client privilege
- Pay groupings may be AAP job group or something else such as grade that is straightforward for OFCCP to utilize in a review.

Recommendation

Federal contractors and subcontractors have a variety of options when it comes to conducting pay equity analyses. However, they would be well-served to consider what the end goal of that analysis is. Is the goal simply to comply with federal regulations or is the goal to uncover pay equity issues and make compensation adjustments? If both goals are important to a federal contractor or subcontractor, then they should consider doing more than one analysis in order to protect privilege and minimize risk while still getting a useful analysis. Federal contractors and subcontractors should weigh the value and goals of each type of pay-related study with the risks associated with the outcomes and results. Organizations that proceed with intention in their pay equity work can both achieve compliance and make progress with mitigating risk and ensuring pay equity for their employees.