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Ms. Jenny R. Yang
Director
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Ave NW
Washington, DC 20210

By email: yang.jenny.r@dol.gov

RE: Office of Federal Contract Compliance Programs, Directive (DIR) 2022-01; Subject: Pay Equity Audits, Effective March 15, 2022

Dear Director Yang:

The U.S. Chamber of Commerce strongly opposes the Department of Labor's Office of Federal Contract Compliance Programs' ("OFCCP") Directive 2022-01, effective March 15, 2022, on the subject of Pay Equity Audits ("Directive"). It will have intended, direct, and negative consequences on the ability of contractors and subcontractors to conduct privileged pay analyses for the benefit of its diversity and inclusion initiatives, as well as in obtaining legal advice to ensure equal pay of its employees under the Equal Pay Act and Title VII of the Civil Rights Act of 1964. The Chamber also strongly objects to OFCCP authorizing this major policy change as an edict instead of as a proposal open to comment. The Department must withdraw this Directive.

OFCCP's Directive is fatally flawed in the following ways:

- Contractors and subcontractors are not obligated to perform a "pay equity audit" under either the relevant statutes or the OFCCP's existing regulations; the term "pay equity audit" is a creation of OFCCP and goes beyond the level of analysis required by law.

- In addition to mandating a pay equity audit (without statutory or regulatory authority or support), the OFCCP also claims the authority to deny these audits and related documents the protection of privilege universally accorded to such confidential analyses when they are prepared in the context of an attorney-client relationship, and one primary purpose was also providing legal advice or in anticipation of litigation or other confidential work-product doctrines. By denying these audits the well-established protection of being privileged, the Directive will discourage contractors from conducting these analyses, thereby impeding the discovery of compensation disparities—exactly the opposite of what OFCCP should be encouraging.

- The Directive erroneously directs staff, contractors, and subcontractors that any failure to produce a privileged pay audit can lead to a negative inference that the contractor is in violation of equal compensation requirements.

- OFCCP's elimination of attorney-client privilege is contrary to the long-standing bipartisan support attorney-client privilege has enjoyed in Congress, along with broad support from interest groups.

- By directing contractors to produce pay equity audits—a type of audit not previously required—OFCCP is, contrary to language in the Directive, placing an entirely new obligation on contractors and subcontractors.

- OFCCP issued the Directive without public notice and comment pursuant to the Administrative Procedure Act ("APA"), or review and approval of the Office of Information and Regulatory Affairs ("OIRA") at Office of Management and Budget ("OMB"). OFCCP attempted to impose the same obligation in 2019 using a traditional notice and comment process. After substantial negative comment, the requirement to include pay or compensation audits in the required production to the OFCCP was withdrawn. Thus, what the OFCCP attempted and failed to accomplish through traditional rulemaking procedures, the Directive now attempts to impose by a unilateral, unreviewed decree.

The OFCCP is Incorrect: 41 CFR 60-2.17(b)(3) Does *Not* Require a Contractor to Perform a Pay Equity Audit.

In the Directive, the OFCCP instructs OFCCP compliance officers to collect and analyze federal contractors' pay equity audits during routine compliance evaluations.[1] The OFCCP's position is based on a section of its regulation labeled "Additional Required Elements of Affirmative Action Programs" — 41 CFR 60-2.17(b)(3). The OFCCP's position is that contractors and subcontractors are already required under this existing Regulation to conduct a "pay equity audit."

Federal Regulations 41 CFR 60-2.17(b)(3) states, in pertinent part:

> Section 60-2.17 Additional required elements of affirmative action programs.
>
> In addition to the elements required by Section 60-2.10 through Section 60-2.16, an acceptable affirmative action program must include the following:
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> ***

[1] See, Directive 2022-1, Sec. 7 Policy and Procedures, pp. 2-4, March 15, 2022.

> (b) Identification of problem areas. The contractor must perform in-depth analyses of its total employment process to determine whether and where impediments to equal employment opportunity exist. At a minimum the contractor must evaluate:
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> ***
>
> (3). Compensation systems(s) to determine whether there are gender, race, or ethnicity-based disparities;
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> ***

OFCCP is wrong that this regulation requires contractors to produce pay equity audits. OFCCP is conflating the analyses required in the regulations with pay equity audits—these are not the same thing. The term "pay equity" is not found in either E.O. 11246 or in any of the OFCCP's implementing regulations, Title VII of the Civil Rights Act of 1964, or the Equal Pay Act. In the Directive, a pay equity audit is described as an "in-depth analysis of compensation systems to determine whether there are gender-, race-, or ethnicity-based disparities, as provided in 41 CFR 60-2.17(b)(3)." However, the focus of the analyses required under the regulation is an evaluation of compensation systems to determine if *disparities* exist. Equity is commonly understood as a broader term than equal pay, accounting for whether certain identified demographic groups are advancing economically relative to the majority population, rather than just whether they are being paid the same amount for the same job, subject to limited variables. Furthermore, "equity" evokes the more amorphous concept of "comparable worth" where dissimilar jobs are compared with the intent of giving them the same value.

Thus, contractors do not have an obligation to conduct a pay equity audit under 41 CFR 60-2.17(b), contrary to OFCCP's instruction. In fact, nowhere does the regulation require a contractor to perform a pay equity audit or any other statistical analyses of the compensation of the contractor's workforce. Neither the words "pay equity audit" nor "equal pay audit" appear anywhere in the federal regulations for government contractors contained in 41 CFR Parts 60-1 and 60-2. Notwithstanding the absence of any statutory or regulatory authority, the Directive instructs OFCCP agents to obtain "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*.)."[2] The OFCCP does not state which of these tests it may require, which it may ignore, or which may be applied to any factual situation. Rather, the agency apparently chose to offer a menu of statistical tests at which it assumed a contractor might look.

[2] *Id.*

Historically, OFCCP has made clear that it was not mandating a specific method of compliance in terms of a contractor's evaluation of compensation systems to discern if disparities exist, and left contractors with significant discretion in determining how to comply with the regulation. For example, OFCCP made clear in 2006 in their voluntary guidelines for self-evaluation of compensation practices that "OFCCP agrees that the contractor need not have relied on quantitative or statistical techniques to comply with 41 CFR 60-2.17(b)(3), as OFCCP has repeatedly noted that the contractor has the discretion to comply by using any self-evaluation technique it deems appropriate."[3] Again in 2013, OFCCP stated "[C]ontractors may continue to choose a self-evaluation method appropriate to assess potential pay disparities among their workforce. OFCCP will not be mandating any specific methodology."[4] Similarly, in 2016's regulation defining discrimination on the basis of sex, OFCCP explained that: "Because the regulation does not specify any particular analysis method that contractors must follow to comply with this regulation, contractors have substantial discretion to decide how to evaluate their compensation systems."[5]

Section 60-2.17(b)(3) provides contractors with flexibility as to how to evaluate their compensation systems; it merely mandates that an evaluation takes place. Indeed, one way for a contractor to meet its evaluation obligation under Section 60-2.17(b)(3) is to provide the OFCCP with confirmation that it has conducted a privileged compensation evaluation. In connection with their obligations under Section 60-2.17(b)(3), as well as to obtain legal advice regarding their compensation practices to ensure compliance with federal, state, and local laws, and/or for other business reasons, contractors are free to, and many do, perform robust privileged compensation reviews[6] that include multivariable regression analyses assisted by outside legal counsel experts, as well as third-party statisticians and other compensation consultants. Other contractors choose to evaluate their compensation practices in other forms, such as: reviewing the impact of existing policies and practices by randomly selected employees or employee job codes; averaging salaries within a job code and comparing relevant employees; or conducting a cohort analysis of similarly situated employees. Moreover, it is common for the analyses that are performed to average or review results on an across-the-board basis instead of by an affirmative action job group that does not necessarily contain similarly situated employees in terms of job duties and responsibilities.

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[3] 71 Fed. Reg. 35119, Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination; June 16, 2006.

[4] 78 Fed. Reg. 13517, Interpreting Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance With Nondiscrimination Requirements of Executive Order 11246 With Respect to Systemic Compensation Discrimination; February 28, 2013.

[5] 81 Fed. Reg. 39125, Discrimination on the Basis of Sex; June 15, 2016.

[6] A contractor's pay analyses may be conducted under one or more of the following legal privilege doctrines: the self-critical analysis privilege; the attorney-client privilege; and/or the work product doctrine in anticipation of litigation. Here, the Chamber refers to the attorney-client privilege, though one or more of the other privileges or doctrines may also be applicable.

The OFCCP can and does obtain contractor data with respect to compensation as well as other facets of employment activity, including hiring, promotion, and termination. The OFCCP is then able to conduct any analysis it deems appropriate and present those analytic results to the contractor for its consideration. If the contractor chooses to challenge the OFCCP's conclusions during this process it can, of course, do so. This is the normal and very longstanding process of OFCCP audits.

The Directive would wipe out decades of compliance audit practice by mandating that the contractor perform a statistical audit of the compensation system, and letting the OFCCP, *sua sponte* determine if it is satisfied with the contractor's analysis and methodology. If it determines that it is not, then it claims the authority to demand the production of any other analysis the contractor undertook for its own reasons and prepared under the direction of counsel, regardless of any protection from privilege that might exist.

The Directive Erroneously Directs Staff and Contractors that a Contractor's Privileged Pay Audit Loses Privileged Status if One of its Purposes is to Evaluate its Compensation System Under 41 CFR 60-217(b)(3).

OFCCP's Directive also departs from its own past practice of respecting the privileged status of a contractor's attorney-client confidential compensation analysis, and incorrectly asserts it has the right to review and inspect a contractor's privileged analysis. This is contrary to established legal principles regarding a party's right to assert and maintain the applicability of the attorney-client and other privileges and doctrines applicable to an employer's privileged pay audit conducted, in part, to satisfy a regulatory requirement. The Directive's unprecedented refusal to accept the applicability of privilege to pay audits conducted, in part, to meet regulatory requirements, but also to ensure compliance with the law and/or to seek legal advice either generally or in the context of potential litigation, single handedly overturns these longstanding common law principles.

In *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981) the U. S. Supreme Court recognized that the attorney-client privilege, "the oldest of the privileges for confidential communications known to the common law," promotes "broader public interest in the observance of law and administration of justice" by "encourage[ing] full and frank communication between attorneys and their clients." 449 U.S. 383, 398. The Supreme Court cautioned that "narrow[ing]" that privilege's scope in the business context "threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law." *Id.* at 392.

In *In re Kellogg Brown & Root, Inc.*, 756 F.2d 754, at 758- 759 (D.C. Cir. 2014), the D.C. Court of Appeals was faced with a nearly identical issue as the one posed by the Directive. In the context of a defense contractor's assertion of privilege over an investigation of alleged wrongdoing, where the investigation was completed to both obtain legal advice as well as to meet the contractor's regulatory compliance obligation to conduct an investigation, the Court reviewed, and provided mandamus relief to the petitioner where the district court had refused

to apply the attorney-client privilege to the petitioner, defense contractor's, investigation. The Court of Appeals held that the fact that a defense contractor undertook privileged work in part to comply with the Department of Defense regulations that require a defense contractor to maintain compliance programs and conduct internal investigations into allegations of potential wrongdoing did not deny the defense contractor's privilege claim over the work completed, where obtaining or providing legal advice was also one of the significant purposes of the work.

According to the OFCCP Directive, any contractor or subcontractor that undertakes a privileged pay equity audit waives privilege over all communications and analyses regarding that subject matter if the employer confirms that it has undertaken a privileged audit, in part, to comply with the obligations of Section 60-2.17(b)(3). The Directive recognizes that federal contractors often retain counsel to assist with the preparation of a pay equity audit, and expressly states "contractors cannot withhold these documents by invoking attorney-client privilege or the attorney work-product doctrine."[7] The Directive relies on self-serving circular logic to justify this position: a communication is not privileged if it is intended to be disclosed to a third-party; federal contractors must provide their pay equity audits and compliance records to OFCCP; therefore, "This obligation defeats any expectation that the pay equity audit and compliance records prepared with the assistance of counsel would remain confidential."[8]

By the Directive's express terms and logic, companies would waive privilege by making a routine regulatory disclosure. That is not the law. The touchstone inquiry in any waiver of privilege case is whether there has been a "disclosure of a communication [made] in confidence between a lawyer and a client" and that relays "legal advice." *Sky Angel U.S., LLC v. Discovery Commc'ns, LLC,* 885 F. 3d 271, 276 (4th Cir. 2018). To hold otherwise would improperly infer that privileged information was disclosed "merely because [the company] sought legal advice on the same topics" on which it later spoke. *Id. See also, Contra Matter of Feldberg*, 862 F.2d 622, 629 (7th Cir. 1988) (noting that it is a "[r]are" case in which "attorney-client conversations do not lead to some public disclosure" and rejecting the notion that such disclosures create privilege waiver).

Courts have made clear that merely disclosing the existence of privileged work to a government entity, without disclosing the privileged communications within the work, does not waive privilege. In *In re Fluor Continental Inc.*, No. 20-1241(4th Cir. Mar. 25, 2020) a government contractor disclosed that it had conducted an internal investigation supervised by its legal team, into an alleged conflict of interest between an employee and a company to which Fluor planned to award a contract. Following the investigation, the Company sent a summary of its findings to the government pursuant to the Contractor Code of Business Ethics and Conduct (48 CFR Section 52.203-13) which requires a contractor to disclose to the government when it has credible evidence that an employee has violated certain federal laws, including The False Claims Act. In a later action by the employee claiming wrongful discharge, the employee asserted that Fluor had waived privilege by its limited mandatory government

[7] Directive Sec. 7(c), OFCCP's Authority to Review Contractors' Pay Equity Audits.
[8] *Id.*

disclosure relating to its privileged investigation. The Fourth Circuit disagreed, holding that the contractor's mandatory government disclosure did not waive privilege when the disclosure covered the same topic upon which the Company was seeking legal advice.

Similarly, in *Welch v. Eli Lilly & Co.*, 2009 U.S. Dist LEXIS 21417 at 33 - 42 (S.D. Ind. 2009) the court reviewed the company's practice of conducting certain pay analyses related to OFCCP compliance, at the direction and on the advice of counsel, noting that only those pay analyses that were provided to the OFCCP would be subject to production in the litigation, given the company's assertion of privilege with respect to the underlying analyses.

Courts have also made clear that a pay analysis having been conducted for both a privileged and business-related purpose does not waive privilege. In *Cahill v. Nike, Inc.*, 2020 U.S. Dist. LEXIS 188472 (D. Or. 2020) the District Court rejected Plaintiffs' attempt to obtain privileged pay audits conducted by Nike under both the attorney-client privilege and litigation work-product doctrine. Nike had disclosed that it had engaged counsel and other third-party experts to perform privileged pay analyses to assist Nike's internal legal team to remediate risk arising from or relating to pay or promotion discrepancies affecting protected-class workers. *See also*, *In Re Kellogg Brown & Root, Inc.*, 756 F.3d, at 757-762.

Plaintiffs claimed that if one of the purposes of the pay audit was a business purpose, the privilege was lost. The court found that the pay audit was conducted to counsel Nike on its pay practices and pay adjustment matters, and to help Nike remediate legal risk arising out of those practices. The court concluded that even where a company undertakes a pay audit for both a business purpose and to eliminate legal risk, the Company's dual purpose does not waive the attorney-client privilege, as the documents were prepared for a primarily legal purpose. *Cahill v. Nike,* 2020 U.S. Dist. LEXIS 188472 at 11 - 13. *See also*, *Portland Wire & Iron Works v. Barrier Corp*. 1980 U.S. Dist. LEXIS 17898, at 4 (D.Or. May 20, 1980). The court rejected Plaintiffs' argument that Nike had failed to maintain the confidentiality of the documents and communications by publicly discussing them. Id. at 12 - 13. *See also*, *Raul v. Coyle*, 744 F. Supp. 1181, 1185 (D.D.C. 1990) (privilege not waived merely because defendant disclosed counsel's conclusion).

As the Supreme Court noted, and multiple other courts have confirmed, the attorney-client privilege enables contractors to communicate with their attorneys in confidence, and it encourages contractors to seek out and obtain guidance in how to conform their pay practices to the law. Neither by Directive, nor regulation, may the OFCCP attempt to ignore the existence and effect of the common law attorney-client privilege.

The privilege facilitates self-investigation into compensation and related practices and policies to identify shortcomings and remedy disparities that are uncovered to the benefit of employees. By refusing to accept attorney-client privilege, the Directive will chill government contractors' conduct of compensation review practices, undermining counsel's ability to assess risk, offer guidance, and promptly identify and correct any disparities. *See Upjohn*, 449 U.S. at 392. Similarly, contractors will face a strong incentive to narrow the content of once robust

reviews. Yet, government contractors conducting robust compensation analyses are exactly the practices that OFCCP should be encouraging, not discouraging.

The Directive Erroneously Directs Staff and Contractors that the Failure to Produce a Privileged Pay Audit Can Lead to an Adverse Finding of Pay Inequity.

The Directive states that in cases where the desk audit reveals disparities in pay or concerns about a contractor's compensation practices, "[f]ailure to provide the required pay equity audit will be considered by the OFCCP as an admission of noncompliance with these regulatory requirements."[9] In effect, the Directive is a coerced waiver of privilege under threat of an adverse finding of pay disparities by the OFCCP.

The Directive attempts to support its statement by citing to language contained in 41 CFR 60-1.12(e) that states where a contractor destroys records or fails to preserve records, "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 or failure to preserve records is due to circumstances outside of the contractor's control. Section 60-1.12(e) does not support the Directive's negative inference of noncompliance based on a contractor's assertion of privilege. A contractor unable to produce records or an audit because they have been destroyed is not the same as a contractor asserting a well-established privilege to prevent disclosure of confidential information or analyses. OFCCP's assertion otherwise is non-sensical and cannot be allowed to stand.

Protecting Attorney-Client Privilege Has Had Broad Bipartisan Support in Congress and Among Interest Groups.

In December 2006, the Department of Justice sought to limit the ability of a company to assert attorney-client privilege and work product protections when that company is the subject of a criminal investigation. In reaction to the DOJ's moves, legislation was introduced in both the House and Senate, the Attorney Client Privilege Act of 2006, which was reintroduced in 2007 as S. 186 and H.R. 3013 (110th Congress). The lead sponsors of the bill in the 110th Congress were Senator Arlen Specter (R-PA), and Rep. Bobby Scott (D-VA). Among the 11 bipartisan Senate co-sponsors were Sen. Biden (D-DE), Sen. Lindsey Graham (R-SC), Sen. Thad Cochran (R-MS), and Sen. John Kerry (D-MA).

The Attorney Client Privilege Act would have prohibited any U.S. agent or attorney, in any federal investigation or criminal or civil enforcement matter, from demanding, requesting, or conditioning treatment on the disclosure by an organization (or affiliated person) of any communication protected by the attorney-client privilege or any attorney work product. Similarly, it would have prohibited a U.S. agent or attorney from conditioning a civil or criminal charging decision relating to an organization (or affiliated person) on any valid assertion of the attorney-client privilege or privilege for attorney work product, among other factors.

[9] *Id.*

The bill attracted support from the Coalition to Preserve the Attorney-Client Privilege which included such dissimilar groups as the U.S. Chamber of Commerce, the American Civil Liberties Union, and Lawyers for Civil Justice. Attached as Appendix A is a statement submitted to the record of a hearing held in the Senate Judiciary Committee in 2007 to examine the bill, expressing strong support for the Attorney Client Privilege Act. The bill passed the House on a voice vote under suspension but was unable to clear the Senate.

The Directive Contradicts Its Own Terms By Imposing a New Type of Audit.

The Directive states, "This Directive does not create new legal rights or requirements or change current legal rights or requirements for contractors."[10] Furthermore, the boilerplate headnote disclaimer for the Directive being merely guidance says it "does not change the laws and/or regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations."

These claims are based on OFCCP's erroneous view that the relevant regulations already require contractors to produce pay equity audits. However, as discussed above, that is not what the key regulations say. OFCCP's Directive claiming that contractors are obligated to provide any pay audit they complete to the OFCCP, would establish (if this policy is allowed to stand), for the first time, an obligation for covered contractors to conduct a detailed pay analysis, deemed a "pay equity audit" and provide such audit to the agency. Accordingly, the OFCCP Directive creates "new legal requirements for contractors," contrary to the boilerplate headnote at the beginning of the Directive, and the discussion under Sec. 8, Interpretation.

Conversely, the headnote also says "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 suggests a contractor could simply ignore OFCCP's requests for the audits it believes contractors are required to conduct. However, as discussed in more detail above, the Directive also says "Failure to provide the required pay equity audit will be considered by OFCCP as an admission of noncompliance with these regulatory requirements."[11] Thus, the contractor ignores OFCCP's imposed audit requirements at its peril, leaving it no good option;it either must acquiesce to OFCCP's new audit requirements that are without regulatory or statutory support, or suffer the negative inference OFCCP will take from the audit not being produced.

The Directive Should Have Been an APA Rulemaking with Notice and Comment.

As noted, OFCCP issued the Directive effective as of issuance, bypassing the traditional rulemaking process that includes notice and comment, as well as other protections against overly burdensome and poorly conceived regulations. Given the Directive's novel and legally suspect requirements, the fact that it did not undergo a review by OIRA, or that OFCCP did not

[10] Directive, Sec. 8, Interpretation.
[11] *Id.*

conduct any impact reviews as required by E.O. 12866 and the Regulatory Flexibility Act is especially troubling.

If OFCCP had conducted the analyses required during a traditional rulemaking (and done them credibly), they would have identified substantial cost burdens associated with the new type of audits the Directive mandates. The statistical level of analysis requires specialists and sophisticated modeling that employers do not typically maintain. Furthermore, the Directive's disregard for attorney-client or work-product privilege is a novel legal theory contrary to established common law principles as described above. Had the Directive been done as a rulemaking, it should have resulted in it being reviewed by OIRA under the terms of E.O. 12866 and well-established, applicable common law principles.[12]

In fact, the Directive's attempt to impose a pay equity audit obligation is not new. In 2019, OFCCP went through the required process of requesting OMB approval for its Scheduling Letter and Itemized Listing,[13] the document which establishes the requirement to accept an OFCCP audit and submit the data required to permit the OFCCP to examine the contractor's compliance with the affirmative action requirements overseen by OFCCP. The requested approval was published in the Federal Register.[14] The OFCCP proposed to amend the Scheduling Letter and the Itemized Listing of required data and documentation to compel contractors to produce "the results of the most recent analysis of compensation systems." The proposal generated substantial negative comment, including from the Chamber, which raised substantial issues regarding attorney-client privilege, unnecessary burden, and lack of authority to require the production of privileged analyses. Later that year, following the submission of stakeholder comments and OMB review, the OFCCP withdrew the proposed requirement.

Not only did OFCCP previously recognize that imposing new audit requirements on contractors requires traditional rulemaking, case law interpreting the APA is clear that the type of obligation being imposed by Directive 2022-01 is precisely the type of regulatory action requiring full notice, comment, and OMB review. In *Chamber of Commerce of the United States, et. al. v United States Department of Labor*, 174 F.3d 206 (D.C. Cir. 1999) then-Judge Ruth Bader Ginsburg discussed the different treatment to be accorded a mere procedural rule falling under the exception provided by section 553(b)(3)(A) of the APA as compared to the notice and comment requirement for substantive rules. The *Chamber of Commerce* case involved an analysis of a Directive issued by the Occupational Safety and Health Administration ("OSHA") regarding the criteria OSHA would follow to determine which employers would be subject to an inspection. After first discussing specific issues emanating from the Occupation Safety and Health Act, Judge Ginsburg analyzed the criteria applied to determine the type of rule the OSHA

[12] One definition of a "significant regulatory action" is that it "Raise[s] novel legal or policy issues arising out of legal mandates…" Executive Order 12866, Sec. 3(f)(4), 58 Fed. Reg., October 4, 1993. If deemed a significant regulatory action by the agency or the administrator of OIRA, the regulatory action must be reviewed by OIRA for various issues including the costs and benefits and an explanation of how the regulatory action is consistent with the statutory mandate. E.O. 12866, Sec. 6(a)(3)(B).

[13] *See* Combined Scheduling Letter and Itemized Listing, OMB No. 1250-0003.

[14] 84 Fed. Reg. 14974, April 12, 2019.

Directive fell under. OSHA argued that the Directive merely established a voluntary process whereby employers could opt to avoid an OSHA inspection by creating and implementing a Cooperative Compliance Program (CCP). However, Judge Ginsburg found that the Directive was not a mere suggestion to undertake a voluntary action. Rather, Judge Ginsburg found that failure to participate in the CCP program would result in an employer being subject to an OSHA inspection, not an inconsequential result. In addition, Judge Ginsburg rejected OSHA's claim that failure to participate was not backed by the threat of a legal sanction.

The OFCCP Directive establishes at least the same degree of legal compulsion. OFCCP states that failure to produce a pay equity audit would result in the OFCCP drawing an adverse inference of pay inequity or discrimination. Since OFCCP asserts the right to require back pay relief as well as the authority to debar a contractor for failure to comply with its requirements, the gloved fist behind this Directive is, like the OSHA CCP that was struck down, hardly a mere suggestion of voluntary action.

Conclusion

OFCCP's Directive 2022-01 imposes new and unauthorized audit requirements on federal contractors and denies contractors the use of well-established attorney-client and work-product privileges to protect privileged information. By doing so, the Directive will discourage the use of audits that are the best way for contractors to uncover compensation disparities. Additionally, the Directive further puts contractors in jeopardy by creating an inference of non-compliance if a contractor asserts privilege as the reason for not producing an audit. The Directive contradicts its own disclaimers related to guidance by creating new obligations. Finally, the Directive should have been developed through a traditional notice and comment rulemaking where OFCCP would have had to analyze its impact on contractors and go through review by OIRA. For any of these reasons, and all of these reasons, the Directive must be withdrawn.

Sincerely,

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