

Management Alert



ALJ Narrows OFCCP's Request for Google Employee and Pay Data

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Seyfarth Synopsis: Last Friday, an administrative law judge limited the amount of information that the OFCCP may seek from Google in its on-going compliance audit because the agency failed demonstrate relevance or justify the burden of its latest data requests. The disputed data requests sought contact information for more than 25,000 employees at Google's CA headquarters, as well as job and salary information dating back to 1998. For Federal contractors, the 43-page decision offers a window into the depth and breadth of OFCCP data requests, particularly with regard to pay.

On July 14th, an Administrative Law Judge ("ALJ") denied certain data requests by the Office of Federal Contract Compliance Program ("OFCCP") that sought massive amounts of pay-related data from Google in connection with a routine compliance audit. In his [decision and order](#), ALJ Steven Berlin took the agency to task over its demands for employee salary and job history dating back more than 20 years "without a minimal showing of relevance." He also narrowed the OFCCP's June 2016 request for contact information for all employees at Google's Mountain View, CA headquarters—approximately 25,000 people—citing both relevance and concerns about employee privacy.

The Disputed OFCCP Data Requests

Since the audit began in September 2015, the OFCCP issued extensive data requests seeking detailed information for employees at Google's headquarters. After Google responded to the agency's initial requests with extensive employee data, the agency asked for still more information in June 2016. Specifically, the OFCCP requested that Google provide:

- An employee report as of September 1, 2014 (one year earlier than the employee report that Google initially submitted) containing over 50 categories of data on each of the 19,539 people employed at that time such as market salaries for jobs, value of stock options, and educational history;
- A list of all starting salaries, salary changes, starting jobs and job changes for each person employed on either September 1, 2014 or September 1, 2015;
- The name, address, telephone number, and personal email of each person employed on either September 1, 2014 or September 1, 2015.

Google refused to comply with the requests on the grounds that they were overly broad and went beyond the scope of what was relevant in the audit. Google also claimed that the OFCCP's request for contact information presented unnecessary risks to the privacy interests of its employees. The OFCCP then initiated a lawsuit to compel Google to disclose the requested information.

Most of the OFCCP's Broad Pay Data Requests Not Supported

As made clear by both the OFCCP and the ALJ during the ensuing litigation, the agency's expansive requests were made in connection with its on-going compliance audit: There has been no finding that Google engaged in unlawful discrimination or failed to meet its affirmative action obligations. Rather, OFCCP representatives testified that additional information was needed to further investigate supposed "systemic compensation disparities against women" identified by its preliminary analyses of Google's data. Without the disputed information, the OFCCP claimed, it could not investigate if the alleged pay disparities were ongoing, how far back they went, or their potential causes. The OFCCP also argued that it needed salary and job histories going back to 1998 to investigate whether Google's practice of pegging compensation increases to market percentages caused pay disparities (that may have been created by how an employee's initial salary was set), to widen over time.¹

The ALJ found no support for either theory, explaining that "OFCCP's salary history, job history, and related requests exceed even the considerable deference owed OFCCP on a determination of relevance" and "create an unreasonable burden on Google and its employees." In so finding, the ALJ denied the OFCCP's requests for salary and job history back to 1998. The ALJ noted that Google did not even become a government contractor until 2007 and held that OFCCP remedial authority did not pre-date contractor status.

Google Is Required to Produce Limited Employee Contact Information

Despite the decision tipping in Google's favor in many respects, the ALJ still ordered that Google produce a limited subset of employee data under the original OFCCP data request for employee contact information. Google contested the OFCCP's request for contact information for all employees at Google's headquarters—approximately 25,000. The OFCCP testified that contact information for all employees was needed so that the agency could interview employees about compensation issues without Google knowing who was being interviewed, and, in turn, avoid any retaliation concerns. The ALJ agreed with the OFCCP's theory that asking for contact information for a large number of employees allowed interviewed employees to "hid[e] in plain sight." Yet, he found that a smaller list would accomplish the same purpose. To that end, the decision limits the request for contact information to 5,000 employees.²

What this Decision Means for Federal Contractors

For Federal contractors seeking guidance on just how much data they must share during an OFCCP compliance audit, the decision offers some guidance as to how to respond to the OFCCP's requests for excessive information and data. At the very least, this decision should hamper the OFCCP's interest in engaging in limitless fishing expeditions absent an articulated basis for onerous data requests.

At the same time, the case illustrates that Federal contractors still bear significant costs when subject to an OFCCP compliance audit, in part due to the agency's aggressive focus on alleged pay discrimination issues. During the litigation, Google submitted evidence that it spent more than 2,300 hours and approximately \$500,000 responding to the OFCCP's data requests to date. This is true even though the requests were made in connection with a routine compliance audit, and were not related to any findings of discriminatory pay practices or any complaint.

1 The OFCCP argued that it was entitled to investigate continuing violations as far back as the employee's date of hire because of the rolling amendment to the statute of limitations for ongoing compensation discrimination created by the Fair Pay Act, (The Lily Ledbetter Act) however, ALJ Berlin concluded that the Fair Pay Act does not apply to claims brought under E.O. 11246.

2 After considering the initial 5,000 employees, the OFCCP may request contact information on up to 3,000 additional employees.

The ALJ decision marks a victory for Google, but not an end to the OFCCP's investigation. We will continue to monitor this case and provide updates with any important developments.

In the meantime, if you have questions about best practices for OFCCP compliance and audit defense, please contact a member of Seyfarth's [Organizational Strategy & Analytics Team](#), [Annette Tyman](#) at atyman@seyfarth.com, [Lawrence Z. Lorber](#) at llorber@seyfarth.com, [Meredith C. Bailey](#) at mbailey@seyfarth.com, or [Michael L. Childers](#) at mchilders@seyfarth.com.

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