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**Selected Current Issues in Compensation  
Discrimination Law**

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## INTRODUCTION

The topic listed in the Committee’s program materials – “Discrimination in Compensation [EEO and EPA, Class and Individual Actions]” – is impossibly comprehensive for a presenter on a short panel shared with several other presenters. Therefore, noting the background of co-panelists, I have chosen to limit this paper, and will mostly limit my remarks, to two topics: (1) discoverability and privilege issues related to corporate submissions and records pursuant to the OFCCP’s final interpretive standards for systemic compensation discrimination under Executive Order 11246 (June 16, 2006); and (2) a brief discussion of several recent and/or pending appellate decisions that significantly affect or raise issues of compensation discrimination law in a class action context.

### **I. THE DISCOVERABILITY OF CORPORATE SUBMISSIONS AND RECORDS UNDER THE OFCCP’S FINAL PAY EQUITY GUIDANCE**

#### **A. Background on the Guidance**

The Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”) recently published guidelines that offer a federal contractor options regarding how to comply with federal regulations which require contractor self-evaluations of compensation practices. Contractors may take little solace from the OFCCP’s express recognition that “it is apparent that many employers perceive the possibility of disclosure of compensation self-evaluations in litigation as a compelling disincentive to conducting such analysis.”<sup>1</sup> The OFCCP recognizes that it has no authority to establish privileges applicable in litigation in federal or state court. Contractors face significant risks that a court will compel them to disclose self-evaluation documents to plaintiffs in private litigation despite their assertions of privilege. This paper analyzes whether the attorney-client privilege, work produce doctrine, and self-critical analysis privilege are applicable to protect a contractor’s documented efforts to comply with the new OFCCP standards and guidelines.

On June 16, 2006, the OFCCP published final interpretive standards for systemic compensation discrimination under Executive Order 11246<sup>2</sup> (the “Standards”)<sup>3</sup> and final voluntary guidelines for self-evaluation of compensation practices for compliance with Executive Order 11246 (the “Guidelines”).<sup>4</sup> Previously, no agency guidance existed regarding how a contractor should comply with 41 C.F.R. § 60-2.17(b)(3)(2000)(the “Regulation”), which requires that “at a minimum, a contractor must evaluate: . . . compensation systems(s) to determine whether there are gender, race, or ethnicity based disparities.” The Standards provide contractors information as to how the OFCCP will conduct its investigations of pay practices and determine whether a contractor is in compliance with the Regulation. The Guidelines are voluntary and intended to provide suggested techniques to comply with the Regulation.

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<sup>1</sup> 71 Fed. Reg. 35114-01 at 35119 (2006).

<sup>2</sup> 30 Fed. Reg. 12319 (1965).

<sup>3</sup> 71 Fed. Reg. 35124-01 (2006).

<sup>4</sup> 71 Fed. Reg. 35114-01 (2006).

The Guidelines offer contractors three options for compliance with the Regulation. First, the contractor can conduct a self-evaluation that “reasonably” implements the OFCCP’s prescribed methodology, which includes analyzing “similarly situated employee groupings”, using a multiple regression analysis, and factoring into the analysis legitimate criteria that determine pay in the contractor’s workplace.<sup>5</sup> Under this option, the contractor will be required to submit its analysis and supporting documentation to the OFCCP, including any remedial pay adjustments it made as a result of the self-evaluation.<sup>6</sup> The OFCCP provides an incentive to comply voluntarily with the Guidelines: if the contractor reasonably adopts the methods, the OFCCP will coordinate its compliance monitoring with the contractor’s self-evaluation approach and will deem the contractor in compliance with the Regulation.<sup>7</sup> Thus, the OFCCP will not conduct its own independent analysis.

Second, a contractor may monitor its compensation practices with any method it deems appropriate, statistical or non statistical, in order to comply with the Regulation. However, under this option the OFCCP may independently review the contractor’s compensation plan. The Standards recognize that “some contractors may take the position, based on advice of counsel, that their compensation self-evaluation is subject to certain protections from disclosure, such as the attorney-client privilege or attorney work product doctrine, and that these protections would be waived if the contractor disclosed the self-evaluation.”<sup>8</sup> If a contractor does not want to produce its methodology or results of its compensation self-evaluation analyses to OFCCP during a compliance review, for that or other reasons, the contractor must certify its compliance with the Regulation.<sup>9</sup> The Alternative Compliance Certification (“ACC”) must state that the contractor has performed, at the direction of counsel, a compensation self-evaluation and that counsel has advised the contractor that the compensation self-evaluation analyses and results are subject to the attorney-client privilege and/or the attorney work product doctrine. The certification must then be signed by a duly authorized officer of the contractor under penalty of perjury.<sup>10</sup>

Third, if a contractor chooses its own self-evaluation method, but does not want to certify its compliance by way of the ACC, it must turn over its documentation related to its monitoring to the OFCCP during a compliance review. Under this option, the OFCCP may perform its own independent evaluation the contractor’s compensation practices in addition to considering the contractor’s documented self-monitoring.

#### **B. In Private Litigation, Plaintiffs May Be Entitled To Discover Contractors’ Self-Evaluation Of Their Compensation Plans.**

In private compensation discrimination suits under Title VII, ADEA, ADA or the Equal Pay Act, federal contractors will likely face extensive discovery requests for documents related

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<sup>5</sup> Id. at 35120-21.

<sup>6</sup> Id. at 35121.

<sup>7</sup> Id. at 35121-22.

<sup>8</sup> Id. at 35122.

<sup>9</sup> Id.

<sup>10</sup> Id.

to their self-evaluations of their compensation plans. In the face of such discovery requests, contractors will likely endeavor to protect such analyses under the attorney-client privilege, the work-product doctrine and/or the self-critical analysis privilege. Contractors will face varying degrees of risk that private plaintiffs will succeed in obtaining such documents through discovery, depending on how the contractors choose to comply with the Regulation.

**1. A Contractor That Implements the OFCCP Guidelines and Produces The Required Self-Evaluation Analyses and Related Documents to the OFCCP Will Likely Have Waived Any Privileges That Would Protect the Documents From Discovery in Private Litigation.**

**a. The Risk of Disclosure.**

A contractor that chooses to comply voluntarily with the Guidelines and seeks the compliance coordination incentive (i.e., the first option) will be required to create, retain and make available to the OFCCP during a compliance review the following data and documentation (collectively referred to as “Voluntary Documentation”):

- (1) Documents necessary to explain and justify its decisions with respect to “similarly situated employee groupings,” the exclusion of certain employees from the regression, factors included in the statistical analyses, and the form of the statistical analyses;
- (2) The data used in the statistical analyses and the results of the statistical analyses for two years from the date that the statistical analyses are performed;
- (3) The data and documents explaining the results of the non-statistical methods that the contractor used to evaluate pay decisions regarding those employees who were eliminated from the statistical evaluation process; and
- (4) Documentation (for two years from the date that the follow-up investigation is performed) as to any follow-up investigation into statistically significant disparities, the conclusions of such investigation, and any pay adjustments made to remedy such disparities.<sup>11</sup>

Contractors may argue that Voluntary Documentation is protected by the attorney-client privilege and/or the work product doctrine. However, once a contractor voluntarily produces the Voluntary Documentation to the OFCCP, the contractor is at substantial risk of being held to have waived the attorney-client and work product privilege. An alternative grounds often advanced by defendants to protect their internal investigations, the so-called “self-critical analysis” privilege, has been only infrequently or sporadically recognized by the courts.

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<sup>11</sup> *Id.* The OFCCP may also review any personnel records and conduct any employee interviews it deems necessary to determine the accuracy of any representation the contractor has made in such documentation or data.

**b. The Attorney-Client Privilege and The Work Product Doctrine.**

To support a claim of attorney-client privilege, a contractor must show:

- (1) that the contractor is the client (or sought to become a client);
- (2) the person to whom the communication is directed is an attorney;
- (3) the communication relates to a fact of which the attorney was informed-
  - (a) by the client;
  - (b) without the presence of strangers;
  - (c) for the purpose of securing primarily either an opinion on law, legal services, or assistance in some legal proceeding, and not the for the purpose of committing a crime or tort; and
- (4) the privilege has been claimed and not waived by the client.

United States v. Noriega, 917 F.2d 1543, 1550 (11th Cir. 1990). Under the common law, a critical component of the privilege “is whether the communication between the client and the attorney is made in confidence of the relationship and under circumstances from which it may reasonably be assumed that the communication will remain in confidence.” United States v. Lopez, 777 F.2d 543, 552 (10th Cir. 1985). “Any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege, and therefore “[t]he attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party.” United States v. Ryans, 903 F.2d 731, 741 n. 13 (10th Cir. 1990). Courts have held that “the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant.” Id. (quotation and alteration omitted).

The judge-made work product doctrine was established by the Supreme Court decision in Hickman v. Taylor, 329 U.S. 495, 511 (1947). This doctrine, now codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, provides qualified protection to “documents and tangible things ... prepared in anticipation of litigation or for trial” by or for a party, or by or for a party's representative. For a party to obtain disclosure of work product, he must demonstrate “a substantial need of the materials in preparation of the party’s case and [an inability] without undue hardship to obtain the substantial equivalent of the materials by other means.” Fed. R. Civ. P. 26(b)(3). Documents containing the “mental impressions, conclusions, opinions, or other legal theories of an attorney or other representative of a party, concerning the litigation” are, however, absolutely protected. See Fed. R. Civ. P. 26(b)(3); Hickman, 329 U.S. at 510; see also Cox v. Adm’ U.S. Steel & Carnegie, 17 F.3d 1386, 1422 (11th Cir. ), modified on other grounds,

30 F.3d 1347 (11th Cir. 1994).<sup>12</sup> However, the protection provided by the work-product doctrine is not absolute, and it may be waived. See United States v. Nobles, 422 U.S. 225, 239 (1975). Courts have indicated that production of work-product material during discovery waives a work-product objection. Grace United Methodist Church v. City of Cheyenne, 427 F.3d 775, 801-02 (10th Cir. 2005); see also Foster v. Hill (In re Foster), 188 F.3d 1259, 1272 (10th Cir. 1999) (indicating that the work-product doctrine is affected when a disclosure is to an adversary).

**c. Application of Attorney-Client and Work Product Privileges to Contractors' OFCCP Compliance Documents.**

By voluntarily disclosing self-evaluation analysis of compensation systems to the OFCCP, a contractor arguably waives any attorney-client privilege or work product protection that would apply. It is unnecessary to share self-evaluation analyses with the OFCCP in order to comply with the Regulation; thus, the voluntary disclosure is not qualitatively different than a defendant's sharing privileged material with its adversary.

This disclosure might not be considered a waiver if the "selective waiver" theory, under which a client may disclose a privileged or protected communication to the Government while continuing to assert the privilege or protection against other parties, were available. However, the "selective waiver" theory has been rejected almost unanimously by the Circuit Courts of Appeals and has not been considered by the U.S. Supreme Court. In re Qwest Communications Int'l Inc. Sec. Litig., 450 F.3d 1179 (10th Cir. 2006). In Qwest, the Tenth Circuit considered as a matter of first impression whether Qwest waived the attorney-client privilege and work-product doctrine, as to third-party civil litigants, by releasing privileged materials to the United States Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) in the course of the agencies' investigation of Qwest. 450 F.3d at 1187. The SEC was investigating Qwest's business practices and the DOJ had also commenced a criminal investigation of Qwest. Id. at 1181. During these investigations, Qwest produced to the agencies over 220,000 pages of documents protected by the attorney-client privilege and the work-product doctrine. Despite written confidentiality agreements between Qwest and each agency, the Tenth Circuit held that Qwest's production of the documents to the agencies resulted in a waiver. The court found that the federal courts had not expanded the attorney-client privilege under Federal Rule of Evidence 501 or the non-opinion work-product doctrine under Federal Rule of Civil Procedure 26(b)(3) and Hickman by applying selective waiver. Id. at 1187-88.<sup>13</sup>

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<sup>12</sup> Work product can be opinion work product, which some courts have held to be absolutely privileged, or non-opinion work product, i.e., fact work product, which may be discoverable under appropriate circumstances. See Frontier Refining, Inc. v. Gorman-Rupp Co., Inc., 136 F.3d 695, 704 n. 12 (10th Cir. 1998); see also Hickman, 329 U.S. at 511-12 (noting that, upon presentation of adequate reasons, non-privileged, relevant facts included in an attorney's files may be subject to discovery).

<sup>13</sup> After extensively reviewing the case law, the court found that only one circuit had applied the selective waiver doctrine to attorney-client material. See Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 607 (8th Cir. 1977) (en banc). All other circuits addressing the matter refused to apply the doctrine. See Permian Corp. v. United States, 665 F.2d 1214, 1216-17 (D.C. Cir. 1981); In re Subpoenas Duces Tecum, 738 F.2d 1367, 1370 (D.C. Cir. 1984); United States v. Mass. Inst. of Tech., 129 F.3d 681, 686 (1st Cir. 1997); Westinghouse Elec. Corp. v. Republic of the Phil., 951 F.2d 1414, 1422 (3d Cir. 1991); In re Chrysler Motors Corp., 860 F.2d 844, 845 (8th Cir. 1988); In re Martin Marietta Corp., 856 F.2d 619, 623-24 (4th Cir. 1988); In re John Doe Corp., 675 F.2d 482, 489 (2d Cir.

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The court rejected the policy arguments for expanding the privileges to permit selective waiver under the circumstances at issue. *Id.* at 1197. Similarly, it is unlikely that a court would permit “selective waiver” in order to protect from disclosure a contractor’s self-evaluation of its compensation practices.

**d. The “Self-Critical Analysis Privilege” and Its Application.**

Because a contractor that produces Voluntary Documentation to the OFCCP is at high risk of having waived the attorney client privilege and the work product doctrine protection, it may seek to claim protection under the “self-critical analysis” privilege. However, “while the self-critical analysis privilege has been applied by some courts, it has been rejected by many others, and it is neither widely recognized nor firmly established in federal common law.” *Abdallah v. Coca-Cola Co.*, No. Civ. A1:98CV13679, 2000 WL 33249254, at \*5 (N.D. Ga. Jan. 25, 2000). Generally, the argument in favor of a privilege for self-critical analysis, “is based upon the concern that disclosure of documents reflecting candid self-examination will deter or suppress socially useful investigations and evaluations or compliance with the law or with professional standards.” *Hardy v. New York News, Inc.*, 114 F.R.D. 633, 640 (S.D.N.Y. 1987).

The majority of federal courts that have addressed the self-critical analysis privilege have rejected it, and none has explicitly recognized the self-critical analysis privilege. *See Johnson v. UPS, Inc.*, 206 F.R.D. 686, 689-90 (M.D. Fla. 2002).<sup>14</sup> Moreover, in the context of employment discrimination, the majority of case law rejects the purported privilege, under the theory that the plaintiffs’ need for relevant evidence of discrimination contained in such reports outweighs the risk that disclosure will impede employers’ self-evaluations. *Id.* at 690.<sup>15</sup>

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1982); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002). The court also reviewed the case law regarding selective waiver and the work product doctrine and found that “in the context of non-opinion work product, no circuit has adopted selective waiver and five circuits have rejected the doctrine.” The Fourth Circuit applied selective waiver to protect opinion work product, but declined to protect non-opinion work product. *See In re Martin Marietta Corp.*, 856 F.2d at 625. The First Circuit rejected selective waiver for non-opinion work product in *Mass. Inst. of Tech.*, 129 F.3d at 686; *see also Westinghouse Elec. Corp.*, 951 F.2d at 1429; *In re Columbia/HCA Healthcare Corp.*, 293 F.3d at 306. A few circuits have rejected selective waiver of work-product protection in the particular cases before them, while leaving open the possibility to apply the privilege in other circumstances. *See In Re Sealed Case*, 676 F.2d 793, 824 (D.C. Cir. 1982); *In re Subpoenas Duces Tecum*, 738 F.2d at 1371-72; *In re Steinhardt Partners, L.P.*, 9 F.3d at 230.

<sup>14</sup> *See, e.g., Granberry v. Jet Blue Airways*, 228 F.R.D. 647, 650 (N.D. Cal. 2005) (self-critical analysis privilege does not exist in Title VII cases, particularly within the Ninth Circuit, which has not recognized the privilege in any case); *Roberts v. Hunt*, 187 F.R.D. 71, 76, 80 FEP 607, 609 (W.D.N.Y. 1999) (self-critical analysis privilege is not available under federal law); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434, 1437-40 (D. Kan. 1995) (ordering production of defendant’s affirmative action plan and documents related to the development of and compliance with plan and declining to recognize self-critical analysis privilege “where Congress itself has not seen fit to create [a privilege] after almost 30 years of implementation of the Civil Rights Act of 1964”), *aff’d*, 112 F.3d 1398 (10th Cir. 1997).

<sup>15</sup> *See, e.g., Adams v. Pinole Point Steel Co.*, 65 F.E.P. 782, 783-84 (N.D. Cal. 1994) (the self-critical analysis privilege does not protect an affirmative action plan prepared in compliance with OFCCP mandates because it is unlikely that an employer has an expectation of confidentiality in such reports; such reports can contain crucial evidence in otherwise hard-to-prove discrimination cases, it serves a public benefit to allow plaintiffs access to the tools they need to prevail in discrimination actions); *Martin v. Potomac Elec. Power Co.*, 58 F.E.P. 355, 358-61 (D.D.C. 1990) (rejecting the self-critical analysis privilege as a basis for avoiding production of the employer’s affirmative action plan and other EEO

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Some courts have acknowledged the self-critical analysis privilege in limited circumstances. These courts have found portions of defendants' affirmative action plans to be privileged, under the theory that voluntary efforts to eliminate discrimination would be hindered if the employer is penalized for acknowledging that discrimination exists.<sup>16</sup> Others have closely examined the documents sought in discovery to determine whether they in fact contain a "self-critical analysis."<sup>17</sup> Some courts have compelled production of affirmative action plans under protective orders.<sup>18</sup>

While it is unlikely that the self-critical analysis privilege could be successfully relied on by contractors to protect compensation analyses, even if the privilege were available, it would likely be held limited to information or reports that are mandated by the government and not to those pertaining to voluntary self-evaluation of its compensation plans.<sup>19</sup>

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reports and records). Other courts have held that affirmative action plans are not confidential and privileged, and all material contained in the plan, including self-critical analysis, must be disclosed because the plaintiff's interest in obtaining redress overrides the defendant's interest in protecting candid self-evaluation information. Witten v. A.H. Smith & Co., 100 F.R.D. 446, (D. Md. 1984); E.E.O.C. v. ISC Fin. Corp., No. 76-CV-829-W-4, 1977 WL 865 (W.D. Mo. Jun. 28, 1977); Jacobs v. Sea-Land Serv., Inc., C-76-2772, 1980 WL 141 (N.D. Cal. Feb. 22, 1980).

<sup>16</sup> See, e.g., Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 387-88 (N.D. Ga. 2001) (precluding from discovery employer's internal diversity reports on basis of self-critical analysis privilege); Sheppard v. Consol. Edison Co. of N.Y., 893 F. Supp. 6, 7-8 (E.D.N.Y. 1995) (granting protective order to protect affirmative action plan because "disclosure would chill future voluntary self-critical analysis of companies who in good faith seek to improve their employment practices"); John v. Trane Co., 831 F. Supp. 855, 856 (S.D. Fla. 1993) (ordering defendant to produce its affirmative action plan, except portions that contain subjective evaluations); Jamison v. Storer Broad. Co., 511 F. Supp. 1286, 1297 (E.D. Mich. 1981) (holding it was error to introduce into evidence evaluations the employer made of its affirmative action stance; new trial granted); Stevenson v. General Elec. Co., 18 F.E.P. 746, 747 (S.D. Ohio 1978) (the affirmative action plan need not be released where it would interfere with public policy mandating frank self-criticism and evaluation); Sanday v. Carnegie-Mellon Univ., 12 F.E.P. 101, 103 (W.D. Pa. 1975) (denying plaintiffs' motion to compel defendant to produce its affirmative action plans).

<sup>17</sup> See Martin, 58 F.E.P. at 360-61 (an employer cannot claim the self-critical analysis privilege to shield documents analyzing or discussing its compliance with EEO laws); Mister v. Illinois Cent. Gulf R.R., 42 F.E.P. 1710, 1714-15 (S.D. Ill. 1985) (subjective self-evaluation statements in affirmative action plans and EEO-1 forms are protected by self-critical analysis privilege); Penk v. Oregon State Bd. of Higher Educ., 99 F.R.D. 506 (D. Or. 1982) (self-critical analyses are privileged; objective data is discoverable).

<sup>18</sup> See, e.g., Riggs v. United Parcel Serv., 24 F.E.P. 93, 94 (E.D. Mo. 1980) (rejecting defendant's contention as to the confidentiality of its affirmative action plans, but entering a protective order); ISC Fin. Corp., 16 F.E.P. at 178-79 (compelling production of the affirmative action plans and programs, but confidentiality protected against persons not parties to the action); Ligon v. Frito-Lay, Inc., 19 F.E.P. 722, 723 (N.D. Tex. 1978) (plaintiff entitled to discovery of the employer's affirmative action plan, but the court will examine it in camera to eliminate privileged matters, and remaining material will be released under protective order). Zahorik v. Cornell Univ., 98 F.R.D. 27 (N.D. N.Y. 1983); Ford v. Univ. of Notre Dame, Nos. 878-0036, 878-0106, 1980 WL 224 (N.D. Ind. Aug. 8, 1980).

<sup>19</sup> See Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431 (E.D. Pa. 1978) (holding that if the self critical analysis privilege were available, the privilege would be limited to information or reports that are mandated by the government and not to those pertaining to voluntary affirmative action.)



**2. A Contractor That Conducts Self-Evaluation of Its Compensation Plan Using Its Own Statistical and Non-Statistical Methods Will Need to Take Extra Precautions To Attempt to Protect Self-Evaluation and Related Documents From Disclosure in Private Litigation.**

As described above, if a contractor chooses to conduct its own method of self-evaluation to comply with the Regulation, it has the option of (1) certifying under penalty of perjury that it has performed a compensation self-evaluation subject to the attorney-client privilege and/or the attorney work product doctrine (the second option) or; (2) turning over that self-evaluation if required during a compliance review (the third option). If the contractor chooses the second option, the self-evaluation does not then need to be disclosed to the OFCCP during a compliance review. However, the fact that the contractor has certified its compliance may be discoverable, and a plaintiff seeking to discover the certification would argue that any attorney-client privilege or work product protection would be waived upon voluntary submission of the certification to the OFCCP. If a contractor selects the third option, the contractor's self-evaluation is disclosed to the OFCCP only if the OFCCP performs a compliance review. Unfortunately, some contractors may tend to treat the reporting as a legalistic requirement to be carried out with the goal of avoiding further scrutiny during a compliance review. Regardless of whether a contractor chooses the second or third option, if the self-evaluation and related documents are not disclosed to the OFCCP or other third parties, whether they are indeed protected by the attorney-client privilege or the work product doctrine requires the same analysis. Protection from discovery in private litigation will depend on the documents' content, the purposes for which they were created, and the contractor's treatment of the documents.

**a. Attorney-Client Privilege.**

The attorney-client privilege protects communications made for the purpose of seeking or giving legal advice. Upjohn Co. v. U.S., 449 U.S. 383 (1981). Thus, the only documents relating to the employer's compensation process that would be protected by the attorney-client privilege are those documents that are sent directly to in-house or outside counsel for the purpose of seeking legal advice about those documents, and counsel's response providing advice or seeking additional information in order to provide advice.<sup>20</sup> A contractor's self-evaluation may not be protected under the attorney-client privilege if it was conducted for purposes of complying with the Regulation, rather than for purposes of seeking legal advice. See Noriega, 817 F.2d at 1550; In re Qwest Communications, 450 F.3d 1179. Similarly, the attorney-client privilege will not apply simply because the work "was initiated with the advice of counsel, and . . . counsel was kept advised of the activities as they progressed." Resnick v. American Dental Assn., 95 F.R.D. 372, 374 (N.D. Cal. Ill. 1982). Where the analyses are management-oriented or compiled for

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<sup>20</sup> Merely circulating a document to an attorney or having an attorney attend a meeting or conference will not trigger the privilege; the attorney's advice must be sought. Renner v. Chase Manhattan Bank, No. 98 CIV, 926, 2001 WL 1356192 (S.D.N.Y. Nov. 2, 2001) (a showing that the document at issue reveals communications made between a client and attorney "in confidence and for the purpose of obtaining legal advice. . . is essential to assertion of the attorney-client privilege").

overall business purposes, the advice and assistance of counsel will not shield them from disclosure. Id.<sup>21</sup>

Furthermore, the contractor must show that the documents and their content were treated confidentially. To determine if a particular communication is confidential and protected by the attorney-client privilege, a contractor must prove the communication was “(1) intended to remain confidential *and* (2) under the circumstances was *reasonably* expected and understood to be confidential.” Bogle v. McClure, 332 F.3d 1347, 1358 (11th Cir. 2003)(emphasis in original). The corporation must be able to show that the documents were not intermingled with other unprivileged, non-confidential corporate documents, but instead were segregated or otherwise clearly identified as privileged, confidential materials. In Re Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863 (D. Minn. 1979), later proceeding, 629 F.2d 548 (8th Cir. 1980).<sup>22</sup> Thus, a corporation that wishes to preserve confidentiality must restrict disclosure of compensation analysis documents to those who participate in the attorney-client communications. Failure to do so, or providing self-critical analyses, such as standard deviation analyses of compensation systems, to other managers, will jeopardize any possibility that the documents are protected by the attorney-client privilege.

Finally, and most importantly, the attorney-client privilege does not protect the disclosure of the underlying facts by those who communicated with the attorney. See Upjohn, 449 U.S. at 395-96 (1981). Courts have noted that a party cannot conceal a fact merely by revealing it to his lawyer. See id. at 396 (collecting cases).

If the contractor chooses not to certify its compliance with the Regulation under the attorney-client privilege, it risks having to produce its self-evaluation and related documents to the OFCCP during a compliance review. Plaintiffs may then argue that such disclosure to the OFCCP waives any attorney-client privilege, in that disclosure was voluntary because the contractor chose not to take advantage of the ACC option.

#### **b. Work product doctrine.**

The work product doctrine will not apply to compensation analyses if the evaluation is performed for the purpose of complying with the Regulation and not in anticipation of litigation. Only documents prepared “in anticipation of litigation or for trial” by a contractor or the contractor’s attorney are protected from disclosure. Fed. R. Civ. Proc. 26(b)(3).

The decision whether documents were prepared in anticipation of litigation varies depending on the nature of the claim and the type of information sought and, therefore, turns on the facts of each case. Moore v. Tri-City Hosp. Auth., 118 F.R.D. 646, 649 (N.D.Ga.1988); Osterneck v. E.T. Barwick Indus., 82 F.R.D. 81, 87 (N .D. Ga. 1979). Generally, a document will

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<sup>21</sup> See also Hardy, 114 F.R.D. 633 (corporation claimed affirmative action plan were treated as confidential but court held they were internal memoranda prepared and circulated as part of the corporation’s ongoing business effort to develop a professional EEO function and an affirmative action plan and not privileged).

<sup>22</sup> See also Hardy, 114 F.R.D. 633 (holding that corporation’s affirmative action plans and related matters were not privileged because they were intermingled with all other personnel documents and were not marked “confidential” or “privileged,” and were therefore not confidential).

be deemed to have been prepared “in anticipation of litigation” when “the document can fairly be said to have been prepared or obtained because of the prospect of litigation ... and not in the regular course of business.” Carver v. Allstate Ins. Co., 94 F.R.D. 131, 134 (S.D.Ga.1982) (parentheses omitted). Courts differ on whether the litigation need be certain or immediate in order for the work product doctrine to apply. Some courts have held that “litigation need not necessarily be imminent as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation.” United States v. Davis, 636 F.2d 1028, 1040 (5th Cir. 1981).<sup>23</sup> If a court were to apply the “primary purpose” standard, a contractor’s assertion of the privilege would fail if the contractor’s purpose in creating the documents was to seek legal advice, assess legal risk and to determine whether it is meeting its equal employment policy and accurately applying its own compensation policies. See Freiermuth v. PPG Indus., 218 F.R.D. 694, 700 (N.D.Ala. 2003). A normal compensation process and equal employment/affirmative action analysis that occurs regardless of any litigation, would not be protected under the work product doctrine.

Contractors may, however, argue that a document may be considered to have been prepared in anticipation of litigation even if the litigation that caused its preparation was an investigation by a government agency. See 6 Moore’s Federal Practice § 26.7 (3d ed.1999) at 26-218. Litigation may generally be expected from agency investigations.<sup>24</sup> An investigation by an agency represents more than a remote possibility of future litigation, and provides reasonable grounds for anticipating litigation. Martin v. Bally’s Park, 983 F.2d 1252, 1261 (3d Cir. 1993).<sup>25</sup> Documents produced to the OFCCP have been held to be prepared in anticipation of litigation and protected as work product. West v. Marion Labs, 1991 WL 517230 (W.D. Mo. 1991). Like the attorney-client privilege, the work product doctrine does not protect against disclosure of the factual data underlying a document that otherwise is protected. Thus, a document analyzing litigation risks based on statistical data may be protected from disclosure, but a private plaintiff taking discovery could obtain the statistical data from other sources. Putting the statistics in an otherwise protected document does not make the statistics confidential.

If a contractor has not opted to certify its compliance with the Regulation, it may be required to turn over its self-evaluation analyses during a compliance review by the OFCCP. Once documents are so disclosed, the issue of discoverability of these documents will turn on whether the contractor waived any work product protection by voluntarily producing the

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<sup>23</sup> See also Kent Corp. v. NLRB, 530 F.2d 612, 623 (5th Cir.1976); Hodges, Grant & Kaufmann v. IRS, 768 F.2d 719, 722 (5th Cir. 1985); Osterneck, 82 F.R.D. at 87 (“The test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”); Briggs & Stratton Corp. v. Concrete Sales & Servs., 174 F.R.D. 506, 508 (S.D. Ga. 1997). See generally FTC v. Grolier Inc., 462 U.S. 19, 23-27 (1983). However, other courts have held that “the probability must be substantial and the commencement of litigation must be imminent.” Moore v. Tri-City Hosp. Authority, 118 F.R.D. 646, 649 (N.D. Ga. 1988); Arkwright Mutual Ins. Co. v. National Union Fire Ins. Co., 771 F. Supp. 149, 151 (S.D. W.Va. 1991); Stauffer Chem. Co. v. Monsanto Co., 623 F. Supp. 148, 152 (E.D. Mo. 1985); Bloodstock Servs. Ireland, Ltd. v. United States, 87 F.R.D. 732, 735 (E.D. Ky. 1980).

<sup>24</sup> See In re LTV, 89 F.R.D. 595 (N.D. Tex. 1981); Martin v. Montford, 150 F.R.D. 172, 173 (D. Col. 1993); Int’l Sys. v. Int’l Sys., 693 F.2d 1235, 1238 (5th Cir. 1982)

<sup>25</sup> See also Pacamor Bearings v. Minebea Co., 918 F. Supp. 491, 513 (D.N.H. 1996); Garrett v. Metropolitan Life Ins. Co., No. 95 Civ. 2406, 1996 WL 325725 (S.D.N.Y. June 12, 1996).

documents to the OFCCP. In this situation, as noted above, plaintiffs may argue that disclosure was voluntary because the contractor chose not to take advantage of the ACC option.

**c. The Self-Critical Analysis Privilege.**

As discussed above, the self-critical analysis privilege has been neither widely recognized nor firmly established in federal common law and would unlikely provide any protection to a contractor that seeks to comply with the Regulation by conducting its own analysis using the self-evaluation method.

**C. The Freedom of Information Act Provides Another Way To Seek A Contractor's Self-Evaluation Of Its Compensation Practices.**

Plaintiffs or others may alternatively attempt to obtain a contractor's compensation analysis from the OFCCP through the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* The FOIA mandates that the federal government release to the public certain categories of agency records, which includes OFCCP agency records.<sup>26</sup> Accordingly, documents submitted to the OFCCP by government contractors are "agency records" within the meaning of the statute. As such, they are subject to potential disclosure.<sup>27</sup> It exempts other categories from *mandatory* disclosure, but gives the agency in possession the *discretion* to release them, unless disclosure is otherwise prohibited by law.<sup>28</sup> This process is often difficult and time consuming; thus plaintiffs in litigation usually prefer seeking discovery directly from the contractor.<sup>29</sup> However, potential plaintiffs and their counsel, interest or advocacy groups, or others not in current litigation with the contractor frequently resort to FOIA as a means of obtaining information about government contractors.

The OFCCP addresses contractors' confidentiality concerns by stating that it will treat compensation and other personnel information provided to OFCCP as confidential to the maximum extent the information is exempt from public disclosure under the FOIA. 71 Fed. Reg. 35114, 35122 (2006). The OFCCP has issued regulations regarding disclosure of records in response to FOIA requests.<sup>30</sup> Generally, the agency has taken a pro-disclosure stance.<sup>31</sup> Unless

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<sup>26</sup> See 5 U.S.C. § 552(a) (e.g., final opinions, statements of policy, staff manuals, rules). Data files maintained by a government grantee are not "agency records" and therefore not within the scope of FOIA, even though the government has a right of access to the data. *Forsham v. Harris*, 445 U.S. 169 (1980). Therefore, compensation analysis that has never been submitted to OFCCP probably cannot be disclosed under FOIA. See *B. Lindemann & P. Grossman, Employment Discrimination Law* 1186 n. 459 (3d ed. 1996).

<sup>27</sup> See, e.g., *Chrysler Corp. v. Brown*, 441 U.S. 281, 292 (1979) ("By its terms, [the FOIA] demarcates the agency's obligation to disclose; it does not foreclose disclosure.").

<sup>28</sup> 5 U.S.C. § 552(b) describes the categories of information that an agency need not disclose under the FOIA, including: "(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential"; and "(7) records or information compiled for law enforcement purposes," to the limited extent specified in the regulation.

<sup>29</sup> The FOIA is also less attractive to Title VII plaintiffs because there is no requirement that the plans be filed with OFCCP, although the contractor must produce them on request from OFCCP, such as during a compliance review. 41 C.F.R. § 60-1.7(a)(3).

<sup>30</sup> 41 C.F.R. at 60-40 (2004).

<sup>31</sup> See *B. Lindemann & P. Grossman, EMPLOYMENT DISCRIMINATION LAW* 1187 (3d ed. 1996).

disclosure is prohibited by law, the OFCCP will release all records submitted pursuant to its programs, provided that the release will further the public interest<sup>32</sup> and will not impede the agency's functioning.<sup>33</sup> The regulations provide for the release of: affirmative action plans, "imposed" and "hometown" plans applicable to construction contractors,<sup>34</sup> final conciliation agreements, validation studies of pre-employment selection methods, dates and times of scheduled compliance evaluations,<sup>35</sup> and EEO-1 reports.<sup>36</sup>

The regulations also delineate the types of documents or parts thereof that should not be released, because disclosure either does not further the public interest or may impede the discharge of any OFCCP functions. Such documents include:

Compliance investigation files including the standard compliance review report and related documents, during the course of the review to which they pertain or while enforcement action against the contractor is in progress or contemplated within a reasonable time. Therefore, these reports and related files shall not be disclosed only to the extent that information contained therein constitutes trade secrets and confidential commercial or financial information. . . .<sup>37</sup>

The regulations allow the OFCCP to withhold other records, consistent with the FOIA, on a case-by-case basis.<sup>38</sup>

Employers may respond to a FOIA request for compensation analysis with a "reverse FOIA" suit to block release, claiming that the agency abused its discretion by failing to categorize the plan under one of FOIA's nine exemptions. See Chrysler Corp. v. Brown, 441 U.S. 281, 317-18 (1979); 5 U.S.C. § 552 (1976). Post-Chrysler courts typically have upheld the OFCCP's disclosure of affirmative action plans, EEO-1 reports, and other records compiled under Executive Order 11246.<sup>39</sup> However, portions of such records containing "confidential" information<sup>40</sup> have been withheld where disclosure would be prohibited by law.<sup>41</sup>

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<sup>32</sup> The Supreme Court has held that the only "public interest in disclosure" relevant to the FOIA is "the extent to which disclosure would . . . contribut[e] significantly to public understanding of the operations or activities of the government." U.S. Dep't of Defense v. FLRA, 510 U.S. 487, 495 (1994) (citation omitted).

<sup>33</sup> 41 C.F.R. § 60-40.2 (2004).

<sup>34</sup> See id. § 60-40.5.

<sup>35</sup> Id. § 60-40.2(b)(1)-(5).

<sup>36</sup> Id. § 60-40.4.

<sup>37</sup> Id. § 60-40.3(a)(5); see also § 60-40.3(a)(1-4).

<sup>38</sup> Id. § 60-40.3(b).

<sup>39</sup> See, e.g., CNA Fin. Corp. v. Donovan, 830 F.2d 1132, 1159 (D.C. Cir. 1987) (it was appropriate for the OFCCP to release documents submitted and created in accordance with the Executive Order); United Tech. Corp. v. Marshall, 464 F. Supp. 845, 855, 24 FEP 929 (D. Conn. 1979) (upholding the release of EEO-1 reports). See also Crown Cent. Petroleum Corp. v. Kleppe, 424 F. Supp. at 744, 753 (D. Md. 1976)(affirming the OFCCP's decision to disclose EEO-1 reports where doing so would not violate the Trade Secrets Act).

<sup>40</sup> "Confidential" is defined in 29 C.F.R. § 70.26(b) and Exec. Order No. 12600 § 2(a) as information, the disclosure of which "could reasonably be expected to cause substantial competitive harm." Information that previously has been disclosed to the public cannot qualify as confidential.

With these FOIA regulations and OFCCP policies regarding disclosure in mind, third parties may be able to obtain contractors' submissions to the OFCCP through a FOIA request.<sup>42</sup> Contractors face significant risk that self-evaluations and supporting documents created and submitted in response to the OFCCP's final pay equity guidance may be disclosed to third parties through FOIA requests and used in private litigation.

## **II. RECENT APPELLATE DECISIONS ON COMPENSATION DISCRIMINATION ISSUES**

### **A. Ledbetter v. Goodyear Tire & Rubber Co., 421 F.3d 1169 (11th Cir. 2005), cert. granted 548 U.S. \_\_\_ (June 26, 2006), argued November 27, 2006.**

At the time of submission of this Paper, this case was pending decision in the United States Supreme Court, three months after oral argument. The question presented in the Supreme Court is:

“Whether and under the circumstances a plaintiff may bring an action under Title VII of the Civil Rights Act of 1964 alleging illegal pay discrimination when the disparate pay is received during the statutory limitations period, but is the result of intentionally discriminatory pay decisions that occurred outside the limitations period.”

If the Supreme Court has rendered its decision by the time of the Conference, the author will attempt to supplement this Paper with comments on that decision.

Ledbetter, a woman, worked as a lower-level management employee for Goodyear for over 16 years prior to the events that precipitated her lawsuit. While Ledbetter contended that she was paid significantly less than males in similar positions at the time of her hiring and for many years thereafter, compensation decisions denying her any salary increase in the course of annual pay reviews in 1996, 1997, and 1998 were the focus of her lawsuit. In late 1998, Ledbetter was informed that she was likely to be laid off, and instead took early retirement. She filed suit alleging compensation discrimination on the basis of her sex in violation of Title VII. In her action, Ledbetter challenged, and was allowed to present evidence of, compensation decisions over the entire period of her employment. A jury trial on this evidence resulted in a plaintiff's verdict of backpay, compensatory and punitive damages; the district court reduced the damages award to the \$300,000 statutory cap amount. Goodyear's appeal argued that pay

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<sup>41</sup> See, e.g., NOW, Washington, D.C. Chapter v. Soc. Sec. Admin., 736 F.2d 727, 732 (D.C. Cir. 1984) (per curiam) (enjoining the disclosure of workforce analyses, department lists, and projected promotions data contained in affirmative action plans and compliance-review reports; but allowing the disclosure of EEO-1 reports, and the remaining portions of affirmative action plans and compliance-review reports).

<sup>42</sup> OFCCP files may be made available to the Equal Employment Opportunity Commission (EEOC). Thus, third parties may also be able to obtain a contractor's self-evaluation and supporting documents regarding its compensation plan through a FOIA request to the EEOC.

decisions made more than 180 days prior to the filing of Ledbetter's EEOC charge were not actionable under Title VII and evidence of those decisions should have been excluded.<sup>43</sup>

The Eleventh Circuit reversed the judgment for plaintiff, ruling that the district court should have granted Goodyear's post-trial motion for judgment as a matter of law. The Eleventh Circuit announced a curious rule: "that in the search for an improperly motivated, affirmative decision directly affecting the employee's pay, the employee may reach outside the limitations period created by her EEOC charge no further than the last such decision immediately preceding the start of the limitations period. We do not hold that an employee may reach back even that far; what we hold is that she may reach no further." 421 F.2d at 1178-1179. In Ledbetter's case, the court held, that meant the plaintiff could base her disparate treatment claim only on allegedly discriminatory actions taken within the 180 day statutory charge-filing period and the last preceding decision before that period. The court found there was no evidence based on the two compensation decisions that occurred within that time frame from which a reasonable jury could find discrimination, and therefore ordered the trial court to grant Goodyear's post-trial motion.

The Eleventh Circuit's discussion essentially grew out of the necessity to reconcile two Supreme Court holdings: Bazemore v. Friday, 478 U.S. 385 (1986), and National Railroad Passenger Corp. v. Morgan, 536 U.S. 101 (2002). In Bazemore, as characterized by the Eleventh Circuit, the Supreme Court "carved out a doctrine for applying the time-filing requirement to disparate pay claims" under Title VII by which many circuit courts "held prior to Morgan that a Title VII claim challenging an employee's pay was not time-barred so long as the plaintiff received within the limitations period at least one paycheck implementing the pay rate the employee challenged as unlawful." 421 F.3d at 1181. Morgan held that Title VII requires that claims based on "discrete discriminatory or retaliatory acts," such as "termination, failure to promote, denial of transfer, or refusal to hire," as distinct from claims "alleging a hostile work environment," had to be brought before the EEOC within the charge-filing limitations period. Under Morgan, a plaintiff's claim that a particular practice constituted a "continuing violation" may support an action based on discrimination occurring prior to the charge-filing period, as long as at least one act of discrimination, related to the ongoing pattern, occurred within that period.<sup>44</sup> Ledbetter claimed that Goodyear's entire history of discriminatory pay actions against her was actionable, and evidence thereof admissible, because at least one pay action occurred within 180 days prior to her EEOC charge filing date.

The Eleventh Circuit held that pay claims such as Ledbetter's, involving a regular annual compensation review, are discrete events that must be timely challenged in an EEOC charge as a condition of being made the subject of a Title VII claim. 421 F.3d at 1180. The court purported not to cast doubt on Bazemore, but did imply doubt as to the continued viability of appellate decisions interpreting Bazemore to permit actions based on the continued issuance of paychecks in amounts lowered by past discrimination. It interpreted Bazemore and Morgan, read together, to bar actions seeking to look back to past discriminatory actions far outside the charge-filing period "at least in cases in which the employer has a system for periodically reviewing and re-

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<sup>43</sup> The case arose in a non-deferral state

<sup>44</sup> Creative plaintiffs' lawyers have urged that this reasoning applies to many types of discriminatory practices, not limited to "hostile environment" claims.

establishing employee pay.” 421 F.3d at 1183.<sup>45</sup> Presumably, consistent with this logic, an employee whose pay is not reviewed within the charge-filing period, working for an employer with no regular system for reviewing and re-determining compensation, who continues to receive paychecks in amounts set in the discriminatory past, could successfully bring a claim based on the past discrimination. And while in a case like Ledbetter, the employee could look back somewhat prior to the charge-filing period, “[t]here must, however, be some limit on how far back the plaintiff can reach.” 421 F.3d at 1182. On this rationale, the court adopted the apparently arbitrary no-more-than-one-pre-filing-period-decision-at-the-outside rule. However it decides the case, the Supreme Court will probably provide a more determinate rule.

**B. Dukes v. Wal-Mart, Inc., \_\_\_ F.3d \_\_\_, 2007 WL 329022 (9th Cir. February 6, 2007), pet. for rehearing pending.**

A Ninth Circuit panel issued its long-awaited decision in the appeal of the district court’s certification of a massive nationwide gender discrimination action against Wal-Mart on February 6, 2007. Dukes v. Wal-Mart, Inc., \_\_\_ F.3d \_\_\_, 2007 WL 329022, aff’g 222 F.R.D.137 (N.D. Cal. 1994). The principal claim in the action, and the claim on which the district court certified a broad class action, was that Wal-Mart pays female employees in its stores less than comparable male employees.<sup>46</sup> The class certified by the district court encompassed approximately 1.5 million female employees and former employees of Wal-Mart, who work(ed) in a number of different store positions in some 3,400 stores organized into 41 regions for corporate management purposes, over a seven plus year period. In a 2-1 panel decision, which defendant has challenged by filing a rehearing petition, the Court of Appeals affirmed the class certification order. Plaintiffs’ theory in the case is that Wal-Mart engaged in a pattern and practice of intentional discrimination carried out in large part through subjective compensation-setting practices and manifested by systematic disparities in the pay rates of similarly-situated male and female store employees.

The panel decision is most interesting, in its discussion of the underlying compensation discrimination claims, for its consideration of the standards and techniques of statistical analysis of Wal-Mart’s compensation data. The lens through which this discussion appears in the decision is that of standards for class certification under FRCP 23(a) and 23(b)(2); however, the discussion, like the evidence, delves substantially into questions that also arise on the merits. The principal issue debated by the parties was the appropriate scope and level of aggregation or disaggregation of the statistical analysis. On this debate, the appellate court did not take sides on the ultimate question of what would constitute the most appropriate analytical approach. It merely determined that the district court had not abused its discretion in determining that the plaintiffs’ expert’s approach, which relied on somewhat aggregated statistical analyses, was a

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<sup>45</sup> The court added that even in these circumstances, admissible evidence of past discrimination would be narrowly limited to that which would “shed light on the motivations of the persons who last reviewed the employee’s pay, at the time the review was conducted,” and the plaintiff would be “limited to recovering for those paychecks received within the limitations period.” 421 F.3d at 1183 and fn. 18.

<sup>46</sup> A second claim in the case alleged classwide promotion discrimination practices against female store employees with respect to promotion to store management positions. The district court certified a narrower class on this claim, and the Ninth Circuit affirmed the limited scope of the class certification on plaintiffs’ cross-appeal. This non-compensation aspect of the appellate decision is not addressed in this Paper.



probative and potentially valid method of analysis. The appellate court also noted that Wal-Mart's expert did not follow the method of analysis suggested by Wal-Mart's criticism of the plaintiffs' method.

Plaintiffs' expert's compensation analysis consisted of 41 separate regressions, each comparing the pay of male and female employees in the stores of a single Wal-Mart region. He controlled for store, position, time in job, full or part-time employee, performance ratings, and other relevant variables. Although Wal-Mart and its expert argued unsuccessfully that this choice of control variables was fatally incomplete in the trial court,<sup>47</sup> Wal-Mart did not appear to press this issue on appeal.

The parties' main debate on appeal, and the disputed issue central to the Ninth Circuit's reasoning, was the aggregation vs. disaggregation question. Wal-Mart contended that the proper frame of analysis was the store unit, and that the only proper regression analyses would be those done on a store-by-store basis. Despite taking this position, Wal-Mart's own expert conducted competing regression analyses not at the store level, but at the sub-store level "by comparing *departments* to analyze the pay differential between male and female hourly employees" – a total of 7,500 different regressions. At this level of disaggregation, not surprisingly, Wal-Mart's analyses did not show statistically significant disparities between male and female employees in the large majority of cases. In contrast, plaintiffs' expert's 41 regressions showed highly statistically significant disparities in all regions.<sup>48</sup> The court supported its determination that the regional-level analysis was not improper by reference to "the similarity of the employment practices and the interchange of employees at various facilities." In this case, the court found, the extremely strong evidence of Wal-Mart's "uniform compensation policies and procedures" and their dissemination throughout the stores "resulting from the frequent movement of store managers" as well as Wal-Mart's "strong corporate culture" provided a "reasonable explanation" for plaintiffs' expert's decision to conduct his analysis at a regional level. The court noted that its decision upholding the district court's acceptance of plaintiffs' approach did not constitute an endorsement of it as correct or persuasive on the merits, but only amounted to holding that it showed the existence of common questions for class certification purposes.<sup>49</sup>

In addition to its reliance on plaintiffs' statistical showing in support of commonality, the court also found that Wal-Mart's practice of permitting store managers to make subjective decisions in applying uniform policies and procedures governing compensation supported the finding of commonality. The court noted that plaintiffs' evidence of the company's "centralized company culture and policies," which was based on both anecdotal witness evidence and a "social framework analysis" of Wal-Mart's employment systems and their corporate setting,

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<sup>47</sup> Wal-Mart argued that the regressions were flawed because they omitted controls for hours worked, seniority, prior experience, shift worked, store characteristics, and other factors.

<sup>48</sup> These competing approaches, and the results they produce, reflect the now-classic contest over aggregated versus disaggregated statistical analysis methods that characterizes litigation of discrimination class actions on compensation and other issues. In part, the difference in results depending on the level of aggregation used in analysis reflects the phenomenon of statistical power.

<sup>49</sup> However, the endorsement given to plaintiffs' methods of analysis, in both trial and appellate courts, appears to leave little doubt that the district court is likely to accept that analysis unless the panel decision is overturned or significantly modified in further appellate proceedings.

submitted by plaintiffs' expert witness' "provides a nexus between the subjective decision-making and the considerable statistical evidence demonstrating a pattern of discriminatory pay ... for female employees."

Despite the fact that plaintiff's statistical analyses of compensation disparities, applied across the huge class and long liability period, would produce enormous figures for earnings lost by female employees due to discrimination, the court held that plaintiffs' claims for monetary relief did not necessarily predominate over their claims for injunctive and declaratory relief. On that basis, and relying on the plaintiffs' insistence that injunctive relief was their principal goal, the court held that the district court's finding on the Rule 23(b)(2) predominance question was not an abuse of discretion. It is noteworthy that plaintiffs' claims for monetary relief included back pay and classwide punitive damages, but not compensatory damages.<sup>50</sup> Thus, the state of the law in the Ninth Circuit, under Dukes, is that in appropriate cases, and upon proper proof, plaintiffs may bring discrimination class actions for both equitable monetary relief and punitive damages on behalf of classes of employees.<sup>51</sup>

Finally, the court rejected Wal-Mart's arguments that permitting plaintiffs to prove liability and their entitlement to monetary relief – both equitable and punitive damages – on a classwide "formulaic" basis, without individualized hearings at which Wal-Mart could attempt to defeat the claim for monetary relief of each class member, either deprived Wal-Mart of due process or was an unmanageable or improper method of resolving remedy stage issues under Teamsters. The result of this holding is that, in the Ninth Circuit at least, a convergence of the types of evidence likely to be necessary, and perhaps largely sufficient, at the class certification, merits trial, and remedial stages of Title VII class action litigation of compensation discrimination claims.

Wal-Mart has sought en banc review of the panel decision and has publicly stated that it is determined to seek further review in the Supreme Court if it does not prevail in the Ninth Circuit.

### C. Carpenter v. Boeing Co., 456 F.3d 1183 (10th Cir. 2006)

The Tenth Circuit upheld the district court's grant of summary judgment for Boeing against plaintiffs' class disparate impact claims, on behalf of female hourly paid employees, of gender discrimination in the granting of overtime and receipt of overtime pay in a unionized Kansas manufacturing plant. Plaintiffs alleged that the discriminatory exercise of supervisors' discretion, in a subjective decision-making system, resulted in men receiving more overtime work and pay than similarly-situated women. Plaintiffs' statistical analysis, presented by a well-known expert witness and based on regression analysis, found highly statistically significant disparities between the amounts of overtime assigned to men and women. However, the Court of Appeals agreed with the district court that plaintiffs' regressions were inadequate and non-

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<sup>50</sup> The absence of a claim for compensatory damages avoids a direct conflict with the line of cases in other circuits beginning with or following Allison v. Citgo Petroleum Corp., 151 F.3d 402 (5th Cir. 1998).

<sup>51</sup> Under prior Ninth Circuit caselaw, see Molski v. Gleich, 318 F.3d 937 (9th Cir. 2003), there is no bright line prohibition on district courts certifying Rule 23(b)(2) class actions for damages, either.

probative because they failed to account for a number of factors that went into the determination of employees' eligibility to receive overtime. Because it found the plaintiffs' statistical analysis insufficient, it held that plaintiffs had failed to present a prima facie case of discrimination, and affirmed the grant of summary judgment as correct. 456 F.3d at 1193.

The Court of Appeals decision reflects an extremely critical and in-depth questioning of the methods used in the plaintiffs' regression analyses.<sup>52</sup> First, it emphasized the importance – even at the prima facie case stage - of comparing “*qualified*” men and women (emphasis in original), “that is, [those] who are eligible for overtime assignments,” rather than just comparing the incidence of overtime among all employees. 456 F.3d at 1194. Second, it resorted to a careful reading of the applicable CBA to identify the various shop rules and local practices that determined eligibility. Then, it compared the factors considered in plaintiffs' expert's regressions to those set out in the CBA, and concluded that the expert had not adequately factored in all of the variables for which data was available.<sup>53</sup> On that basis, it held the analysis “insufficient to establish a prima facie disparate-impact case.” 456 F.3d at 1199.

In the course of its discussion, the court articulated a notably restrictive and skeptical set of standards for judging the sufficiency of proof in the form of regression analyses. While acknowledging the importance of statistical analysis, the court emphasized the requirement that disparate impact analysis should focus on the effects of specific identified employment practices, and observed that while subjective decision-making could potentially be such a practice, if the subjective processes contained objective elements then the analysis should attempt to control for those elements. The court further emphasized the importance of reliable data regarding the composition of the qualified applicant pool, or if such data are unavailable or believed to be biased (or tainted variables), then an adequate proxy, consisting of a “close fit,” for such pool composition data. 456 F.3d at 1197. In addition, the court took a skeptical approach to plaintiffs' somewhat broad claims, which were not supported by specific evidence that the court found persuasive, that data as to the unconsidered variables was truly unavailable. Finally, the court took a swipe at the legal significance of evidence showing statistically significant disparities over a large comparison group population, noting that disparities of relatively small practical magnitude could produce large standard deviation figures in that setting.<sup>54</sup>

In its decision, the court distinguished Bazemore v. Friday (discussed, in the note on Ledbetter v. Goodyear Tire & Rubber Co. on another point, above). After genuflecting perhaps unconvincingly before the Supreme Court's statement in Bazemore that “a regression analysis that includes less than ‘all measurable variables’ may serve to prove a plaintiff's case,” the court “understood” that opinion to relate only to requirements for proof of discrimination after a prima facie case had been made by other means, not to the showing of a prima facie case in the first

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<sup>52</sup> In this, it stands in contrast to at least the tenor of the Dukes v. Wal-Mart decision summarized above.

<sup>53</sup> Among the factors the court deemed relevant, which it held the expert's regressions should have considered unless plaintiffs showed the necessary data to be unavailable, were “crew” assignment, “position,” and “shop.”

<sup>54</sup> The court characterized disparities in the range of 10%-20% in the amount of assigned overtime as not of impressive practical significance, adverting to the four-fifths rule used by federal agencies in screening for potential violations, although many would consider a 20% variation in compensation to be significant in a layperson's or practical sense.

instance; and further distinguished Bazemore as not involving any disputed issue over whether the employees under analysis “were not qualified or eligible for the benefit at issue – namely, a higher salary.” 456 F.3d at 1200.

The rigorous approach to regression analysis suggested by the Tenth Circuit in Carpenter would be difficult to satisfy, or at least very expensive to attain, in compensation discrimination cases that involve complex work rules or eligibility factors, like that prevailing at the Boeing facility in that case. In settings involving a smaller number of jobs and plausible eligibility or wage-relevant factors, however, regression analysis that accounts for the appropriate variables for which data is available is still feasible under the Tenth Circuit’s standards. Nevertheless, the burden of proof incumbent on plaintiffs is certainly a more challenging one in that Circuit than might previously have been anticipated.

**D. Wernsing v. Dept. of Human Services, 427 F.3d 466 (7th Cir. 2005), cert. denied 547 U.S. \_\_\_\_ (March 6, 2006)**

In this decision, the Seventh Circuit weighed in decisively with the minority position on an important issue that splits the circuits. That issue is whether basing the pay of a newly hired female worker on her pay level in a prior position where her pay was allegedly lowered by discriminatory compensation practices, and on that basis paying her less than an otherwise similarly situated male employee, violates §206(d)(1) of the Equal Pay Act.<sup>55</sup> Prior to the Wernsing decision, four circuits – the Second, Sixth, Ninth, and Eleventh - had held that paying lower wages based on a female employee’s wages in a prior job is a practice based on a “factor other than sex,” and therefore not violative of §206(d)(1), *only* if the employer “has an ‘acceptable business reason’ for setting the employee’s starting pay in this fashion,” 427 F.3d at 468, with the Ninth Circuit’s decision in Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982), standing as the lead decision in this line. The Eighth Circuit, however, rejected that analysis in Taylor v. White, 321 F.3d 710, 719 (8th Cir. 2003), holding the reasonableness of the employer’s adoption of this pay-setting method irrelevant to its legality and therefore unnecessary to determine. The Seventh Circuit in Wernsing sided with the Eighth Circuit’s position in a strongly worded opinion which, despite the circuit split, the Supreme Court declined to review.

The Seventh Circuit held that where an employer’s compensation decision results in a “differential based on any other factor other than sex” it is immaterial whether that factor – such as pay in a prior position – is an “acceptable business reason” or indeed whether it has any legitimate business rationale at all. 427 F.3d at 468. Apart from the rule adopted for initial compensation cases under the Equal Pay Act, the court’s opinion is significant for its comparisons of EPA principles to those of Title VII, and for suggesting that similar defenses may be available in Title VII compensation discrimination cases where, of course, the specific EPA exemption for factors “other than sex” does not apply. The court contrasted the EPA’s disparate treatment scheme with disparate-impact claims under Title VII, and noted that the

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<sup>55</sup> “No employer ... shall discriminate ... between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work....” 29 U.S.C. §206(d)(1).

requirement under Title VII that a practice which has discriminatory impact on a protected class must be justified by a sound business reason, or a business necessity, does not apply to the EPA. The court further opined broadly that “in disparate-treatment litigation under other employment-discrimination statutes, the rule is ... [that] the employer may act for any reason, good or bad, that is not one of the prohibited criteria such as race, sex, age or religion,” and compared the Kouba approach disapprovingly to the discredited “comparable worth” theory. 427 F.3d at 469-470.

The court also disposed of Wernsing's alternative claim that market-determined wages cannot serve as a lawful basis for setting initial pay because women generally earn less than men in the labor market. Accepting the premise of market compensation inequality, the court held that in order to succeed a plaintiff would have to show that her own wages had been depressed as a result of those market factors, in particular that the market in which the employer recruits, or from which plaintiff's wages were determined, was itself affected by disparate compensation patterns. On this point the court held that the plaintiff had failed to carry her burden of proof or to adduce any probative evidence, and therefore summary judgment was properly entered against her.