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## Department of Labor Administrative Law Judge Rules in Google's Favor on Expansive Pay Data Request

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On March 15, 2017, a U.S. Department of Labor Administrative Law Judge (ALJ) in San Francisco denied an OFCCP enforcement request that sought to compel Google to produce extensive information on pay data. Many government contractors subject to recent OFCCP compliance reviews have been struggling with the scope and extent of pay data requests, therefore this decision is a welcome one. Although the ALJ acknowledged that the requested information was relevant to OFCCP's investigation, the ALJ focused primarily on the unreasonably burdensome aspect of the request in denying it.

### Brief Procedural History

- OFCCP began its compliance review with a scheduling letter in September 2015. Google complied and produced its materials for the desk audit portion of the compliance review.
- OFCCP examined that submission and requested information on compensation. Google complied.
- OFCCP requested to conduct an onsite visit, and Google complied. OFCCP conducted interviews of more than 20 Google managers.
- OFCCP then requested a second snapshot of data, going one year back, for some 19,000 employees and extensive additional information. Quoting the ALJ:

**"The second 'snapshot' requires Google to produce for each of over 19,000 employees base salary or wage rate; hours worked in a typical workweek; other compensation or adjustments to salary such as bonuses, incentives, commissions, merit increases, locality pay or overtime; additional data on factors used to determine employee compensation, such as education, past experience, duty location, performance ratings, department or function, and salary level/band/range/grade; and documentation and policies related to compensation practices. To this OFCCP has added: bonus earned, bonus period covered, campus hire or industry hire, competing offer, current compa-ratio, current job code, current job family, current level, current manager, current organization, date of birth, department hired into, education, equity adjustment, hiring manager, job history, locality, long-term incentive eligibility and grants, market reference point, market target, name, performance rating for the past 3 years, prior experience, prior salary, referral bonus, salary history, short-term incentive eligibility and grants, starting compa-ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, stock monetary value at award date, target bonus, total cash compensation, and any other factors relating to compensation."** (Opinion at page 7)

- The ALJ noted that "after some conciliation efforts on these last additional requests, the parties reached an impasse, and Google declined to produce the additional information."
- OFCCP sought enforcement.

## Summary of the ALJ's Decision

- Whenever OFCCP is seeking information of this nature, its request is an “administrative subpoena.” OFCCP is not demanding an intrusion into offices or personnel, a demand that could be viewed as an administrative warrant.
- An administrative subpoena is subject to the search and seizure requirements of the Fourth Amendment. The ALJ rejected OFCCP’s argument that Google waived its Fourth Amendment rights and protections when it entered into the government contract.
- To meet the Fourth Amendment’s requirements, OFCCP must show that its request is reasonable.
- OFCCP argued that because Google has “huge resources,” the cost for Google to produce the requested information would not “threaten normal operation of the business.”
- OFCCP asserted that Google’s parent corporation’s market value was over \$500 billion and its 2016 reported revenues were \$90 billion. The ALJ rejected these facts and amounts as not relevant:
  - “Google has no access to its parent corporation’s assets. Even if it did, market capitalization is the value of the shares that shareholders hold; it is not an asset of the corporation. . . . Revenue has meaning only when compared to expenditures. For example, in 2007, General Motors had revenue of \$180 billion (twice the revenue of Google’s parent in 2016), but it reported a net loss of \$43.3 billion and was soon in bankruptcy.” Opinion at 5.
- Instead, the ALJ focused on how much the government had paid Google on its government contract compared to Google’s estimate of the cost of complying with OFCCP’s request. The ALJ determined that it would cost Google more to comply with OFCCP’s request, than the government was paying Google for the contract:
  - “I am focused more on OFCCP’s allegation in its complaint (signed on December 29, 2016) that, as of that date, GSA had paid Google \$600,000 on this contract in two and one-half years. Google contends that compliance with just OFCCP’s demand for a compilation of interview notes on about 54,000 job interviews will cost Google over \$1 million. And this is only one of the items OFCCP is demanding. If Google is correct and if OFCCP is entitled to an order requiring Google to comply with the full extent of its demands, it begins to appear that the GSA contract had a poison pill that would rob Google of the benefits of the contract: namely, compliance with OFCCP’s demands will far exceed all of Google’s gross revenue under the contract.” Opinion at 5-6.
- The ALJ also was concerned with the broad scope of OFCCP’s request. OFCCP’s request would have required Google to pull employment history from as many as 19 years ago and sought an extremely broad range of information:
  - “The employee records sought . . . are unlimited as to time. Google was incorporated in 1998. The government contract was agreed to in 2014. Although a worker’s starting salary – and later adjustments to that salary – obviously relate to compensation, OFCCP has not shown how a starting salary 19 years ago – and 16 years before the government contract – is relevant to its proper purpose in a compliance review. To the extent that this information is relevant, when it concerns more than 20,000 employees whose histories must be searched, it would appear to be unreasonably burdensome, given its extremely limited possible relevance.” Opinion at 6.

- The ALJ's final remarks also are likely to resonate with contractors currently under an OFCCP audit:
  - "OFCCP demands that, for the thousands of employees, Google add to the requested database 'any other factors related to compensation.' OFCCP must determine what information it wants and describe it with sufficient specificity for [Google] to know what it must do to comply. OFCCP has interviewed a significant number of Google managers. It should have asked what factors Google considers when setting compensation. OFCCP could also ask Google to prepare a list of factors it considers when setting compensation. But Google is not required to anticipate what OFCCP might someday conclude is 'related to compensation' and therefore should have been produced." Opinion at 7-8.

### **A Few Cautionary Notes About the Meaning or Use of the Decision**

- The ALJ reached this decision during a summary proceedings. So, the ALJ concluded that there wasn't enough evidence to prove that OFCCP's request was not unreasonably burdensome. If the proceedings were not expedited, it is possible that the ALJ might have reached a different result.
- The ALJ also noted that OFCCP need not engage in an iterative process with the contractor, explaining the status of the investigation when it requests further information. This decision does not mean that every time an OFCCP compliance officer requests more compensation data, the contractor can compel OFCCP to negotiate over it. Google did not object to OFCCP's initial request for compensation information prior to the onsite, and the initial request was not the subject or focus of the OFCCP's complaint. It was the post-onsite request, and the breadth of the request, that Google objected to.
- The ALJ must give weight, or deference, to OFCCP's decisions regarding the relevance of its information requests. In this case, the ALJ held that OFCCP's request met that deferential standard for relevance. However, even if a request is relevant, the ALJ held that the request can still be unduly burdensome. "But, even accepting that Google has extraordinary capability to search and create databases, OFCCP's request that this extensive information be supplied for a second 'snapshot' date requires some showing that it is not unduly burdensome. Had GSA paid Google \$600 million on this contract, not \$600,000, it would be a different analysis, but that is not the history of this contract." Opinion at 7.
- Government contractors that are being paid a lot more than Google for their government contracts may not have as strong an argument that a similar request is burdensome. This ALJ looked at the cost of complying with the request versus the benefit received – payment under the contract. A request costing Google \$1 million was not reasonable when Google has only received \$600,000 in payment on the contract.