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What Employers Need to Know Today About Challenging the Subpoena Power of Government Agencies

Introduction

Receiving a subpoena or request for documents from a government agency over the course of an investigation feels daunting, but employers have options to narrow the scope of these requests.

Administrative agencies draw their subpoena power from a statute or an executive order. An agency head or official, acting unilaterally or with the approval of multiple people, can issue a subpoena without judicial approval. Once issued, the recipient of a subpoena can challenge it through the courts by affirmatively moving to quash or by responding to the agency's motion to compel.

Under traditional principles of agency law, courts give agencies wide latitude to exercise this power provided they issue subpoenas in good faith and for lawfully authorized purposes.[1] As long as "the inquiry is within the authority of the agency," the court will defer to the agency's own determination of relevancy, quashing only if the agency's analysis is "obviously wrong." This reasonableness analysis presents a lower evidentiary bar than the Fourth Amendment "probable cause" analysis.

What, exactly, agencies and courts consider reasonable depends on the agency and the specific facts underlying any given claim or issue under investigation. We examine the subpoena power of the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA) consider the effect of rule changes and court decisions and provide guidance for employers who receive subpoenas from these agencies. We will also look at Office of Federal Contract Compliance Programs (OFCCP) directives under the Biden administration and how contractors should respond to requests for information from OFCCP, which does not have subpoena power.

All employers will eventually find themselves in a position to defend against an agency action. Litigating with an eye toward successful resolution from the start, whether through informal resolution or mediation or at trial, will help ensure the most favorable outcome for businesses. Strategic responses to agency subpoenas and information requests — knowing when to comply and when to push back — is a key component of a successful litigation strategy.

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ISSUE #1 EEOC's subpoena power

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

EEOC has broad subpoena authority that can arise in any investigation. Knowing the scope and limitations of EEOC's subpoena powers can be crucial for managing and responding to an expanded EEOC investigation.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

While courts have always been deferential to agencies' subpoena power, the EEOC gained a greater advantage in 2017 with the U.S. Supreme Court's decision in *McLane Co. v. EEOC*.[2] The Court reiterated that the role of the judiciary in EEOC subpoena enforcement proceedings "is not to use an enforcement proceeding as an opportunity to test the strength of the underlying complaint."[3] Rather, "[i]f the charge is proper and the material requested is relevant, the district court should enforce the subpoena unless the employer establishes that the subpoena is "too indefinite," has been issued for an "illegitimate purpose," or is unduly burdensome."[4]

The question presented to the Court was what standard of review the appellate court should apply when reviewing a district court's decision to quash or enforce an EEOC subpoena: de novo or more deferential abuse of discretion.[5] Citing the "fact-intensive" nature of a district court's analysis, the Court determined that deferential review was appropriate in this context.[6] This holding gives the EEOC the advantage when issuing subpoenas and increases the burden on employers hoping to prove that the subpoena is unreasonable.

That said, if the subpoena is reasonable, not overbroad and not unduly burdensome, an employer should comply. Objecting to an EEOC subpoena on principle is rarely a fruitful litigation tactic, particularly in the early stages when the parties have a chance to avail themselves of many off-ramps from litigation to informal resolution.

If, however, the subpoena seeks irrelevant information, unduly burdens the employer, or strives to conduct a "fishing expedition," employers are not without recourse. An employer's first step upon receiving the offending subpoena should be to file a petition to revoke or modify the subpoena to preserve the right to challenge the subpoena in court. EEOC regulations allow only five days to file a petition to revoke or modify a subpoena, so employers should file the petition quickly. For investigations relating to claims under Title VII or the ADA, the EEOC must issue a determination on the petition before seeking enforcement through the courts. Filing a timely petition to revoke may buy some time to engage in negotiation with the EEOC over the scope a subpoena and avoid court action.

Even if the EEOC has issued a subpoena, employers can negotiate over what information they supply. The EEOC may be willing to compromise during the pendency

of a petition to revoke or before they file a subpoena enforcement action in the U.S. district court.

Though the EEOC has broad investigatory powers, look for defensible arguments to support objections to the subpoena. For example, subpoenas seeking complete personnel files may be overbroad.[7] A subpoena seeking pattern and practice employment data related to a single claim of employment discrimination also may be overbroad.[8] The request may be unduly burdensome or lack relevancy.[9] An employer should not hesitate to ask for clarification on how the information sought is relevant to the claim if it has a good faith basis to dispute the relevancy.[10]

Throughout the process, employers should keep good records during the process and document all verbal communications and agreements with the EEOC. Look for off-ramps to informal resolution, but be prepared to see the case through to trial if necessary.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

Employers may feel like they have little choice but to comply with burdensome EEOC subpoenas in the wake of *McLane,* but strategic objections can mitigate the expense and control the scope of an EEOC investigation.

ISSUE #2 OSHA

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

An aggressive approach to agency enforcement is expected.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

The U.S. Department of Labor Solicitor of Labor spoke at the ABA Occupational Safety and Health Law Meeting in March 2022, where she promised that the agency would "use all the tools in its toolbox" in the realm of OSHA enforcement, including subpoena power and subpoena enforcement.[11] The solicitor reiterated this stance in December 2022, promising that her office would get involved "early and often" to support client agencies in conducting rapid investigations and thwart what she characterized as obstruction from employers.

In line with the Biden administration's aggressive approach to agency enforcement, OSHA has proposed an "interim final rule" that it claims will provide "helpful clarity" about the use of subpoenas in health and safety actions. Whether this clarity is necessary is up for debate as OSHA currently maintains a Field Operations Manual that dedicates five pages to subpoenas and arguably provides sufficient guidance.[12]

By introducing the change as a "final interim rule," OSHA skirts the "notice and comment" requirements of the Administrative Procedure Act, therefore shielding the revised rule from formal criticism by opponents. Ultimately, this rule will codify the broad subpoena power courts have already granted through case law and give OSHA an advantage over employers seeking to limit the scope of a subpoena to a single issue or incident.

The Supreme Court laid out the three factors courts must consider when determining whether to enforce an agency subpoena: (1) whether the inquiry is within the authority of the agency, (2) whether the demand is "not too indefinite," and (3) whether the information sought is reasonably relevant.[13] Already "not particularly burdensome,"[14] courts have weakened this test (and empowered the agencies further) by repeatedly holding that the information the agency seeks need only be relevant "to any lawful purpose of the agency."[15] By defining "relevancy" as encompassing any information relevant to "any lawful purpose of the agency," courts essentially give agencies subpoena power greater than the scope of the investigation that prompted the subpoena.

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

Once OSHA formalizes this expansive subpoena power with its "final interim rule," which is targeted for June of this year, employers will need to consider carefully their responses to OSHA subpoenas. Unlike subpoenas from the EEOC, the core of the conflict here is not the subpoena itself but the scope of the information sought. Given the deference courts show to the agency, employers should try to resolve any disputes directly with OSHA. Engaging counsel to navigate the strategic considerations that arise during an OSHA investigation can help employers avoid pitfalls that could lead to penalties or greater liability going forward or court orders granting OSHA access to information beyond what is relevant to the instant investigation.

ISSUE #3 OFCCP

WHAT YOU NEED TO KNOW — THE BOTTOM LINE:

OFCCP has broad authority to seek records, data and information from government contractors through the agency's audit function to ensure compliance with the affirmative action regulations. Under the current administration, OFCCP will exercise that authority often and with vigor. However, that authority remains limited by constitutional safeguards against unreasonable search and seizure.

WHY YOU NEED TO KNOW — INFORMATION AND ANALYSIS:

OFCCP enforces the nondiscrimination laws and regulations applicable to federal contractors and subcontractors. Unlike OSHA and the EEOC, OFCCP lacks subpoena

power. Even so, the agency interprets its authority to investigate — and by extension, request records of — contractors for noncompliance broadly. The Biden administration's aggressive and ambitious enforcement approach extends to OFCCP and the agency's directives, which provide guidance to staff and contractors on enforcement and compliance. Although directives formalize policy and practice and provide invaluable information to contractors, they do not have the force and effect of law or regulation.

The first OFCCP directive of the Biden administration, addressing pay equity analysis, shows the increased focus on investigation and enforcement promised by the DOL in other contexts.[16] The directive promises broader, more extensive reviews of contractor pay practices. If the initial review of pay data supplied to OFCCP during an audit reveals pay disparities or other concerns about the contractor's pay practices, OFCCP will request supplemental information.

Similarly, in OFCCP's second directive under the Biden administration, the agency makes clear that it can request "supplemental data, follow-up interviews, and/or additional records and information if … OFCCP identifies issues that warrant further analysis."[17] The directive asserts an extremely broad interpretation of OFCCP's authority to request information from contractors in audits. Even so, OFCCP must "reasonably tailor the request to the areas of concern, allow contractors a reasonable time to respond, and include the basis for the request."[18]

The most likely issue to face contractors under the new OFCCP directives is how to meet their obligations without waiving attorney-client privilege or the protections of the work-product doctrine. Directive 2022-2 states, "OFCCP will not require the production of privileged attorney-client communications or attorney work product." Yet contractors may not merely invoke a privilege, provide a standard privilege log and withhold documents.[19] OFCCP makes clear that contractors must comply by providing a redacted version of the pay analysis (as long as the nonredacted version provides the information sought), conducting a separate analysis that does not implicate attorney-client privilege or the work-product doctrine or presenting a detailed affidavit containing specific information.[20] OFCCP will then review the documents the contractor provides and determine whether the invocation of privilege is appropriate or whether the contractor is noncompliant with its obligations.[21]

Without the ability to challenge an OFCCP-issued subpoena directly, contractors must withhold requested documents and wait for OFCCP to initiate legal action before an administrative law judge. Along with being time-consuming and expensive, the outcome of a hearing before the Office of Administrative Law Judges, which has its own rules, is difficult to predict.

Although risky, pushing back against OFCCP data requests can achieve desired results. In 2017 an administrative law judge (ALJ) issued a decision roundly criticizing OFCCP for making overbroad and unduly burdensome requests and denying OFCCP's enforcement action seeking compliance with its remaining requests.[22]

The facts of the case are straightforward. OFCCP issued data requests to Google as part of a regularly scheduled compliance review. Google cooperated with three separate information requests, but it balked at a fourth.[23] Google argued that the OFCCP failed to demonstrate the relevancy of the request to the issue under review. The company also claimed the requests were unduly burdensome and interfered with Google's business operations.[24]

Agencies with statutory subpoena power need to meet only a deferential "reasonableness" standard when issuing subpoenas.[25] Here, however, the ALJ applied the much stricter Fourth Amendment "probable cause" analysis and concluded that these requests violated Google's Fourth Amendment rights.[26] OFCCP failed to identify specific areas relevant to its audit, engaging in a "fishing expedition" of the sort disfavored by courts grating at motions to quash EEOC subpoenas.[27]

The ALJ closed with guidance to OFCCP for how to engage in an iterative process and avoid adverse holdings like this one:

> Under Directive 307, OFCCP should engage in an iterative process, asking Google for information, interviewing Google's officials and managers, reviewing the documentary materials and data Google has produced, considering information gathered from the EEOC and the California Department of Fair Employment and Housing, and reviewing information from any other source it has. Based on that, it should consider Google's statements of its policies and practices, such as the testimony Wagner gave. It should determine whether Google's representations are consistent with the data and other information obtained. It should then adjust its models and request further information consistent with observable indicators in the information it has. Without this process, as outlined in Directive 307, OFCCP's requests for information are untethered to any factual basis and are no more than speculation. As such, the requests impose without rationale a burden on Google and the more than 25,000 involved employees (whose private information OFCCP seeks).[28]

NOW THAT YOU KNOW — KEY TAKEAWAY(S)

Government contractors can expect OFCCP to seek more information during audits than ever. As demonstrated by the agency's proposed revisions to its scheduling letter, OFCCP intends to collect a significant amount of information from contractors to allow for more robust compliance evaluations. Although OFCCP enjoys broad authority to collect information from contractors during audits, that authority has limits. Accordingly, contractors should evaluate each request for relevancy to OFCCP's authority to evaluate contractor compliance with the affirmative action regulations, along with the burden it imposes. In certain limited circumstances, contractors may find it appropriate to challenge a request. In doing so, contractors should take into account the time and resources needed

to navigate the archaic process for seeking administrative law judge review of such requests.

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[1] *United States v. La Salle Nat'l Bank*, 437 U.S. 298, 307, 98 S. Ct. 2357, 2363 (1978); *United States v. Powell*, 379 U.S. 48, 57 (1964); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 209 (1946).
[2] *McLane Co. v. EEOC*, 581 U.S. 72, 137 S. Ct. 1159 (2017).
[3] *Id*. at 1164.
[4] *Id*.
[5] *Id*.
[6] *Id*.
[7] *See United States EEOC v. Serv. Tire Truck Ctrs*., No. 1:18-CV-1539, 2018 U.S. Dist. LEXIS 178025, at *17 (M.D. Pa. Oct. 17, 2018) (circumscribing subpoena request to exclude "medical and healthcare information unrelated to pregnancy, retirement plan information, names and other identifying details for spouses and dependents, personal email addresses, copies of social security cards, and tax information beyond earnings and salary").
[8] *EEOC v. Se. Food Servs. Co., LLC,* No. 3:16-MC-46-TAV-HBG, 2017 U.S. Dist. LEXIS 97340, at *10 (E.D. Tenn. June 23, 2017) (holding that "information sought by the EEOC through a subpoena must still be relevant to the underlying charge, even if the EEOC decides to broaden its inquiry").
[9] *See EEOC v. VF Jeanswear, LP*, No. MC-16-00047-PHX-NVW, 2017 U.S. Dist. LEXIS 103487, at *17 (D. Ariz. July 5, 2017) (denying the EEOC's application to enforce its subpoena because "the nationwide, companywide search for systemic discrimination in promotions to top positions is too removed from [plaintiff's] charge of one-off demotion from a sales job to be relevant in a practical sense" and the estimated 300+ hours and over $10,000 to comply placed undue burden on the employer); *EEOC v. G4S Secure Sols (USA) Inc*., No. 18cv2335-BAS (NLS), 2018 U.S. Dist. LEXIS 203540, at *10 (S.D. Cal. Nov. 29, 2018) (denying the EEOC's motion to enforce with respect to its request for all documents discharged during the relevant time period because the complainant did not allege improper discharge).
[10] *EEOC v. Austal USA, LLC*, No. 17-00006-WS-MU, 2017 U.S. Dist. LEXIS 133302, at *33 (S.D. Ala. Aug. 18, 2017) ("Given the EEOC's inability to consistently focus its argument on how the requested information would resolve Cooper's individual charge of discrimination or is necessary to determine whether Austal discriminated against Cooper, granting the application would render the relevancy requirement a nullity").
[11] Benjamin Briggs, Brent Clark, A. Schott Hecker, Patrick Joyce, Melissa Ortega, Matthew Sloan and Adam Young, *Report from Day 1 of the 2022 ABA OSHA/MSHA Law Conference*, JDSupra (March 10, 2022), https://www.jdsupra.com/legalnews/report-from-day-1-of-the-2022-aba-osha-1656830/ (last visited Jan. 26, 2023).
[12] U.S. Dep't of Lab. Occupational Safety and Health Admin., Field Operations Manual, Chapter 15 (April 14, 2020), https://www.osha.gov/enforcement/directives/cpl-02-00-164.
[13] *United States v. Morton Salt Co*., 338 U.S. 632, 652, 70 S. Ct. 357, 369 (1950).
[14] *Acosta v. Ross*, No. 4:17-MC-9017-DGK, 2017 U.S. Dist. LEXIS 191058, at *5 (W.D. Mo. Nov. 20, 2017).
[15] *See Acosta v. Ross*, 2017 U.S. Dist. LEXIS 191058, at *5; *Scalia v. Pure Pollination, LLC*, No. 20-mc-00227-DDD-STV, 2021 U.S. Dist. LEXIS 254942, at *3 (D. Colo. Feb. 1, 2021); *Walsh v. Dale Printing Co*., No. 4:21-mc-00742-AGF (E.D. Mo. Aug. 11, 2021); *Perez v. Jasper Contractors*, No. 1:16-MI-0020-WSD-JSA, 2016 U.S. Dist. LEXIS 198656, at *8 (N.D. Ga. Apr. 12, 2016); *Solis v. Sea World of Fla., LLC*, No. 6:13-cv-2-Orl-RBD-DAB, 2013 U.S. Dist. LEXIS 49014, at *8 (M.D. Fla. Mar. 13, 2013); *Chao v. Conocophillips Co.*, No. 03-mc-0136, 2003 U.S. Dist. LEXIS 21030, at *6 (E.D. Pa. Nov. 5, 2003).
[16] OFCCP Directive 2022-01 Rev. 1, Advancing Pay Through Compensation Analysis (Dep't of Labor Aug. 18, 2022).
[17] OFCCP Directive 2022-02, Effective Compliance Evaluations and Enforcement (Dep't of Labor March 31, 2022).
[18] *Id.*
[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *OFCCP v. Google, Inc*., No. 2017-OFC-00004, ALJ's Recommend Decision (Dep't of Labor July 14, 2017).
[23] *Id.* at 2.

[24] *Id.* at 13-17.
[25] The Supreme Court explicitly rejected a Fourth Amendment analysis in this context when formulating the "reasonableness" test applicable to agency subpoenas, stating "Although the right to be let alone — the most comprehensive of rights and the right most valued by civilized men is not confined literally to searches and seizures as such, but extends as well to the orderly taking under compulsion of process neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." *Morton Salt Co*., 338 U.S. at 651-52 (internal citations omitted).
[26] *Id.* at 20-23.
[27] *Id.*
[28] *Id.* at 38.