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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Victoria Prussen Spears

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OFCCP Launches Three New Initiatives Impacting Its Relationship with Contractors

*By Rebecca L. Springer, Kris D. Meade, and Laura Offenbacher Aradi**

The Office of Federal Contract Compliance Programs has announced three directives that impact how it will resolve conflicts over compliance and enforce the anti-discrimination laws that apply to federal contractors. The authors of this article discuss the directives, which further the agency's broader goals to both bring more clarity to its processes and expand its own enforcement footprint.

In its latest effort to revamp agency policies due to outcry from the contracting community, the Office of Federal Contract Compliance Programs (“OFCCP”) has announced three directives that impact how it will resolve conflicts over compliance and enforce the anti-discrimination laws that apply to federal contractors. These directives, which establish early resolution procedures, scale back the compliance review procedures, and develop a system for published Opinion Letters and Help Desk responses, may bring some welcome relief to contractors. However, the benefits offered are not without costs.

EARLY RESOLUTION PROCEDURES (DIRECTIVE 2019-02)

The most significant directive establishes Early Resolution Procedures (“ERP”) for the OFCCP and multi-establishment contractors to resolve purported violations identified by the agency during the audit of an establishment and proceed directly to conciliation without the issuing a Notice of Violations.

If the contractor and the OFCCP agree to ERP, the contractor must produce additional information about all, or a negotiated subset, of its other establishments and, ultimately, submit biannual progress reports to the agency regarding its remediation of the alleged violations for five years. The OFCCP will then limit compliance reviews during the five-year period, depending on the type of violations.

While contractors may benefit from limits on compliance reviews, this directive is more beneficial to the OFCCP than to contractors, as it allows the

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OFCCP to impose nationwide monitoring and remedial actions when it does not otherwise have any authority to do so.

Here's how the ERP applies to material and non-material violations:

(1) If a desk audit finds *non-material violations* that can easily be corrected, and no other significant issues, the compliance officer will seek to resolve those problems during the desk audit and issue a closure letter.

(2) If a desk audit finds *material non-discrimination-related violations* at an establishment (e.g., record keeping, applicant tracking, failure to conduct self-analyses), the OFCCP may offer to resolve those violations through an Early Resolution Conciliation Agreement with Corporate-Wide Corrective Action ("ERCA"). The ERCA would require the contractor to review all or a subset of its other establishments for violations similar to those identified at the establishment under review, implement necessary corrective actions at all identified establishments, and submit progress reports to the OFCCP for five years. Those progress reports would report on the corrective actions and provide "all supporting documents and information reasonably related to such a review." In return, during the five-year period, the OFCCP will not schedule a new compliance evaluation for the establishment that was initially under review. It can, however, still schedule a compliance evaluation of any other establishment. While this may have advantages for contractors undergoing an audit of their headquarters, the ERCA provides little benefit outside of headquarters audits.

(3) If a desk audit finds *material discrimination-related violations* at an establishment, the compliance officer must discuss the findings and potential for ERP resolution with district and regional office management within 14 days. If the regional office agrees that ERP may be appropriate, the district office may then conduct interviews, and may request readily and electronically-available information (which the contractor must provide within 14 days unless the contractor and agency agree otherwise) to allow it to "refine the indicators" of discrimination and "calculate the estimated monetary remedy." The OFCCP will complete its "refined analysis" within 14 days of receiving information from the contractor and, if indicators of potential discrimination are still present, the OFCCP will offer to engage in ERP.

If the contractor agrees to ERP, the parties will meet within 14 days

to discuss the findings, a proposed remedy, and corrective actions. The OFCCP will seek “make whole relief for affected class members, which may include back pay, job offers . . . salary adjustments, and/or other appropriate remedies and corrective actions.” An ERCA resolving discrimination-related violations will also “require the contractor to review all, or a negotiated subset, of its remaining establishments for the similar violation(s) during the progress report-monitoring period and, if necessary, implement corrective actions at those establishments to eliminate the violation(s) and prevent recurrence.” Such corrective actions at these other establishments may also require job offers and/or salary adjustments. The contractor will be required to submit bi-annual progress reports to the OFCCP for five years reporting “the results of its analysis, findings, any corrective actions, and . . . supporting documents and information reasonably related to such a review.” In return, during the five-year period, the OFCCP will not schedule new compliance evaluations for *any* of the contractor’s establishments covered by the ERCA. In essence, in exchange for a five-year pass on audits, the contractor will be required to affirmatively investigate, address, and report on any potentially discriminatory conduct at all of its establishments twice a year for five years. Contractors will need to think long and hard about whether such an agreement would be beneficial, or even feasible.

COMPLIANCE REVIEW PROCEDURES (DIRECTIVE 2019-01)

This directive somewhat scales back the OFCCP’s compliance review procedures by rescinding the Obama administration’s Active Case Enforcement procedures.¹ That directive had granted compliance officers wide discretion to conduct more frequent full desk audits and onsite reviews that were burdensome to contractors.

The new directive reiterates several previously-issued Trump administration directives that shorten the time to complete a full desk audit and provide contractors with the agency’s scheduling list methodology;² monitor compliance through AAP verification and compliance checks;³ and review compliance with EEO and non-discrimination obligations through neutrally scheduled focused reviews.⁴

¹ Directive 2011-01.

² Directive 2018-09.

³ Directive 2018-07.

⁴ Directive 2018-04.

The directive also emphasizes that compliance officers must follow the procedures outlined in the Federal Contract Compliance Manual and formally documents the OFCCP's practice of exempting an establishment from another compliance review for 24 months following the closure of an audit. This directive should help to provide certainty to both contractors and the OFCCP about the rules of engagement for compliance and enforcement.

The result may likely be an increased number of compliance reviews, but an accompanying decrease in full-blown audits with lengthy onsite and follow-on components.

OPINION LETTERS AND HELP DESK (DIRECTIVE 2019-03)

The Opinion Letters and Help Desk Directive is less significant than the other two directives, but may prove to be useful to contractors. Following a path already utilized by other agencies within the Department of Labor, under this directive: (1) the OFCCP will provide fact-specific guidance through Opinion Letters, which may be published anonymously with the consent of employer/employee, and (2) the OFCCP website will be updated to include searchable Help Desk inquiries and responses.

While these Opinion Letters and Help Desk responses will not have the force of law or regulation, they may bring some much-needed clarity and transparency to contractors' affirmative action obligations and the OFCCP compliance process.

CONCLUSION

These three new directives further the OFCCP's broader goals to both bring more clarity to its processes and expand its own enforcement footprint. It remains to be seen whether these new efforts will actually benefit the contracting community.