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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

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OFCCP Announces Plan to Streamline Affirmative Action Audits: 10 Key Points for Federal Contractors

*By Cheryl L. Behymer and Sheila M. Willis**

In this article, the authors discuss the key points that federal contractors should understand about a recent directive from the U.S. Department of Labor's Office of Federal Contract Compliance Programs.

The federal agency that oversees federal contractor affirmative action programs recently took several big steps towards streamlining employer audits—and that means it is time for employers to make sure they have their ducks in a row before the time comes for them to have their workplace practices placed under a microscope.

Following quickly on the heels of its Directive on Pay Equity Audits, the U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") rescinded four prior directives and clarified that contractors under audit by the agency should expect to provide fully complete and compliant Affirmative Action Plans ("AAPs") on an expedited timetable. The directive is consistent with OFCCP's new electronic Contractor Portal requirement that under which contractors had to certify their affirmative action compliance no later than June 30.

WHAT IS A DIRECTIVE?

First, it is important to note that an OFCCP directive is not legally binding. As the agency itself states in the introductory language, it does not have "the force and effect of law and is not meant to bind the public in any way."

That said, the directive informs the federal contractor and subcontractor community subject to OFCCP's enforcement of how it will operate internally. If there is a direct conflict with executive orders, statutes, or regulations, those laws supersede the directive.

* Cheryl L. Behymer is a partner in Fisher Phillips and co-chair of the firm's Pay Equity Practice Group, as well as the firm's Affirmative Action and Federal Contract Compliance Practice Group. Sheila M. Willis, a partner in the firm, represents companies as they navigate employment issues related to hiring, discipline, investigations, employment discrimination, unemployment, and other related issues. Resident in the firm's office in Columbia, South Carolina, the authors may be contacted at cbehymmer@fisherphillips.com and swillis@fisherphillips.com, respectively.

Nonetheless, a directive is guidance that contractors should note when engaged in activities relevant to the subject matter. They predict how the agency will evaluate your efforts.

WHICH DIRECTIVES WERE RESCINDED?

The four directives that were rescinded all required OFCCP to provide additional information and transparency to contractors and to follow disclosed procedures and standards.

Similar to the OFCCP's position when it shifted its compensation focus in 2013, the agency is seeking to cast off the shackles of procedures that it believes prevented it from taking a customized, unique approach to each audit.

Instead, OFCCP now claims that it will endorse and follow the more expansive Title VII approach, utilizing any statistical methods, in any way, to review any disparities. Directives now rescinded include:

- Contractor Recognition Program;
- Transparency in OFCCP Compliance Activities;
- Efficiency in Compliance Evaluations; and
- Certainty in OFCCP Policies and Procedures.

10 KEY POINTS BASED ON THE NEW DIRECTIVE

Given the guidance provided in the newest OFCCP directive, here are 10 steps companies should consider to ensure that they are in the best possible position.

1. First and foremost, ensure that your high-level officials understand the time-sensitive nature of an OFCCP scheduling notice. They should be trained to forward it to your HR or compliance team immediately. And do not expect a 45-day reprieve from an audit notice after your name appears in the Corporate Scheduling Announcement List ("CSAL") advance notice list. This prior courtesy has been rescinded by this directive.
2. Ensure you have a fully compliant affirmative action plan and program that addresses all federal regulatory requirements. You should consider proactively conducting routine self-audits of your employment practices and systems. Your internal audit systems should be in good working order and key personnel should understand the recruiting and hiring procedures required by federal contractors.
3. OFCCP announced that it will coordinate "evaluations of common policies and patterns" across multiple establishments. This means it

will effectively be auditing multiple establishments at the same time. If it identifies issues at one establishment, it may sweep other establishments into the remedy phase, potentially increasing the scope and extent of remediation remedies. Thus, contractors with more than one establishment undergoing review should be aware of this potential expansion—as it may greatly increase your exposure.

4. You must timely provide your AAPs and supporting documents during an audit. The agency has said that it will only provide extensions under “extraordinary circumstances,” listing reasons such as extended medical absences, deaths in the family, localized or company-specific disasters affecting records retrieval, and unexpected turnover or departure of key affirmative action officials. Given these very limited and extraordinary circumstances, you should ensure you maintain required documentation in an easily retrievable format. Where you have implemented new human resources information system (“HRIS”) or applicant tracking system (“ATS”) databases, you should be sure you can still access data from the previously used system.
5. Be prepared for broad audit parameters. You always need to be ready to submit up to two years of prior AAPs and employment data during compliance audits. But the directive goes further and provides explicit notice that OFCCP may request subsequent data created after the scheduling letter, expanding the scope of the audit. Further, if you do not have requested documents at the ready, there may be a presumption that the missing documents or information would have been unfavorable to you. This outlook adopts the spoliation approach we see utilized in litigation, but over a very broad spectrum of data.
6. Do not expect to be recognized in OFCCP’s Contractor Recognition Program, which used to recognize contractors with high-performing compliance programs.
7. The agency notes, however, that it is retaining the HIRE (Hiring Initiative to Reimagine Equity) program. This plan will see the agency engage a broad range of stakeholders to recognize innovative initiatives and evidence-based research to advance equity in recruiting and hiring.
8. You can expect OFCCP will no longer accept redacted employee information. This means you should be prepared to provide detailed “unredacted” contact information, including social security numbers, for current and former employees, applicants, and witnesses.
9. One of OFCCP’s key clarifications in the new directive is that an AAP

must comply with all regulatory requirements. OFCCP has now officially confirmed that it does not recognize a “minimally compliant” AAP as compliant at all if it fails to include all components required by the federal regulations. Consistent with this position, OFCCP will no longer permit a contractor to provide parts of its AAPs and then receive a 30-day extension for providing the statistical reports and other support data identified in the scheduling letter. To justify this change, OFCCP points to the new federal contractor portal certification (required by June 30) where contractors annually certify compliance that they have “developed and maintained complete AAP.” This change will require proactive preparation on your company’s part to ensure you get this right the first time.

10. Finally, the directive reminds contractors that non-management personnel do not have a right to have an attorney present in onsite interviews conducted by OFCCP representatives, although they may submit a written request for a union representative or personal legal counsel to attend. OFCCP will conduct a private interview with the non-management employee to determine if it believe there may be a conflict of interest or the person has been pressured to including the representative. OFCCP cautions that former management employees will generally not be permitted to have the company’s legal counsel present, although the agency acknowledges that it will comply with relevant contrary legal requirements.

CONCLUSION

Finally, the directive indicates that OFCCP will review its own agency policies and procedures on an annual basis, so you can expect further refinements in the years to come.