



2018 and (so far) 2019 Directives in Review

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Agenda

- What's going on at the OFCCP?
- 2018 and 2019 Directives in Review
- Q and A



What's going on at the OFCCP?



What's Going on at the OFCCP?

Changing Directors

- Patricia Shiusteps down as Director of the OFCCP in November, 2016
 - Had been focused on finding discrepancies in pay regardless of race/gender
 - Implemented reporting requirements for Protected Veterans and Individuals with Disabilities
 - Extended the previous 11 item scheduling letter to its current 22 items
 - Rescinded Active Case Management and replaced it with Active Case Enforcement, resulting in longer compliance evaluations and fewer audits
- Ondray Harris is appointed in December, 2017, over a year after Patricia left
 - Attempted to restore the relationship between the OFCCP and contracting community by releasing DIR 2018 – Use of PreDetermination Notice
 - Steps down in July, 2017less than 8 months at the agency



What's Going on at the OFCCP?

Changing Directors

- Craig Leen, Deputy Director under Harris, becomes Acting Director and is now Director (as of December 2018)
 - Heavily focused on promoting inclusion for Individuals with Disabilities
 - Responsible for the release of seven Directives in 2018 and three (so far) in FY 2019
 - Proponent for transparency and working with the contracting community by releasing “What Contractors Can Expect” document, emphasizing use of OFCCP help desk, and potentially reviving the ombudsman position to assist in resolving disputes between the OFCCP and contractors



What's Going on at the OFCCP?

Audit Updates – Corporate Scheduling Announcement Letter (CSAL)

- Sent on Sept 7, 2018
- 750 letters to 445 companies, 69 Corporate Management Compliance Evaluation (CMCE), and 66 FAAPS. Universities were not included
- Provides contractors with 45 day advanced courtesy notice prior to receiving scheduling letter
- Will grant a onetime 30-day extension for supporting data when AAP is provided timely
- Limited scheduling to no more than 10 establishments of any parent company
- No more than four establishments of a single contractor within a single district office



What's Going on at the OFCCP?

Audit Updates – Published [Methodology for Developing the Scheduling List](#)

- Outlines how a contractor is chosen for an audit:
 - OFCCP downloads contract information from archived files of the Federal Procurement Data System Next Generation (FPDSNG) for 2015, 2016, and 2017
 - Removed cancelled contracts, contracts associated to debarred companies, contracts that expired by January 1, 2017, contracts valued at less than \$50,000 and contracts awarded to a public entity
 - Identified an 'Available Pool' and removed establishments currently under review, completed a review in the last five years, currently under conciliation agreement, contracts expiring before March 31, 2018, or included in an earlier scheduling list
 - Removed contractors with fewer than 70 employees based on ~~FFIC~~ ~~FFIC~~



What's Going on at the OFCCP?

Audit Updates – Published Methodology for Developing the Scheduling List

- Outlines how a contractor is chosen for an audit:
 - Separate pools for each district office were created and scheduling list was capped at 1,000 establishments.
 - Rank ordered employee count from high to low within each district office to determine the number of establishments for each district office
 - Priority for establishments with higher employee count
 - No more than 10 establishments for each parent company
 - No district office having more than four establishments of the same company
 - No more than two functional units for each FAAP
 - No more than two CMCE, two FAAP units, and one university for review



2018 and 2019 Directives in Review



2018 and 2019 Directives in Review

DIR 201801: Use of PreDetermination Notice (PDN)

- Released on February 27, 2018
- If findings of discrimination are present during an audit review process, a PDN is sent to the audited site prior to a Notice of Violation (NOV) informing the site of findings
 - Provides contractor with an opportunity to submit additional information that would explain away the reasons for the CO's findings
 - Contractor has 15 days to respond once the PDN is received
 - [Sample Notice](#)



2018 and 2019 Directives in Review

DIR 201802: TRICARE Subcontract Enforcement Activities

- Released on May 18, 2018
- Amends the moratorium in Directive 201011 and extends the five year moratorium of AA obligations of TRICARE subcontractors for another two years
- Now also includes Veteran Affairs Health Benefits Program Providers
- If contractor has additional government contracts outside of TRICARE, they still need to meet the compliance requirements of E.O. 11246, VEVRAA, and Section 503



2018 and 2019 Directives in Review

DIR 201803: Exemption for Religion-Exercising Organizations

- Released on August 10, 2018
- Extends antidiscrimination protection to religion-exercising organizations and individuals
- Reminder for the federal government of its duty to protect religious exercise and not to impede it



2018 and 2019 Directives in Review

DIR 201804: Focused Reviews of Contractor Compliance with EO 11246, Section 503, and VEVRAA

- Released on August 10, 2018
- A portion of future scheduling lists will include focused reviews of each covered authorities enforced by the OFCPE.O. 11246, Section 503, and VEVRAA
- OFCCP would conduct comprehensive onsite reviews of the particular at issue authority
 - Section 503/VEVRAA: interview managers responsible for EEO and Section 503/VEVRAA compliance and employees affected by those policies; seek to evaluate hiring, compensation data, reasonable accommodation requests, and ensure IWD and PVs are not being discriminated against
 - E.O.11246: ensure compliance with EEO and-discrimination pertaining to E.O.



2018 and 2019 Directives in Review

DIR 201804: Focused Reviews of Contractor Compliance with EO 11246, Section 503, and VEVRAA (cont.)

- OFCCP staff is directed to ensure a portion of future audits include focused reviews
- Selected from the same methodology used to determine which contractors/subcontractors will be audited
- OFCCP staff will be developing staff training and contractor education and compliance assistance to provide guidance
 - Protocol for conducting the focused reviews will be made publicly available in the FAQs prior to next scheduling letter list being issued



2018 and 2019 Directives in Review

DIR 201805: Analysis of Contractor Compensation Practices During a Compliance Review

- Released on August 24, 2018
- Rescinds Directive 307
- Outlines standard procedures for reviewing compensation during an audit
- Identifies that OFCCP used statistics to establish prima facie proof of a pattern and practice of discrimination but will also consider non-statistical proof, such as anecdotal evidence
- Contractors are encouraged to provide compensation hierarchy and job structure during audit submission
 - OFCCP will design its analysis based on the structure provided
 - In the absence of compensation hierarchy or job structure information, OFCCP will conduct preliminary analysis using EEO categories or job groups



2018 and 2019 Directives in Review

DIR 201805: Analysis of Contractor Compensation Practices During a Compliance Review (cont.)

- Statistical methodology and modeling is outlined: use of Multiple Regression, will separately analyze base pay and total compensation, and review statistical outliers that result from inappropriate job groups
 - Outlines explanatory variables that will/can be used in the regression model
 - Identifies the variables that will be controlled for during the analysis
- *Findings, Transparency, and Conciliation*
 - Outlines how findings will be shared to the contractor and the provision of an opportunity to respond to the issues outlined in the PDN
 - During conciliation, OFCCP clarifies variable coding, statistical methods and findings, or answer appropriate questions about the process and assumptions used to calculate back pay



2018 and 2019 Directives in Review

DIR 201806: Contractor Recognition Program

- Released on August 24, 2018
- Recognizes contractors with high quality and high-performing compliance programs and initiatives
 - Highlights specific contractor programs and initiatives that are innovative, have achieved demonstrable results, and can be taught or incorporated into peer mentoring programs
- Hoping this program will be more beneficial than what was attempted before (OFCCP EVE Directive) and results will be measurable
- Not for contractors that solely comply with legal requirements but contractors considered ‘thought leaders among their peers for achieving diverse and inclusive workplaces’



2018 and 2019 Directives in Review

DIR 201807: AAP Verification Initiative

- Released on August 24, 2018
- Looks to expand compliance reach due to the OFCCP's limited ability to audit more contractors
 - Government Accountability Office (GAO) report indicates that 85% of audited contractors do not submit an AAP within the scheduling letter's 30-day timeframe
- Contractors would have their AAP certified on an annual basis
 - Non-certification would be an additional factor in the neutral selection methodology for determining who to audit
- Proposed public outreach and education campaign will be incorporated to assist contractors



2018 and 2019 Directives in Review

DIR 201808: Transparency in OFCCP Compliance Activities

- Released on September 19, 2018
- Ensures transparency and consistency in all stages of the compliance evaluation process so contractors know what to expect through “mutual dedication” between OFCCP and contractors
- Outlines responsibilities
 - Contractors:
 - Ensure non-discrimination and affirmative action
 - Timely submittal of AAP and supporting data during an audit
 - Provide OFCCP access to records and establishments in line with applicable law and contractual provisions



2018 and 2019 Directives in Review

DIR 201808: Transparency in OFCCP Compliance Activities (cont.)

- Outlines responsibilities
 - OFCCP:
 - Educate contractors about how to comply with requirements
 - Conduct high quality, consistent, and efficient compliance evaluations
 - Allow for open communication, cooperation, and minimize unnecessary burden
 - Do its best to resolve violations through conciliation
 - Pursue litigation when/if necessary



2018 and 2019 Directives in Review

DIR 201808: Transparency in OFCCP Compliance Activities (cont.)

- Highlights of policies and procedures include:
 - Scheduling letter will be issued 45 days after Corporate Scheduling Announcement Letter (CSAL) is sent
 - Published the scheduling methodology for selecting contractors for review
 - Compliance Officer (CO) will make contact with the contractor after 15 days of the scheduling letter being sent
 - Extension of AAP submittal will only be granted if core AAP is submitted on time
 - CO acknowledges submittal within five days of receipt



2018 and 2019 Directives in Review

DIR 201808: Transparency in OFCCP Compliance Activities (cont.)

- Highlights of policies and procedures include:
 - After AAP is submitted
 - CO reviews AAP and supporting data and to promptly notify the contractor of its acceptability and completeness
 - Supporting data will not be reviewed until complete and acceptable
 - Contractor has 15 days to respond if not acceptable and complete
 - Requests made outside of scheduling letter should only happen after the desk audit has been completed



2018 and 2019 Directives in Review

DIR 201808: Transparency in OFCCP Compliance Activities (cont.)

- Highlights of policies and procedures include:
 - After AAP is submitted
 - Close reviews with no indicators quickly – ideally within 45 days of receiving completed submission
 - Offsite review should occur as soon as onsite is complete. CO provides status updates to contractor at least every 30 days
 - Share with contractor the results of the analysis so contractors can replicate, share any non-statistical or anecdotal evidence to add context to the findings, share factors used to calculate back pay
 - Work with contractors to find remedies and make good faith efforts to ensure progress is being made during conciliation agreements



2018 and 2019 Directives in Review

DIR 201809: OFCCP Ombud Service

- Released September 19, 2018
- Creates ombudsman program in an effort to increase transparency and communication with agency stakeholders
- Ombudwill:
 - Suggest improvements to OFCCP based on stakeholder concerns and promote/facilitate resolution with district and regional offices
 - Act as a liaison between district and regional offices to resolve stakeholder issues
 - Refer stakeholders to the OFCCP Help Desk for compliance and technical assistance questions
 - Accept and review matters referred by the national office
 - Have the discretion to reject a referral in appropriate circumstances



2018 and 2019 Directives in Review

DIR 201809: OFCCP Ombud Service (cont.)

- Ombud will not:
 - Choose sides in a dispute
 - Provide legal advice, analysis, opinions, or conclusions
 - Conduct compliance evaluations, complaint investigations or participate in conciliation agreement negotiations
 - Have any role in conduct or discipline issues regarding OFCCP staff



2018 and 2019 Directives in Review

DIR 201901: Compliance Review Procedures

- Released on November 30, 2018
- Rescinds DIR 201011, Active Case Enforcement (ACE) Procedures
 - ACE decreased number of evaluations and increased overall processing time
- Ensures the OFCCP's compliance evaluation procedures follow what is outlined in the Federal Contracts Compliance Manual (FCCM)
- 24 month exemption of being audited again after date of closure or final progress report
- Reiterates that the CO should always try to work with the contractor to obtain proactive corrections to problems at the desk audit when it identifies non-material violations with no additional indicators of discrimination



2018 and 2019 Directives in Review

DIR 201902: Early Resolution Procedures (ERP)

- Released on November 30, 2018
- OFCCP once again speculates only a small percentage of contractors are audited on an annual basis
- Wishes to use new approaches to increase contractor compliance, reach more establishments, and remedy violations more quickly through early and efficient resolutions
- Work with contractors with multiple establishments to develop corporate-wide compliance
- OFCCP will use the ERP when a PDN, Notice of Violation (NOV), or Show Cause Notice (SCN) has not been issued



2018 and 2019 Directives in Review

DIR 201902: Early Resolution Procedures (ERP) (cont.)

- Early Resolution Procedures
 - Non-Material Violations:
 - For problems that can be remedied immediately during the desk audit and no indicators of potential discrimination are found, OFCCP will issue a closure letter with violation(s) listed and associated remedies included
 - Material Violations: Non-Discrimination
 - For contractors with multiple establishments, seek to resolve these issues (e.g., record keeping, applicant tracking, etc.) through Early Resolution Conciliation Agreement (ERCA)



2018 and 2019 Directives in Review

DIR 201902: Early Resolution Procedures (ERP) (cont.)

- Early Resolution Procedures
 - Material Violations: NonDiscrimination
 - ERCA requires contractors to review practices done at other establishments and implement corrective actions (if necessary) at those establishments.
 - Contractors will need to provide progress reports to show results of the analysis, findings, corrective actions, and provide OFCCP with supporting documentation
 - If amenable, the OFCCP will not schedule a new compliance evaluation at the audited establishment for five years, yet will be under progress reporting monitoring for part of that time period



2018 and 2019 Directives in Review

DIR 201902: Early Resolution Procedures (ERP) (cont.)

- Early Resolution Procedures
 - Material Violations: Discrimination
 - CO discusses findings with district and regional office management and seek to resolve through the ERP
 - District office schedules interviews with contractor and appropriate company employees, rejected applicants, and HR staff by phone or videoconference
 - Obtains additional information that may explain the results, identify affected individuals, and calculate monetary remedy
 - Provides contractors additional 14-calendar days to provide readily available and/or electronic information to OFCCP



2018 and 2019 Directives in Review

DIR 201902: Early Resolution Procedures (ERP) (cont.)

- Early Resolution Procedures
 - Material Violations: Discrimination
 - CO will refine the analysis with new information in 14-calendar days
 - If violation is still present after new analysis OFFCP and contractor will meet to discuss findings, proposed remedy, and corrective actions
 - OFCCP will seek make-whole relief for affected class members (e.g., back pay, job offers, etc.) by implementing corrective actions and remedies
 - Contractors with multiple establishments will have remaining establishments reviewed for similar violations during progress report monitoring



2018 and 2019 Directives in Review

DIR 201902: Early Resolution Procedures (ERP) (cont.)

- Early Resolution Procedures
 - Material Violations: Discrimination
 - OFCCP will monitor implementation of the ERCA, results, and ongoing compliance through semi-annual progress reports for a five-year period
 - If conciliation fails during the ERP, OFFCP will request for additional information needed to continue the compliance evaluation
 - Conciliation of ERCA will ideally last no more than 60-calendar days



2018 and 2019 Directives in Review

DIR 201903: Opinion Letters and Help Desk

- Released on November 30, 2018
- Help Desk currently allows stakeholders to ask questions by phone or email and provides technical assistance
 - Common questions are posted to the FAQ section on OFCCP's website
 - Received 2,664 inquiries during the first three quarters of FY 2018
- Would like to enhance the Help Desk by making certain questions and related responses available and searchable on the OFCCP's website
- OFCCP will begin accepting opinion letters from both employers and employees in line with how other agencies within the DOL have incorporated them



2018 and 2019 Directives in Review

Proposed Directive: Functional Affirmative Action Plans (FAAPs)

- Was open for public comment until November 13, 2018
- More encouraging of contractors who operate by function or business unit to complete FAAPs or a combination of FAAPs and established AAPs
- Contractors must still submit a written request to the OFCCP Director and supply supporting data in order to obtain a FAAP agreement
- Extends the FAAP agreement from three years to five
- FAAP audit is exempt from additional review for 36 months (previously 24 months)
- Modification notice must be submitted if changes to the organizational structure or addition/removal of FAAPs are made (instead of agreements being modified annually)



Questions?