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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Victoria Prussen Spears

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Reviewing OFCCP Directives: Potential Signs of Greater Transparency and Cooperation with Federal Contractors?

*By Patricia R. Ambrose, Michael D. McGill, Ogechi A. Muotoh,
George W. Ingham, and Adilene Rosales**

This article provides an overview of the Office of Federal Contract Compliance Programs' recent directives and what they could mean for contractors moving forward.

The Office of Federal Contract Compliance Programs (“OFCCP”)—the Department of Labor office responsible for overseeing federal contractors’ and subcontractors’ equal employment opportunity and affirmative action obligations—was very active in 2018. Led by new Director Craig Leen, who served as acting director of the agency until December 2018, OFCCP issued 12 new directives. Many of these directives suggest that OFCCP is moving in a direction intended to improve transparency, efficiency, and cooperation with contractors. Of course, it remains to be seen how OFCCP will implement the directives in practice.

This article provides an overview of OFCCP’s 2018 directives and what they could mean for contractors moving forward. It begins by describing OFCCP’s highly publicized directive regarding OFCCP’s compensation evaluation process. The article also describes some of the other key directives aimed at enhancing transparency, efficiency, and cooperation with contractors, including directives relating to the issuance of opinion letters and establishment of a help desk, establishment of an ombud service, and the requirement that predetermination notices be issued when there are preliminary findings of employment discrimination. The article concludes by summarizing some of the notable directives issued by OFCCP last year, including the extension of the TRICARE moratorium, and OFCCP’s views on dealing with contractors’ religious beliefs.

Contractors should pay careful attention to the recent directives, which may provide greater latitude to push back during audits, and greater opportunities to take proactive steps before audits to enhance compliance and achieve better results if audited.

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OFCCP'S NEW COMPENSATION DIRECTIVE SAYS IT AIMS TO INCREASE TRANSPARENCY AND CONTRACTOR COOPERATION IN COMPENSATION REVIEWS

On August 24, 2018, OFCCP issued Directive (“DIR”) 2018-05,¹ which describes how OFCCP intends to examine compensation data during audits of federal contractors and subcontractors (each hereinafter referred to collectively as “contractors”). In DIR 2018-05, OFCCP attempts to provide contractors with clarity and transparency regarding its compensation evaluation process while increasing the efficiency of such evaluations. DIR 2018-05 applies to all OFCCP audits scheduled on or after August 24, 2018. OFCCP has also published a list of frequently asked questions (“FAQs”).²

Background on Pay Discrimination

It is illegal for contractors and non-contractors alike to engage in pay discrimination. Pay discrimination can occur under a theory of disparate treatment (i.e., intentional discrimination on either a group or individual basis) or disparate impact (i.e., a facially neutral policy or practice that unintentionally results in compensation disparities among groups).

Executive Order 11246 (“EO 11246”), Section 503 of the Rehabilitation Act (“Section 503”), and the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”) prohibit contractors from engaging in pay discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, veteran status, or disability status. Further, contractors and non-contractors are prohibited from engaging in pay discrimination under a variety of other laws, including Title VII of the Civil Rights Act of 1964, the Equal Pay Act, and state and local laws. Some of these laws go beyond merely prohibiting pay discrimination. For example, some states and localities have passed laws that prohibit employers from inquiring into or considering a job applicant’s prior compensation history. Pay equity and issues such as a gender pay gap have also gained recent focus from lawmakers and the public as a result of the #MeToo movement. All in all, the issue of pay equity is of particular importance for all employers, both in terms of complying with the law and in attracting and retaining top talent. Pay equity, however, is especially important for contractors, who are subject to proactive OFCCP audits of their compensation practices on the basis of gender, race, and ethnicity, and who are also required to perform self-audits of their compensation systems.³

¹ <https://www.dol.gov/ofccp/regs/compliance/directives/Dir2018-05-ESQA508c.pdf>.

² https://www.dol.gov/ofccp/regs/compliance/faqs/CompGuidance_faqs.htm.

³ See 41 C.F.R. § 60-2.17(b)(3) (requiring contractor evaluation of its compensation system).

OFCCP states in DIR 2018-05 that enforcing the legal prohibition on pay discrimination is a “key OFCCP priority.” During an audit by OFCCP, contractors must provide individual-level compensation data on the basis of gender, race, and ethnicity, which OFCCP will statistically analyze to search for evidence of compensation discrimination. If OFCCP detects compensation discrimination, the consequences can include OFCCP demanding that a contractor enter into a conciliation agreement to:

- Pay back pay and benefits.
- Make salary adjustments.
- Give promotions or job placements.

In cases where a contractor and OFCCP are unable to agree on a conciliation agreement, OFCCP may initiate formal proceedings to pursue significant remedies, including cancellation of federal contracts and debarment from entering into future federal contracts for a period of time.

OFCCP states that its priority is to identify and resolve pay disparities that involve systemic disparate treatment or disparate impact—rather than identifying and resolving individual compensation disparities. In conducting its analysis, OFCCP identifies employees in different protected groups that are sufficiently similar and compares the manner in which they are compensated to determine whether this suggests that differences in compensation are the product of discrimination.

Key Changes Made By DIR 2018-05

DIR 2018-05 does not change the law of pay discrimination, but instead describes how OFCCP intends to evaluate contractor pay practices moving forward. DIR 2018-05 rescinds DIR 2013-03, also known as “Directive 307.” Directive 307 had left OFCCP largely unconstrained in conducting compensation evaluations on a case-by-case basis. As a result, Directive 307 was criticized for providing contractors little guidance regarding how OFCCP approached compensation evaluations. For example, under Directive 307, OFCCP sometimes informed contractors that there were “indicators” of pay discrimination, but would not provide sufficient information for the contractors to understand or rebut these indicators.

DIR 2018-05 attempts to provide greater transparency to contractors. Specifically, it explains that OFCCP will undertake the following key steps in evaluating contractor pay practices:

to determine “whether there are gender-, race-, or ethnicity-based disparities”), https://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&SID=2dca13c9b7c12c21e22f7b5fdb49112&rgn=div5&view=text&node=41%3A1.2.3.1.2&idno=41&se41.1.60_62_117.

- When a contractor is scheduled for a compliance evaluation, OFCCP will request certain compensation data set forth in OFCCP’s Scheduling Letter as part of its desk audit. OFCCP states that the compliance officer’s analysis of the contractor’s compensation data will not begin until the submission is complete and acceptable, and that the compliance officer must work with the contractor to obtain any missing information.
- OFCCP will make comparisons of similarly situated employees by developing “pay analysis groupings” (“PAGs”) of comparable employees and then statistically controlling for differences among members of the PAG and individual employee characteristics. Significantly, and in a departure from Directive 307, OFCCP states that in an effort to “mirror a contractor’s compensation system . . . [i]f a contractor provides its compensation hierarchy and job structure . . . OFCCP will attempt to design its analysis based on that structure,” so long as:
 - The structure is “reasonable.”
 - OFCCP can “verify the structure as reflected in the contractor compensation policies.”
 - “The analytical groupings are of a sufficient size to conduct a meaningful systemic statistical analysis.” If a contractor does not provide information about its own compensation system, DIR 2018-05 states that OFCCP “will conduct its preliminary desk audit analysis using either EEO-1 or AAP job groups, provided they are reasonable, meet the requirements of 41 C.F.R. § 60-2.12, and are of a sufficient size to conduct a meaningful statistical analysis.” OFCCP’s FAQs explain that there is no bright-line rule for what is a sufficient size, and provide more details regarding how OFCCP evaluates the size of a group.
- If a desk audit indicates further review of a contractor’s compensation practices is needed, OFCCP will seek additional information to understand the compensation system, and may alter the PAGs as needed. OFCCP must specifically notify the contractor in writing of “any preliminary compensation disparities that warrant further information requests or onsite review.”
- If OFCCP issues a Predetermination Notice (“PDN”) to indicate preliminary findings of employment discrimination, it must provide “individual-level data necessary for the contractor to replicate the PAGs and regression results,” and to give the contractor an opportunity to provide a response. OFCCP’s national office will review such responses.

Likewise, OFCCP must provide similar information for a Notice of Violation for discrimination findings if such findings are different from the PDN.

- OFCCP states that while its primary method of determining whether a violation exists is statistics, it will also seek nonstatistical evidence, including anecdotal evidence drawn from reviews of documents and interviews of managers and workers. Notably, OFCCP states that it is “less likely to pursue a matter where the statistical data are not corroborated by non-statistical evidence of discrimination unless the statistical evidence is exceptionally strong.”
- DIR 2018-05 also describes aspects of OFCCP’s statistical methodology that it will generally follow in a compensation analysis. Although the description of the methodology is not entirely clear, contractors conducting their own pay equity audits should consider consulting this methodology in structuring self-audits.
- Although DIR 2018-05 contains a number of potentially positive aspects, it also raises concerns regarding the manner in which OFCCP states it will conduct its statistical analysis. As described above, if a contractor does not submit pay analysis groups, OFCCP may run the desk audit by either EEO-1 or AAP job group; and OFCCP will control for job title and other structural variables only in job titles with five or more employees.

Key Takeaways

It is too early to tell whether DIR 2018-05 will significantly improve the audit process for contractors. Ultimately, the impact of DIR 2018-05 will be determined by how OFCCP implements it in compliance evaluations.

Contractors should consider taking the following steps in light of DIR 2018-05 and developments in the law and public opinion relating to pay equity:

- Regularly audit compensation policies and practices. Consider conducting pay equity audits under attorney-client privilege, with the assistance of experienced counsel and a statistician. In conducting these audits, consider attempting to mirror (to the extent practicable) the statistical methodology described by OFCCP.
- Document compensation policies and practices in writing and follow them consistently. If there are deviations from these policies for a legitimate reason, such deviation should be documented. Be prepared to provide this documentation to OFCCP so that it can structure PAGs

consistent with your pay structure rather than defaulting to EEO-1 or AAP job groups or PAGES constructed by OFCCP.

- Consider how performance reviews, job descriptions, and other factors play into compensation. Consider updating job descriptions if they do not accurately describe the duties, qualifications, and other aspects of the position. Consider whether performance reviews should be quantified.
- Consider how state and local laws may impact your obligations in the area of pay equity.

OFCCP ISSUES NEW DIRECTIVES AIMED AT ENHANCING TRANSPARENCY, EFFICIENCY, AND COOPERATION

Below is a summary of the directives and guidance issued by OFCCP in 2018 focused on the themes of transparency, efficiency, and cooperation and the key takeaways for contractors:

- *DIR 2019-01, Compliance review procedures* (rescinds DIR 2011-01): OFCCP has rescinded its Active Case Enforcement procedures, which required full OFCCP desk audits under all three legal authorities: EO 11246, Section 503, and VEVRAA. Going forward, compliance reviews must be conducted by OFCCP staff in accordance with the OFCCP Federal Contractor Compliance Manual (“FCCM”) and its supplemental guidance. Additionally, the directive clarifies that any contractor establishment that OFCCP audits will not be audited again for 24 months after closure of a compliance evaluation or OFCCP’s acceptance of a final progress report. Also, OFCCP will continue to publish its scheduling methodology in its Freedom of Information Act Library. Finally, the scope of an onsite review is limited to “the nature or scope of the indicators or concerns that triggered the onsite review.”
- *DIR 2019-02, Early resolution procedures* (“ERPs”): OFCCP has established new ERPs, which allow OFCCP to resolve violations more quickly without going through the process of issuing a Predetermination Notice or Notice of Violation. Specifically, the directive establishes procedures for investigating and resolving three types of audit violations for early resolution:
 - *Nonmaterial, nondiscrimination violation*—For minor violations that can be remedied during the desk audit and there are no indicators of potential discrimination, OFCCP staff are directed to work with the contractor to resolve the deficiency and once resolved, issue a closure letter.
 - *Material, nondiscrimination violation*—For material nondiscrimi-

nation violations, such as the failure to implement audit and reporting systems, OFCCP will attempt to resolve the deficiencies through a voluntary Early Resolution Conciliation Agreement with Company-Wide Corrective Action (“ERCA”). The ERCA will require the contractor to investigate if the violations exist at all of its establishments (or a negotiated subset) and ensure that the deficiencies are corrected. During the five-year period, the establishment will be under progress report monitoring. In exchange for agreeing to the ERCA terms, OFCCP will not audit the contractor’s establishment under review for five years, though all other establishments will be open to review.

- *Material, discrimination violations*—For material violations that involve discrimination by a contractor with multiple establishments, OFCCP will seek resolution through an ERCA. OFCCP has established a 60-day process for it to collect data from the contractor, refine its analysis, and engage in conciliation with the contractor including entering into an ERCA. Under the ERCA, OFCCP would monitor compliance and require progress reporting for a five-year period, during which all establishments covered by the ERCA are exempt from further compliance reviews.
- *DIR 2019-03, Opinion letters and help desks*: Under this directive, OFCCP will:
 - Develop a public and searchable help desk FAQ repository.
 - Issue formal opinion letters. These initiatives are aimed to “ensure that contractors have practical and timely compliance assistance to understand and fully meet equal employment opportunity obligations.” OFCCP will accept requests for Opinion Letters from both employers and employees. In the opinion letters, OFCCP will be able to provide fact-specific guidance on the application of regulations. Significantly, OFCCP will now take into consideration when conducting compliance evaluations if a contractor has “acted consistently and in good faith with an opinion letter, directive, FAQ, help desk answer, or other OFCCP guidance.”
- *DIR 2018-08, Transparency in OFCCP compliance activities*: This directive emphasizes that “transparency should guide OFCCP staff during every stage of a compliance evaluation, from beginning to end,” and sets out OFCCP’s expectations for contractors during compliance

evaluations by describing what they must submit and when. For example:

- *Delayed scheduling*: OFCCP will delay scheduling of a compliance evaluation for 45 days after it issues Corporate Scheduling Announcement Letters (“CSAL”) in order to provide contractors more time to prepare. (CSALs are sent prior to sending scheduling letters.)
- *30-day extensions*: Contractors may receive a one-time 30-day extension on the deadline for providing supporting data if the request is made within 30 days of receiving the Scheduling Letter and the contractor timely submits its Affirmative Action plans (“AAPs”). If the contractor subsequently fails to meet the extended deadlines for submitting its AAPs and supporting data, OFCCP will immediately issue a procedural Notice to Show Cause, triggering an additional 30 days for the contractor to provide the AAPs and supporting data in response to the notice.
- *Efficient closures of desk audits*: Compliance officers are required to begin desk audits promptly, ideally within five days upon receiving the contractor’s AAP and/or support data and work to close reviews quickly (ideally within 45 days) when there are no indicators of discrimination or other violations.
- *15 days to address issues with initial submissions*: During the desk audit, compliance officers must promptly notify the contractor of any deficiencies in its desk audit submissions and allow the contractor 15 days to provide complete submissions.
- *Limitations on additional data requests*: During the desk audit, compliance officers must limit their requests for follow-up information to the data requested by the Scheduling Letter. The compliance officer can request information that goes beyond the Scheduling Letter only after the completion of a desk audit. Moreover, such requests must be reasonably tailored to the concern and request only information needed for OFCCP to “refine indicators and prepare for a potential onsite visit.”
- *Onsite confirmation letters*: Onsite confirmation letters must include a high-level summary of any preliminary indicators of discrimination. A sample onsite confirmation letter is attached to the directive.
- *Conciliation efforts*: OFCCP anticipates a collaborative approach

with contractors including the mutual sharing of information and source data and working together to find “innovative remedies” to ensure contractor compliance.

- *DIR 2018-06, Contractor recognition program:* OFCCP will develop a Contractor Recognition Program to recognize contractors with “high-quality and high-performing compliance programs and initiatives.” Specifically, OFCCP plans to acknowledge those contractors that have implemented model practices, contractor mentoring programs, and created other initiatives to encourage collaboration and feedback with OFCCP.
- *DIR 2018-09, OFCCP ombud service:* OFCCP will implement a new ombud service in its national office to facilitate the “fair and equitable resolution” of concerns raised by stakeholders including contractors, employees, and industry groups. The ombud will act as a liaison to resolve certain issues after stakeholders have exhausted district and regional office channels. Additionally, the ombud will listen to feedback of stakeholders and make recommendations for improvement of OFCCP services. The ombud will not handle routine compliance and technical assistance issues or give legal advice.
- *DIR 2018-01, Use of PDNs:* This directive establishes a uniform protocol of the use of PDNs in discrimination cases, both individual and systematic. OFCCP uses PDN letters to inform contractors of preliminary findings of employment discrimination. Regional OFCCP offices will no longer have discretion as to whether to issue PDNs. Now, OFCCP staff must first issue a PDN, in the form a letter to the contractor, explaining its proposed discrimination findings before it issues a final Notice of Violation, and provide the contractor 15 calendar days to rebut OFCCP’s proposed findings.

OTHER NOTABLE OFCCP DIRECTIVES

In addition to its directives focused on the themes of transparency, efficiency, and cooperation, OFCCP has issued a handful of other directives that contractors should review.

- *Moratorium extension on TRICARE subcontractor enforcement activities.* DIR 2018-02 extends the current moratorium on the enforcement of TRICARE subcontractors’ affirmative action obligations for another two years—until May 7, 2021. This moratorium applies to all health care entities that participate in TRICARE as subcontractors under a prime contract between the Department of Defense TRICARE Management Activity and one of the prime managed-care contractors. For

more information, see the original moratorium (DIR 2014-01).

- *204(c) Religious exemption.* DIR 2018-03 instructs OFCCP staff to act in a neutral and tolerant manner toward religious beliefs and to be sensitive to the religious practices of contractors. OFCCP staff are prohibited from acting “in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices” and from conditioning the availability of opportunities on a contractor’s willingness to surrender its religious character. In addition, OFCCP must comply with the Religious Freedom Restoration Act (“RFRA”) in promulgating regulations, permit faith-based organizations “to compete on a level playing field for” government contracts, and respect the right of individuals and institutions “to practice their faith without fear of discrimination or retaliation” by the government. It is unclear whether the application of DIR 2018-03 will conflict with OFCCP’s preexisting regulations and policies regarding gender identity and sexual orientation, and if such conflicts arise, how the regulators will deal with them. One footnote suggests that it supersedes OFCCP’s FAQs on gender identity and sexual orientation, but at the same time, the directive does not purport to override regulations on these subjects.
- *Focused Reviews of EO 11246, Section 503, and VEVRAA.* DIR 2018-04 sets forth OFCCP’s plan to implement so-called “focused reviews” of contractor compliance of the laws OFCCP enforces. While the details of this plan are unclear at this time, the directive indicates that a portion of future contractor compliance reviews will concentrate on either EO 11246, Section 503, or VEVRAA, and involve an on-site review. OFCCP will develop a standard protocol for conducting the focused reviews, to be released in its FAQs prior to the next scheduling list being issued.
- *Affirmative Action program verification initiative.* DIR 2018-07 sets forth OFCCP’s plans to implement a new verification process that will require contractors to certify annually that they are in compliance with AAP requirements. Failure to annually certify will increase the likelihood of an audit, among other things. The directive only announces the establishment of a verification program at some point in the future. OFCCP has not indicated exactly what the program will entail or when it aims to implement it. The directive mentions that when the program is developed, it will prepare a “public outreach and education campaign.”
- *Functional Affirmative Action programs (“FAAPs”).* OFCCP is currently in the process of promulgating a directive to establish policies and procedures for FAAPs. A FAAP is an alternative to the normal

procedure of establishing an AAP for each contractor “establishment,” and instead allows a covered federal contractor or subcontractor “to organize its AAP to reflect how the company operates functionally and not where its facilities and people are physically located.”

It has typically been burdensome and time-consuming for contractors to apply and be approved for a FAAP. However, OFCCP’s proposed directive may indicate that it will be easier and more attractive in the future to pursue a FAAP.

CONCLUSION

The year 2018 was very busy for OFCCP, and more directives and information are expected from them this year. OFCCP is taking an approach that suggests a greater desire to be transparent and cooperate with contractors, though again, it remains to be seen how OFCCP will behave in practice. Nonetheless, contractors should take advantage of this opportunity by considering some of the following actions:

- Review compensation policies and practices in light of the new compensation directive.
- Request additional information from OFCCP in the context of audits, and request extensions when needed.
- Seek guidance from OFCCP when encountering challenging compliance questions via OFCCP’s opinion letters and help desk resources, or seek assistance from the OFCCP ombudservice.

As always, contractors should ensure that they are satisfying the basic requirements of OFCCP. Given OFCCP’s plans to implement a verification process requiring annual certification of compliance with AAP requirements, it is even more important for contractors to ensure that they have appropriate AAPs in place if required.