



Feds Set to Ratchet Up Pressure With New Audit and Conciliation Procedures for Federal Contractors: What You Need to Do

Insights

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The federal agency overseeing affirmative action and federal contract compliance is about to adjust the way it audits federal contractors and conciliates disputes over alleged discriminatory practices – and it might mean a big change for your business practices. The Office of Federal Contract Compliance Programs' (OFCCP's) final rule released on August 4 removes much of the clarity and transparency that contractors have enjoyed the past several years when it comes to pre-enforcement notices and conciliation procedures, generally making things more complicated for the employer community. There isn't much time left before the rule becomes effective on September 5 – meaning now is the time for federal contractors to understand what is changing and what it means for them.

What Changed?

Federal contractors may recall the OFCCP issuing a helpful rule in December 2020 that heightened the standards the agency needed to apply when going down the path of investigating employers. Titled “Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination,” it formalized the process the agency needed to use before issuing a pre-determination notice (PDN) and any subsequent notice of violation (NOV).

Specifically, the 2020 rule imposed a heightened evidentiary requirement before the agency could issue a PDN, introducing certainty, efficiency, and “transparency into the process.

- The agency was required to disclose “quantitative” and “qualitative” evidence to support its preliminary findings of potential discrimination.
- This meant that contractors were provided with the evidence OFCCP gathered — testimony, documents, and data analyses — and upon which the agency relied in reaching its preliminary findings.
- This evidence had to be disclosed in “sufficient detail” so that a contractor could investigate and respond – and contractors had 30 days to respond after the PDN was approved by the OFCCP Director and issued.

While the new rule about to take effect still requires the OFCCP to issue PDNs and NOVs, the specific evidentiary requirements placed on the agency by that 2020 rule will be eliminated. *

- Instead, OFCCP needs only describe its “preliminary findings of potential discrimination” to the contractor.
- Further, the time for a contractor to respond to a PDN has been reduced from 30 days to 15 days. OFCCP has stated this time period can be extended for “good cause,” such as extended medical absences of key personnel, localized or company-specific disasters affecting records retrieval, unexpected military service absence of key personnel, or unexpected departure of key affirmative action personnel.

The new rule also clarifies that additional violations discovered after a PDN is issued may be included in a Notice of Violation or Show Cause Notice without the agency having to amend the prior PDN or issue a new PDN.

Why Has the Rule Changed?

In an e-mail from the OFCCP announcing the new rule, the agency said the 2020 rule “imposed inflexible evidentiary requirements early in the agency’s compliance evaluation process and attempted to codify complex definitions for ‘qualitative’ and ‘quantitative’ evidence and other standards. These evidentiary standards and definitions hindered OFCCP’s ability to pursue cases with merit and diverted agency and contractor resources away from addressing discrimination.”

The thrust of OFCCP’s rationale is that the evidentiary standards imposed on the agency under the 2020 rule resulted not in more compliance, but in time-consuming disputes with contractors over the application of the evidentiary requirements. OFCCP argued that the rigid thresholds that the agency had to meet before issuing a PDN were greater than those required under other Title VII cases and resulted in an inefficient and inflexible process.

What Does this Mean for Federal Contractors?

While the new rule may result in more perceived efficiency and flexibility for OFCCP, it creates problems for federal contractors.

- The evidentiary requirements placed on OFCCP under the 2020 rule allowed federal contractors to receive the specific information the agency relied upon in issuing a PDN. This transparency allowed contractors the ability to investigate the data and documents and not only prepare a thorough response to a PDN, but also better understand situations that could result in liability.
- Further, the reduced time to respond to a PDN will pose significant constraints on federal contractors. Starting September 5, a federal contractor may receive a PDN with little description of the indicators relied upon by the agency. While OFCCP has been required to identify with more

specificity the evidence that supported the agency's findings over the past few years, that will no longer be the case.

- No longer will federal contractors have a sufficient opportunity to review and investigate the grounds and prepare a response more efficiently. Instead, federal contractors will spend more time trying to investigate and find evidentiary support to understand OFCCP's basis for its finding – and do so on a shorter deadline.

Finally, by adding that OFCCP need not amend a PDN or issue a new PDN for subsequently identified information, federal contractors will be deprived of the proper opportunity to respond. You may only find out about an alleged violation in these situations once the agency issues a Notice of Violation.

What Should Federal Contractors Do?

Contractors currently under audit and those to be audited in the future should be aware of these new procedures from OFCCP. You can expect less transparency from the agency in terms of its findings during the audit. That means you should be prepared to quickly defend your organization if and when OFCCP finds preliminary indicators of potential discrimination. You should also coordinate with your legal counsel for support during compliance audits.

Conclusion

Fisher Phillips will continue to monitor any further developments in this area as they occur, so you should ensure you are subscribed to [Fisher Phillips' Insight System](#) to gather the most up-to-date information. If you have any questions about how this development impacts your organization, please consult your Fisher Phillips attorney, the authors of this Insight, or a member of Fisher Phillips' [Affirmative Action and Federal Contract Compliance Practice Group](#).

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