

HERE'S WHAT FEDERAL CONTRACTORS NEED TO KNOW ABOUT THE NEW EXPEDITED CONCILIATION PROCEDURES

Insights
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The federal agency overseeing affirmative action and federal contract compliance recently updated its procedures for expedited conciliation when alleged discriminatory practices are found during compliance evaluations – which means federal contractors' compliance strategies may need to be revised. Specifically, the Office of Federal Contract Compliance Programs (OFCCP) issued a directive on July 26 that aims to align the expedited conciliation process with a final rule it issued last year. OFCCP primarily assesses federal contractor compliance by conducting compliance evaluations, but it's only able to cover a fraction of covered contractors. The new procedures are meant to give contractors and the agency flexibility when resolving violations, according to the agency, but they also can make things more complicated for the contractor community. Here's what you need to know about the new directive and how it aligns with last year's final rule on pre-enforcement notice and conciliation procedures.

How Did We Get Here?

The Prior Rule: Federal contractors may recall 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. 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,

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- 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 — such as 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.

The Current Rule: After a change in administration, the agency issued a new rule that took effect in August 2023. This current rule still requires OFCCP to issue PDNs and NOV, but the specific evidentiary requirements placed on the agency by the 2020 rule were 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, the unexpected military service absence of key personnel, or the unexpected departure of key affirmative action personnel.

The 2023 rule also clarifies that additional violations discovered after a PDN is issued may be included in a NOV or Show Cause Notice without the agency having to amend the prior PDN or issue a new PDN.

The thrust of OFCCP’s rationale for the change was 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.

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What's New?

OFCCP has said it wants to remedy violations quicker than it has in the past. Thus, the August 2023 rule retained the expedited conciliation option from the prior rule and clarified OFCCP's role in the expedited conciliation process. Now, the most recent [July 26 directive](#) updates related procedures to align with the August 2023 rule. Key aspects of the expedited conciliation process include:

For Non-Discrimination Violations

- After a desk audit, **OFCCP may seek to resolve non-discrimination violations through an Expedited Resolution Conciliation Agreement (ERCA)** and may seek an enterprise-wide resolution if the contractor has multiple establishments (e., an agreement that includes all establishments). Non-discrimination violations include problems with recordkeeping, applicant tracking, failure to implement audit and reporting systems, and failure to conduct a self-analysis.
- If the contractor and OFCCP reach an agreement, **OFCCP will not schedule a new compliance evaluation for the covered establishments for a minimum of three years**, but they will have to comply with progress report monitoring during that time.
- **The contractor may need to review all or some of its remaining establishments for similar violations** during the progress report monitoring period and potentially implement corrective actions at those establishments.

For Discrimination Violations

OFCCP may also offer expedited conciliation to resolve **discrimination violations** and will generally follow these steps:

- Within 14 calendar days of a desk audit, **the investigator generally must discuss the findings and potential for expedited conciliation** with the agency's district and regional office management.
- **The district office may conduct an additional investigation** before offering expedited conciliation, which may include interviews and additional requests for information. If so, the contractor will generally be given 14 calendar days to provide the additional information.

- **Next, the investigator will complete a refined analyses** within 14 calendar days. If potential discrimination is found, the contractor may be offered expedited conciliation.
- **If the contractor agrees to expedited conciliation, the** parties have 14 calendar days to discuss OFCCP's findings, proposed remedy, and corrective actions. This presents an opportunity to conciliate possible violations before proceeding with the compliance evaluation and an on-site investigation. Notably, however, OFCCP may continue compliance evaluations during the expedited conciliation process.
- **The expedited conciliation is expected to last no more than 60 calendar days** from the initial meeting with the contractor, as long as the parties are making substantial progress towards an agreement. The agency says examples of "substantial progress" include situations where the contractor submits all documentation requested, OFCCP has conducted interviews, and/or OFCCP and the contractor have exchanged case valuations.

What Should Federal Contractors Do?

- **Review New Procedures:** Contractors currently under audit and those to be audited in the future should be aware of these new procedures from OFCCP.
- **Prepare Defenses.** 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.
- **Consult with Legal Counsel.** You should coordinate with your legal counsel for support during compliance audits. It is important that appropriate defenses are raised to alleged violations, especially those related to alleged discrimination, before agreeing to any resolution through a three-year conciliation agreement.

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.