



# OFCCP Issues 2 Directives Affecting Federal Contract Compliance Reviews

Insights

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A focus on equal employment opportunity and the protection of religious freedom will become part of future reviews for federal supply and service contractors' compliance with regulations under two policy directives issued by the Office of Federal Compliance Programs (OFCCP) on August 10. One directive adds to the agency's enforcement activity reviews, focusing on federal contractors' compliance with workforce antidiscrimination laws. The other requires OFCCP personnel to follow, in all their activities, recent court rulings and White House executive orders protecting the rights of organizations in the exercise of religion.

## Review Of Compliance With Antidiscrimination Laws

The first directive (2018-04) provides that, as part of a comprehensive workplace initiative, the OFCCP will add "focused reviews" to its scheduling list of compliance reviews starting in fiscal year 2019 (beginning October 1, 2018). The comprehensive, on-site reviews will focus on three laws that OFCCP enforces: Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRA).

Together, these laws prohibit federal contractors and subcontractors from discriminating against employees on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, and status as a qualified individual with a disability or protected veteran. In addition to prohibiting discrimination, these laws require contractors and subcontractors to take affirmative steps to ensure equal opportunity in employment. [Executive Order 13665](#), issued by President Barack Obama under the authority of Executive Order 11246, also protects applicants and employees who inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

As a result of the directive, OFCCP staff is directed to establish a standard protocol for these focused reviews. The review will focus solely on Executive Order 11246, Section 503, or VEVRA compliance. The compliance officer will review contractor policies and practices relating to the particular law chosen for the review and interview responsible managers and affected employees. The compliance officer will also evaluate hiring and compensation data and the handling of accommodation requests.

## Protection For Organizations In The Practice Of Religion

The second directive (2018-03) requires OFCCP personnel to take into account recent U.S. Supreme Court decisions and executive orders that have addressed the broad freedoms and antidiscrimination protections that must be afforded to religion-exercising organizations and individuals.

Both the U.S. Supreme Court and President Donald Trump have acted in recent years to protect the religious freedom of business owners and organizations. The Supreme Court has ruled that the government violates the Free Exercise Clause when its decisions are based on hostility to religion or a religious viewpoint (*Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*) and when it conditions a generally available public benefit on an entity's giving up its religious character, unless that condition withstands the strictest scrutiny (*Trinity Lutheran Church of Columbia, Inc. v. Comer*). The Court has also held that the Religious Freedom Restoration Act applies to federal regulation of the activities of for-profit closely held corporations (*Burwell v. Hobby Lobby Stores, Inc.*).

The president's recent executive orders declare that the executive branch wants faith-based and community organizations to compete on a level playing field for grants, contracts, programs and other federal opportunities. They have also made clear that the federal government will vigorously enforce protections for religious freedom (E.O. 13831, 13798).

Quoting key language from the Court's decisions and the executive orders, the OFCCP directive instructs staff to bear in mind that:

- They “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices” and must “proceed in a manner neutral toward and tolerant of ... religious beliefs;”
- They cannot “condition the availability of [opportunities] upon a recipient's willingness to surrender his [or her] religiously impelled status;”
- “A federal regulation's restriction on the activities of a for-profit closely held corporation must comply with [the Religious Freedom Restoration Act];”
- They must permit “faith-based and community organizations, to the fullest opportunity permitted by law, to compete on a level playing field for ... [Federal] contracts;” and
- They must respect the right of “religious people and institutions ... to practice their faith without fear of discrimination or retaliation by the Federal Government.”

## **What's Next?**

The first directive (regarding compliance reviews) requires OFCCP to publish answers to frequently asked questions prior to implementation. It also requires the agency to provide staff and contractor education as to the focused reviews. Federal contractors and subcontractors should watch for these materials and periodically self-audit their compliance with these antidiscrimination laws.

As for the second directive (regarding religious freedoms), organizations are already protected against discrimination claims by language in Executive Order 11246. This allows a religious organization to employ individuals of a particular religion to perform work connected with the organization's activities. The new directive further assures organizations that they will not be discriminated against in federal government contracting because of their religious nature.

For more information about these directives or how they may affect your business, contact any member of our [Affirmative Action and Federal Contract Compliance Practice Group](#) or your Fisher Phillips attorney.

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*This Legal Alert provides an overview of specific federal directives. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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