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OFCCP Issues First Directive Under Trump Administration

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Since the beginning of the Trump Administration, federal contractors have been waiting to see what changes the new administration would make to the Office of Federal Contract Compliance Programs ("OFCCP"). Thus far, the greatest change has been more style than substance, with OFCCP officials expressing a desire to have a better relationship with the government contractor community. Late last month, however, OFCCP issued its first new directive since President Trump took office. In announcing the change, OFCCP stated that the new policy is part of a broader effort to "increase transparency of preliminary findings with federal contractors, and to achieve consistency across regional and district offices."

OFCCP's new Directive 2018-01 (the "Directive") requires OFCCP offices to adopt a uniform approach to Predetermination Notices ("PDNs") in compliance evaluations. Pursuant to the new PDN, published with the Directive, OFCCP will: (1) inform the contractor of the agency's preliminary findings of employment discrimination; and (2) provide the contractor with 15 days to rebut OFCCP's preliminary findings.

Prior to the Directive, OFCCP reserved use of the PDN for systemic discrimination cases. OFCCP also afforded regional and district offices the discretion to issue a PDN prior to issuing a Notice of Violation ("NOV"). Under the new Directive, regional and district offices are ***required*** to issue PDNs for preliminary findings identified during the course of compliance evaluations, regardless of whether system discrimination is found. The Directive also provides increased oversight by OFCCP's national office of potential violations before a final decision is made. Going forward, the appropriate regional Office of the Solicitor must review all PDNs before they are submitted to OFCCP's national office for a review and final decision.

The Directive, which goes into effect immediately, will serve as an interim guidance until OFCCP amends its Federal Contract Compliance Manual.

Directive 2018-01 is a welcome development and the first concrete sign that OFCCP wants to do more than just talk about improving its relationship with the government contractor community. Many contractors have faced circumstances where, after months of silence, OFCCP suddenly issues an NOV during a compliance evaluation. Because the contractor was not contacted before the issuance of the NOV, the NOV can be based on incorrect findings or assumptions that could have been corrected with additional input from the contractor. However, once an NOV is issued, OFCCP is often reluctant to reconsider the findings in them. The Directive provides a mechanism to facilitate the exchange of information and potentially avoid erroneous NOVs. The fact that PDNs will be subject to regional and national-level review before issuance is a positive sign that the Directive will also improve consistency in enforcement actions across the agency's regions.

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