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OFCCP Issues New Directive Addressing "Transparency in OFCCP Compliance Activities"

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Quick Hit: OFCCP has issued Directive 2018-08 (the "Directive") which sets forth new policies and procedures for OFCCP compliance evaluations. The Directive contains numerous specific rules and procedures that compliance officers must follow at every phase of a compliance evaluation.

Key Takeaways:

- The Directive provides contractors a better sense of what they can expect during a compliance evaluation. The rules contained in the Directive can be cited to during a compliance evaluation if (or when) compliance officers fail to abide by them. *If your business is currently under a compliance evaluation, review the Directive and make sure your compliance officer is following its requirements. It may take some time before compliance officers are familiar with all of the Directive's details.*
- The Directive reinforces the comments included in Directive 2018-07 that OFCCP expects contractors to have prepared their Affirmative Action Programs ("AAPs") on time and be able to produce them to OFCCP within 30 days of receipt of a Scheduling Letter. The Directive makes clear that contractors should not expect to receive extensions of time on this deadline and should expect OFCCP to promptly issue show cause notices when this deadline is missed. *In other words: Make Sure You Prepare Your AAPs Annually!*
- Contractors under audit should expect more transparency from OFCCP. For example, compliance officers must now provide specific explanations about what indicators of discrimination have prompted an onsite inspection, and share details underlying any Notice of Violation during the conciliation process – including regression analysis details supporting a pay discrimination finding.
- If the Directive is followed, contractors under audit should expect to receive regular communications from their OFCCP compliance officer. The Directive requires compliance officers to communicate with contractors within 15 days of the issuance of the Scheduling Letter, after receiving the contractor's AAP and supporting documentation in response to the scheduling letter (ideally within 5 days), and

regularly thereafter ("ideally at least once every 30 days).

- OFCCP appears to be listening to the contractor community. Many of the provisions in the Directive respond to concerns raised by contractors for years. That being said, the Directive contains wiggle room for compliance officers, so the extent to which the Directive provides contractors with more transparency and predictability during onsite evaluations remains to be seen. That being said, if followed, the Directive contains numerous provisions (as detailed below) that should improve the compliance evaluation experience.

More Detail: On September 19, 2018, OFCCP issued Directive 2018-08 (the "Directive"). The Directive's stated purpose is "[t]o ensure transparency in all stages of OFCCP compliance activities to help contractors comply with their obligations and know what to expect during a compliance evaluation, and to protect workers from discrimination through the consistent enforcement of OFCCP legal authorities." This is the latest in a string of measures taken by OFCCP to improve its transparency – a major shortcoming identified by contractors during OFCCP's 2017 Town Hall Meetings and an initiative included in OFCCP's Town Hall Action Plan.

OFCCP states that the Directive "extends OFCCP's transparency initiative to every stage of a compliance evaluation to facilitate consistency of operations, improve efficiency, and resolve collaboratively matters during compliance evaluations." To emphasize that point, the Directive states that "Transparency should guide OFCCP staff during every stage of a compliance evaluation, from beginning to end." To that end, the Directive sets forth numerous new policies and procedures that either clarify ambiguities or fill in gaps in the Federal Contract Compliance Manual ("FCCM") – the main resource upon which contractors rely to understand the procedures applicable to compliance evaluations. The Directive makes clear that it expressly "supersede[s] any procedures in the FCCM or other previously issued guidance to the extent they could be read to conflict." It also expressly states that "OFCCP staff must follow" the new policies and procedures.

Some of the key provisions of the Directive include:

- ***30 Day Extensions Available – But ONLY For Supporting Data.*** The Scheduling Letter that commences a compliance evaluation provides a 30 day period in which to provide the requested AAP and supporting data. The Directive provides that contractors may receive a 30 day extension on the deadline for providing supporting data, provided that: (1) the request is made within 30 days of receiving the Scheduling Letter, ***and*** (2) the contractor timely submits its AAPs

within the initial 30-day period. The Directive makes clear that extensions of time to submit AAPs will rarely be granted. Failure to meet deadlines for submitting AAPs and/or supporting data will result in the "***immediate***" issuance of a Notice to Show Cause why OFCCP should not initiate enforcement proceedings, providing contractors an additional 30 day period in which to provide the information. These Show Cause Notices will not require approval from OFCCP's National Office.

- ***Initial Contact by Compliance Officer After Issuance of Scheduling Letter.*** Within 15 days after a Scheduling Letter is issued, the compliance officer will contact the contractor to: (1) establish the compliance officer as the primary point of contact; (2) provide an overview of the compliance evaluation process; (3) offer compliance assistance; (4) explain the available 30 day extension on the deadline to provide supporting data; and (5) the Notice to Show Cause process if the contractor cannot meet deadlines for submitting its AAP and supporting data.
- ***Time to Address Issues with Initial Submissions.*** The Directive requires compliance officers to notify contractors promptly of any deficiencies in the AAPs and supporting data submitted in response to the Scheduling Letter, and provide "15 days to provide complete and acceptable submissions." Many contractors complained about the short timelines provided by some compliance officers. Now contractors can expect at least 2 weeks to respond to issues with their initial submissions.
- ***No Fishing Expeditions During the Desk Audit Phase and Parameters On Additional Data Requests.*** The Directive makes clear that during the desk audit stage of a compliance evaluation, any follow up requests by compliance officers must be limited to the data requested by the Scheduling Letter. If the matter progresses beyond the desk audit phase, requests for information may go beyond that requested in the Scheduling Letter, but should be aimed at "refin[ing] indicators and prepar[ing] for a potential onsite visit." Moreover, contractors must be informed why the information is being requested, and the requests must be "reasonably tailored to the areas of concern, and allow a reasonable time to respond."
- ***Contractors Must Be Told Why OFCCP Is Coming Onsite.*** Onsite confirmation letters must "[i]nclude a high-level summary of any preliminary indicators of discrimination." With this requirement, contractors should no longer face the prospect of an onsite inspection without knowing what OFCCP is investigating. The sample onsite confirmation letter attached to the Directive indicates that OFCCP must provide specific details about the indications of discrimination leading to the onsite. Specifically, the sample explanations in the form letter suggest that OFCCP must disclose the type of violation and the job group at issue: "(1) (e.g., hiring practices in the Technician I job group); and (2) (e.g., compensation policies and

practices with respect to women in the following pay analysis groups).” That being said, OFCCP makes clear that the stated reasons for its onsite inspection do not limit the scope of its review, as it states in the sample onsite confirmation letter: “identification of these preliminary indicators does not limit the scope of OFCCP’s authority to confirm compliance with other requirements or investigate other potential violations that it discovers during the course of this compliance review.”

- ***Quick Closure of Most Compliance Evaluations.*** The Directive contemplates that for “the majority of cases” where the desk audit review reveals no indicators of discrimination or evidence of other violations, compliance evaluations should be closed within 45 days of receipt of the contractor’s AAPs and supporting data.
- ***Sharing Information in Conciliation Phase.*** The Directive anticipates a “collaborative approach” between OFCCP and contractors during the conciliation phase, including provision by OFCCP of “information and essential source data.” This includes sufficient information “to assist the contractor in understanding and replicating OFCCP’s findings, sharing factors used to calculate back pay, [and] providing an overview or summary of anecdotal evidence or non–statistical findings to add context to the statistical results.”
- ***Next Business Day Rule.*** The Directive includes a rule (contained in footnote 5) that if certain deadlines fall on a weekend or holiday, the Contractor has until the next business day to respond. Although this seems like a minor enhancement, it relieves contractors of the need to either ask for permission to extend a weekend or holiday deadline or respond in advance of the deadline.

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