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OFCCP Provides Guidance On New Promotions and Accommodations Focused Reviews

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As we recently reported, OFCCP has issued its 2020 Corporate Scheduling Announcement List. That list included contractors selected for two new types of reviews focused on promotions and accommodations. Other than some comments made by Director Leen in speeches, contractors had little information concerning the new types of reviews and what they entailed.

That is, until now. On September 23, 2020, OFCCP announced the launch of two websites providing information on the new Promotions Focused Reviews and Accommodations Focused Reviews. These websites provide an overview of the new types of focused reviews and the scope of the new evaluations. The websites also include FAQ sections (see here and here) related to these new focused reviews, answering anticipated questions contractors may have concerning these new audits. OFCCP has stated it will update the sites in coming months "to include best practices and other types of resources for both types of focused reviews."

Note that OFCCP has not yet proposed scheduling letters for these new focused reviews. Until it does so, and such letters are approved by the Office of Management and Budget, it will not be able initiate such reviews. Even so, the new guidance provides contractors selected for such reviews some information upon which to prepare.

Below we summarize some of the key information provided by the OFCCP on its new websites.

Promotions Focused Reviews

The Promotions Focused Reviews site states that these evaluations will look at "contractor data, policies, and procedures related to promotions to ensure that federal contractors are meeting their equal employment opportunity obligations."

The new website also gives contractors a sense of what these new reviews will entail. It explains that during the course of promotions focused reviews "Compliance Officers will review, among other things, contractor policies and procedures, employee personnel files, and personnel data tracking contractors' promotion decisions. . . . OFCCP may also evaluate hiring and compensation policies, procedures, and data, as appropriate, to determine if qualified applicants are being steered into lower paying positions with limited upward mobility or otherwise prevented from advancing professionally."

As with the Section 503 and VEVRAA focused reviews introduced last year, this focused review has a mandatory "on-site" component, during which compliance officers will "conduct interviews with managers responsible for promotion decisions and, if applicable, with affected employees." Such interviews should take place virtually while COVID-19 related social distancing measures are in effect. It is also possible OFCCP will continue virtual on-sites after the pandemic concludes, as Proskauer has learned that OFCCP has found virtual on-sites to be effective and efficient.

The site also provides answers to frequently asked questions ("FAQs") regarding these kinds of reviews, including what promotions focused reviews are and why such evaluations are being conducted. The FAQs also covers:

- ***How OFCCP defines "promotion."*** The FAQs explain "OFCCP's Federal Contract Compliance Manual (FCCM) defines promotion as '[a]ny personnel action resulting in, for example, the movement to a position affording higher pay, greater rank, change in job title, or increase in job grade; an increase in pay, requiring greater skill or responsibility; or the opportunity to attain such. A promotion may be either competitive or noncompetitive.' The definition of promotions as inclusive of advancement opportunities recognizes that promotion policies and/or procedures may effectively foster or hinder advancement and, as such, should be examined and corrected if discriminatory."
- ***Actions contractors should take in preparing for such a review.*** The FAQs provide that contractors can take steps such as "evaluating personnel activity (including promotions) and selection procedures to identify whether disparities on the basis of a protected characteristic [exist]."
- ***Whether contractors can be subject to another kind of compliance evaluation while a promotions focused review is pending at the same establishment.*** The FAQs provide that "[w]hile a focused review is pending at an establishment, that establishment will not be scheduled for any other types of compliance evaluations."

Accommodations Focused Reviews

The Accommodations Focused Reviews site provides that such evaluations will look at "a contractor's policies and procedures related solely to religious and disability accommodations." To assist contractors meet their religious accommodation obligations, the site directs contractors to the Equal Employment Opportunity Commission Religious Discrimination Guidance.

The site also describes what contractors can expect during these focused reviews: "Compliance Officers will examine a contractor's policies and procedures related solely to religious and disability accommodations, as identified in the scheduling letter. The Compliance Officer will specifically review documentation relating to accommodation requests and dispositions, with a particular emphasis on denial(s) of accommodation."

This focused review, like other focused reviews, has a mandatory "on-site" component, during which compliance officers will interview "managers responsible for or involved in the accommodation process as well as with affected employees and applicants." Such interviews should take place virtually while COVID-19 related social distancing measures are in effect. It is also possible OFCCP will continue virtual on-sites after the pandemic concludes, as Proskauer has learned that OFCCP has found virtual on-sites to be effective and efficient.

The FAQs page for accommodations focused reviews also provides answers to anticipated questions regarding the scope and purpose of such evaluations. The FAQs include information regarding the OFCCP's views on the legal obligation to accommodate disability and religious accommodation requests, as well as the availability of the undue hardship exception to providing requested accommodations. Like the FAQs for Promotions Focused Reviews, these FAQs note that "[w]hile a focused review is pending at an establishment, that establishment will not be scheduled for any other types of compliance evaluations."

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- **Guy Brenner**
  Partner