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OFCCP Proposes Significant Rule Amendments to Increase its "Flexibility" and Loosen Standards For Discrimination Findings

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On December 10, 2020, OFCCP published its "Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination" (the "Rule"). The Rule was welcomed by the contractor community, as it established important procedural and substantive requirements before OFCCP can issue discrimination findings. Among other things, the Rule sets forth clear parameters for what OFCCP has to establish in order to pursue discrimination findings, and provides for transparency in the compliance evaluation process to ensure contractors understand the bases for OFCCP's preliminary findings and to foster dialogue to avoid erroneously-based Notices of Violation ("NOVs").

On March 21, 2022, the agency announced it will be proposing amendments to the Rule as well as other regulatory changes. These proposed changes would roll back many of the Rule's safeguards in order to, as Director Jenny Yang explained, lift "constrain[ts on] OFCCP's broad enforcement discretion." As detailed below, the proposed rulemaking would, among other things:

- eliminate evidentiary requirements for the issuance of pre-determination notices ("PDNs") and NOVs;
- eliminate the requirement that PDNs be approved by the OFCCP Director before issuance;
- permit OFCCP to issue NOVs for violations not included in PDNs; and
- reduce contractors' time for responding to PDNs by half.

It is clear from the proposed rulemaking that the Biden Administration's OFCCP wishes to pursue discrimination findings without having to comply with certain evidentiary and procedural requirements. It justifies the changes on various grounds, including its desire for flexibility in enforcing its mandate and to eliminate delays caused by contractors seeking to hold the agency to the Rule's requirements.

If these changes are implemented, contractors can expect to face more findings of discrimination with less transparency from OFCCP. They will no longer be able to count on: receiving detailed bases for preliminary findings of discrimination or formal findings of discrimination; receiving notice and the opportunity to respond to discrimination findings prior to the issuance of an NOV; or knowing any PDN or NOV has been subject to a review by the Director, which was intended to provide some level of consistency to discrimination findings across the agency. This development, as well as the Directive on disclosure of pay equity analyses announced last week, is a clear signal to contractors that OFCCP will be far more aggressive in compliance evaluations moving forward.

OFCCP's proposed rulemaking will be formally published on March 22, 2022. The public will have until April 21, 2022 to submit comments.

What Amendments Are Being Proposed?

Removal of Evidentiary and Procedural Standards for PDNs and NOVs

The existing Rule provides that before OFCCP may issue a pre-determination notice ("PDN"), providing the contractor notice of a preliminary finding of discrimination and the opportunity to respond, the agency must have certain evidentiary support. Specifically, the agency is required to disclose both the "qualitative" (*i.e.*, testimony and documents) and "quantitative" (*i.e.*, data analysis) evidentiary support for its preliminary finding(s). With regard to quantitative evidence, the agency is required to demonstrate any disparity is "practically significant." Further, PDNs must be approved by the OFCCP Director before issuance.

OFCCP now proposes to do away with these safeguards. With regard to the evidentiary prerequisites, OFCCP seeks to eliminate them, "conclud[ing] that rigid evidentiary standards are unnecessary and unduly constrain the agency's broad enforcement discretion as to the cases it decides to litigate and those it does not." In its proposed rulemaking, the agency contends the requirements are inconsistent with Title VII's evidentiary standards and "led to delays in resolutions by increasing disagreements between OFCCP and contractors about the requirements for" PDNs. Further, OFCCP complains that the requirement that the agency disclose in the PDN the anecdotal evidence relied upon in reaching its preliminary determination "may have a chilling effect on the willingness of victims and witnesses to participate in OFCCP's investigation due to concerns that an employer may uncover their identities, which could lead to retaliation." As proposed, OFCCP would only have to issue a PDN "describing the indicators and providing the contractor an opportunity to respond."

Because OFCCP proposes it no longer be required to disclose qualitative and quantitative evidence in its PDN, its proposal would also do away with the definitions of those terms in the Rule. OFCCP also proposes to jettison the requirement it demonstrate practical significance prior to issuing a PDN. Further, PDNs will no longer require Director approval prior to issuance.

OFCCP seeks to do away with the same evidentiary requirements currently in place for NOVs, as well as the Rule's requirement that NOVs may not include discrimination findings unless they were also included in the PDN. In other words, under OFCCP's proposal, a contractor could first learn of a discrimination issue when OFCCP issues a formal finding of discrimination in an NOV.

Reducing Contractors' Time To Respond to a PDN

One welcome feature of the Rule is its extension of the time to respond to a PDN to 30 days. The OFCCP's proposal would revert the response time back to 15 days, which may be extended by OFCCP for "good cause." Given that PDNs can be (and generally are) issued with little to no notice, and may contain multiple indicators of discrimination that often take time to analyze and rebut, this proposed change will place significant time constraints on contractors.

Defining "Reasonable" Efforts" With Regard To Conciliation

Current regulations (41 C.F.R. § 60-1.20(b)) provide that if OFCCP finds "deficiencies" during a compliance evaluation, "reasonable efforts [shall be made] to secure compliance through conciliation and persuasion." OFCCP proposes to define such "reasonable efforts" to "make clear that OFCCP's conciliation standards align with Title VII." To that end, OFCCP proposes to have "reasonable efforts" be "interpreted consistently with title VII of the Civil Rights Act of 1964 and its requirement that the Equal Employment Opportunity Commission 'endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion.'"

Show Cause Notice Provisions

Show Cause Notices ("SCNs") are issued to contractors OFCCP has "reasonable cause to believe" have violated the equal opportunity clause, and provides the contractor 30 days to show cause why enforcement proceedings should not be instituted. SCNs typically follow the issuance of an NOV and the failure by OFCCP and the contractor to reach a conciliation agreement, though they can also flow from a contractor refusing OFCCP access to facilities or information.

OFCCP proposes to amend its regulations to make clear that SCNs may be issued without first issuing a PDN or NOV, where the contractor "has failed to provide access to its premises for an on-site review or refused to provide access to witnesses, records, or other information."

OFCCP's proposal also provides that it may issue Show Cause Notices ("SCNs") that include violations not included in its NOVs. SCNs must "include each violation that OFCCP has identified at the time of issuance," and where "OFCCP identifies additional violations after issuing a [SCN], OFCCP will modify or amend the" SCN. The proposed regulation does provide that contractors will be offered "an opportunity to conciliate additional violations identified in the" SCN that are not included in a prior NOV.

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We will continue to monitor developments with regard to these proposed regulatory changes.

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