

OFCCP Publishes Rule Modifying Pre-Enforcement Notice and Conciliation Procedures

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On August 4, 2023, OFCCP published its [final rule](#), “Pre-Enforcement Notice and Conciliation Procedures” (the “New Rule”) which “modif[ies] procedures and standards [OFCCP] uses when issuing pre-enforcement notices and securing compliance through conciliation.” In a blog post, OFCCP Acting Director Michele Hodge [touts](#) the final rule as one that “strengthens [OFCCP’s] ability to investigate and remedy employment discrimination.”

The New Rule amends the agency’s [“Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures To Resolve Potential Employment Discrimination”](#) rule (the “Current Rule”), which, when promulgated, was hailed as providing contractors with transparency and clarity regarding the procedures and standards by which OFCCP can issue discrimination findings. The New Rule undoes many of the Current Rule’s welcome features. For example, the New Rule:

- eliminates evidentiary requirements for the issuance of pre-determination notices (“PDNs”) and notices of violation (“NOVs”);
- eliminates the requirement that PDNs be approved by the OFCCP Director before issuance;
- permits OFCCP to issue NOVs for violations not included in PDNs; and
- reduces contractors’ time for responding to PDNs by half.

The New Rule reflects OFCCP’s desire to pursue discrimination findings without having to comply with certain evidentiary and procedural requirements. OFCCP 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 Current Rule’s requirements.

Once the New Rule takes effect on September 5, 2023, 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. Contractors can expect OFCCP to be far more aggressive in compliance evaluations moving forward.

Public comments on the measure when it was first proposed in March 2022 resulted in no substantive changes. The New Rule essentially adopts the measure [originally proposed](#) by OFCCP, with a few minor changes. These include a “clarification” that:

- OFCCP “may conduct an additional investigation after issuing the [PDN] and as a result of the contractor’s response to the [PDN],” and that;
- OFCCP will issue a Notice of Violation (“NOV”) if a contractor’s response to a PDN and any additional investigation fails to resolve the agency’s preliminary findings.

As noted above, the New Rule will take effect on September 5, 2023. FAQs on the New Rule can be found [here](#).

More Detail

As discussed, the New Rule does away with many guidelines intended to provide contractors with clarity and transparency, and to hold OFCCP to certain standards related to findings of discrimination. Key changes in the New Rule are detailed below.

Removal of Evidentiary and Procedural Standards for PDNs and NOVs

The Current 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 was 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 was required to demonstrate that any disparity is “practically significant.” Further, PDNs had to be approved by the OFCCP Director before issuance.

Under the New Rule, those safeguards have been eliminated. The evidentiary prerequisites and disclosure requirements have been removed, as PDNs now only have to “describe[] the preliminary findings and provide[] the contractor an opportunity to respond.” Further, PDNs will no longer require Director approval prior to issuance.

The New Rule also does away with the evidentiary requirements currently in place for NOVs, as well as the Current Rule’s requirement that NOVs may not include discrimination findings unless they were also included in the PDN. In other words, under the New Rule, a contractor may 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 Current Rule was its extension of the time to respond to a PDN to 30 days. The New Rule reverts 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 change will place significant time constraints on contractors.

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 as to 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 SCNs can also flow from a contractor refusing OFCCP access to facilities or information.

The New Rule makes clear OFCCP may issue SCNs 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.”

The New Rule also provides that it may issue SCNs that identify violations not included in the 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.

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