

OFCCP Issues Three New Directives

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As noted in our recent posts, [OFCCP remains open for business](#) despite the COVID-19 pandemic. On April 17, 2020, OFCCP provided further evidence of that fact, [announcing](#) three new directives “to maximize the effectiveness of [its] compliance assistance resources, increase accountability, and resolve federal contractor compliance evaluations more efficiently.” Director Leen [revealed](#) that two of these directives—those on efficiency and mediation—were forthcoming during an event Proskauer attended in February 2020.

The three new directives are:

- **[Directive 2020-02](#)**, entitled “Efficiency in Compliance Evaluations.” This Directive outlines steps the agency is taking in order to “keep the number of cases that are aged below 15 percent of OFCCP’s total caseload.” OFCCP shares that it has “established an operational goal of completing evaluations within 180 days absent preliminary findings of discrimination, or to issue a [Predetermination Notice (PDN)] in alleged discrimination cases no later than one year from the issuance of the scheduling letter.” Some of the key policies and procedures the OFCCP will implement to achieve this goal described in Directive 2020-02 include:
 - The agency’s Compliance Management System (CMS) will be set up to send “reminders to Compliance Officers to contact contractors at least once every 30 days after a compliance evaluation commences in order to provide a status update,” and alert “the Regional Director and the Directors of Program Operations and Enforcement when a compliance evaluation remains open for 12 months without the issuance of a PDN.”
 - The agency will promptly issue show cause notices (SCNs) and refer “denial of access cases for enforcement where necessary.”
 - OFCCP’s Director will review the policies in the Directive “annually and, if prudent, further shorten the deadlines.”
 - Where contractors have submitted all information requested by OFCCP, they “may request that OFCCP conduct a review of an open compliance evaluation to determine and address any reasons for a delay under the following circumstances:

- [the] compliance evaluation remains open for one year from the day the contractor received the scheduling letter, without the issuance of a PDN; or
- [the] compliance evaluation remains open for two years and has not been referred to the Office of the Solicitor.”

The Directive also touts the efficiency already achieved by the agency since Fiscal Year 2018. According to the Directive:

- “In FY 2018, the average time to close a compliance evaluation was 516 days, with the average time to complete a desk audit ranging from 142 days (in evaluations without [a Notice of Violation (NOV)]) to 229 days (in evaluations with a NOV).”
- “By FY 2019, OFCCP was able to decrease these timeframes significantly: evaluations took an average of 399 days to close (a decrease of 23%), desk audits with NOVs took an average of 158 days to complete (a decrease of 31%), and desk audits without NOVs took an average of 68 days to complete (a decrease of 51%).”
- “In the first quarter of FY 2020, OFCCP completed the average desk audit in 35 days.”
- **[Directive 2020-03](#)**, entitled “Pre-Referral Mediation Program.” This Directive establishes a mediation program “to resolve findings of discrimination violations prior to referrals to the Office of the Solicitor for enforcement.” Under OFCCP’s current procedures, if the parties are unable to conciliate, OFCCP issues an SCN, to which the contractor may provide a response within 30 days, after which the matter is referred to the Office of the Solicitor of Labor for enforcement.

As OFCCP explains, under this new program “OFCCP will offer contractors an opportunity to mediate as a last attempt at obtaining timely remedies and avoiding the delay and expense of litigation” after the issuance of an SCN. OFCCP states that it “reserves the authority to mediate at any stage, but OFCCP believes mediation is most useful after attempts to conciliate following the issuance of a SCN citing violations of discrimination, but prior to referral for enforcement, were unsuccessful.”

Directive 2020-03 includes an overview of the policies and procedures for the Pre-Referral Mediation Program, detailing the process by which mediators are selected and how mediations are conducted, but notes that these are “suggested steps and procedures” and “the chosen mediator may wish to institute their own process for conducting the mediation based on the specific issues.”

OFCCP notes in the Directive that it “retains the discretion to bypass mediation in two types of cases,” which are cases where the contractor refuses OFCCP access, or “in the very rare case where [OFCCP] proceeds directly to an enforcement recommendation without issuing a SCN based on exceptional circumstances.”

Directive 2020-04, entitled “Ombuds Service Supplement.” As we [previously reported](#), in 2018 OFCCP issued [Directive 2018-09](#), wherein it announced its intention to create an Ombud Service, the stated goal of which is to “facilitate the fair and equitable resolution of specific types of concerns raised by OFCCP external stakeholders in coordination with regional and district offices.” Directive 2020-04 supplements Directive 2018-09 and sets forth the agency’s “[Ombuds Service Protocol](#)” in order to “facilitate the public’s understanding of this compliance assistance resource.” The Ombuds Service Protocol includes, among other things, information regarding the ombudsman’s standards of practice, functions, and record and performance management plans.

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