

Contractors, Get Ready. New OFCCP Directive Signals A New Unfriendly Enforcement Era

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On March 31, 2022, OFCCP issued [Directive 2022-02](#) titled “Effective Compliance Evaluations and Enforcement” (the “Directive”). The Directive’s stated purpose is to “provide transparency on OFCCP’s compliance evaluation policies and expectations for contractors.” However, the Directive guts former-Director Craig Leen’s efforts to ensure OFCCP provided contractors with transparency, fairness, and consistency in audits and in its other interactions with the contractor community. To that end, the Directive rescinds four Leen-era directives.

Key aspects of the Directive include:

Contractors No Longer Guaranteed Advance Notice of Audits. Per the now-rescinded [Directive 2018-08](#), contractors who appeared on the Corporate Scheduling Announcement List (“CSAL”), meaning they had been selected for an OFCCP audit, could rely on at least 45 days after the CSAL’s publication before such an audit would commence. Well, no longer. While the Directive commits OFCCP to “continue to post a CSAL to notify contractors that they are included in OFCCP’s scheduling list,” it “will no longer delay scheduling contractors for 45 days after the issuance of a CSAL.” In other words, “OFCCP may begin scheduling contractors upon the publication of the CSAL.” The stated purpose of this change is to “promote efficiency,” but many contractors who have experienced lengthy delays in OFCCP contact during audits may question this stated motivation. Whatever the true purpose, contractors no longer can count on any advance notice of an audit going forward.

Contractors Can No Longer Expect Grace From OFCCP During Audits. The now-rescinded [Directive 2018-08](#) provided that contractors that submit their affirmative action programs (“AAPs”) within 30 days of receiving an audit scheduling letter would automatically receive a 30-day extension for providing the other items requested in the scheduling letter. Well, no longer. Contractors scheduled for audits going forward will be “required to submit all AAPs and itemized listing data, including support data, within 30 calendar days.” Extensions, may be granted “in the event of extraordinary circumstances.” Examples of such circumstances are:

1. Extended medical absences of key personnel;
2. Death in the immediate family of key personnel;
3. Localized or company-specific disaster affecting records retrieval such as a flood, fire, or computer virus;
4. Unexpected military service absence of key personnel; and
5. Unexpected turnover or departure of key affirmative action official.

When extensions are requested, “OFCCP may ask for supporting documentation, where appropriate. OFCCP will decide whether to grant the extension on a case-by-case basis.”

Contractors should not expect OFCCP to be liberal in the granting of extensions. OFCCP warns that failure to provide information requested in the scheduling letter in a timely manner “may result in the issuance of a Notice to Show Cause why OFCCP should not initiate enforcement proceedings. The Director of OFCCP also has discretion to immediately refer the matter to the Solicitor [of Labor] for administrative enforcement when a contractor refuses to submit an AAP or other requested information and efforts to conciliate the matter are unsuccessful.”

Contractors should expect to hear threats of Show Cause Notices and referrals to the Solicitor if they fail to submit information by OFCCP-established timelines.

Contractors Can Expect More Requests for Additional Data During Audits. The Directive takes pains to “reiterate[]” OFCCP’s “long-standing policy that the agency may request supplemental data, follow-up interviews, and/or additional records and information if the contractor’s desk audit submission is incomplete or OFCCP identifies issues that warrant further analysis.” The Directive somewhat helpfully provides that “[w]hen requesting this supplemental information, OFCCP will reasonably tailor the request to the areas of concern, allow contractors a reasonable time to respond, and include the basis for the request.” Of course, what “reasonably tailored” and “reasonable time to respond” mean in practice remain to be seen. The general tenor of the Directive suggests OFCCP intends to provide short timelines and hold contractors to them.

Further, the Directive makes clear “[w]here OFCCP finds additional compliance issues, these supplemental requests do not limit the agency’s ability to request additional information or expand the investigation,” and states these requests may seek information “to cover a period beginning two years before the date the contractor received the Scheduling Letter” as well as information “created after the date of the Scheduling Letter to determine whether the practices in question have ended and to evaluate whether the practice has continued.”

The Directive also indicates that document requests will be a standard part of conciliation discussions, stating: “[w]hen entering conciliation discussions, OFCCP will request wage and benefits data and will consider information the contractor provides on mitigation, such as employee turnover data, for the purpose of accurately estimating make-whole relief. The exchange of this data will expedite the conciliation process.”

Contractors Can Expect OFCCP’s Audits To Include More Requests For Witness Information and More Witness Interviews. The Directive provides that “[e]mpowering and listening to workers to understand their experiences is an important priority for OFCCP.” Accordingly, the Directive “underscores the importance of contractors providing access to their premises and records relevant to OFCCP’s investigation,” which “includes records ... that will enable OFCCP to contact employees, former employees, applicants, or other witnesses.”

To that end, “OFCCP will request that contractors provide the agency with unredacted contact information such as telephone numbers, mailing addresses, email addresses, and social security numbers for these individuals.” While the Directive recognizes the contractor’s right to “have an attorney or another representative present” when OFCCP “conducts interviews with upper-level managers and directors in their management capacity that speak for, or make decisions on behalf of, the company.” However, the Directive contends that “[g]enerally, the contractor does not have a right to have a representative present for agency interviews of former employees, with some exceptions.” The Directive reiterates the agency’s longstanding position “that when OFCCP is interviewing nonmanagement personnel, the contractor does not have the right to have a representative present.”

Changes to audit scheduling. The Directive shares that OFCCP is “enhancing its neutral scheduling procedures for selecting federal contractors for compliance evaluations to reach a broader universe of contractors” and “to identify those with greater risk factors for noncompliance with nondiscrimination and affirmative action requirements.” Notably, the Directive fails to share what it has done or plans to do in order to “strengthen” its selection procedures. It does state OFCCP “will continue to provide information about its scheduling methodology to explain how the agency neutrally selects contractors for a compliance evaluation.”

Director Yang Cleans House. In addition to the changes set forth above, the Directive rescinds four Leen-era directives, contending they “are either outdated or modified by this directive to provide updated guidance and transparency on OFCCP’s policies for compliance evaluations.”

- OFCCP is rescinding [DIR 2018-08, Transparency in OFCCP Compliance Activities](#), for the stated reason of “minimiz[ing] the delay in remedying employment discrimination and positively impact[ing] more workers.” That directive contained a number of contractor-friendly provisions discussed above, such as “authorizing an automatic 30-day extension for submitting key compensation, employment activity, and other support data” and an “automatic 45-day scheduling delay after the issuance of a Corporate Scheduling Announcement List (CSAL) to notify contractors that they are included in OFCCP’s scheduling list.” The Directive eliminates those “policies because they run counter to OFCCP’s goal of conducting comprehensive compliance evaluations that foster consistent accountability and timely submission of required information.” It also contends other aspects of the directive have been

incorporated into the agency's Federal Contract Compliance Manual.

- OFCCP is also rescinding [DIR 2020-02, Efficiency in Compliance Evaluations](#), which it describes as “an outdated directive.” Specifically, the Directive claims DIR 2020-02 “references OFCCP enforcement data and measures from previous fiscal years, which the agency has accomplished or exceeded.” But, OFCCP does not address the other aspects of DIR 2020-02, which were aimed at ensuring OFCCP acted promptly during compliance audits. Given that the Directive makes numerous changes unfavorable to contractors to make compliance evaluations more efficient and eliminate delays, it seems incongruent to eliminate requirements that ensure OFCCP also acts expeditiously during audits.
- OFCCP also is rescinding [DIR 2018-06, Contractor Recognition Program](#). OFCCP does not really explain why it is rescinding the program “which had the purpose of recognizing contractors with high-performing compliance programs and supporting proactive compliance.” Instead, the Directive states “OFCCP will continue to emphasize and support a proactive approach to compliance by contractors, including actively self-auditing employment systems to identify and resolve problems.”
- Finally, the Directive rescinds [DIR 2021-02, Certainty in OFCCP Policies and Practices](#). It explains this directive “committed the agency to an ‘ongoing review on at least an annual basis of all of its policies and practices,’” but “[u]pon reconsideration, OFCCP does not believe an annual review of all policies and practices is practical or necessary.” Putting aside the merits of the agency's view of the need for regular review of its policies and practices, this explanation does not fully convey what rescinding DIR 2021-02 eliminates. That directive did far more than require the agency to review its policies and practices; it enshrined what was known as the [Contractor Bill of Rights](#). That document included numerous reasonable expectations such as professional courtesy by OFCCP staff, timely responses to compliance assistance questions, and confidentiality of information submitted to OFCCP.

The Directive takes effect March 31, 2022. We will continue to monitor any additional developments related to this Directive and report on them here.

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- **Guy Brenner**
Partner