

OFCCP Issues Directive Updating Expedited Conciliation Procedures

Government Contractor Compliance & Regulatory Update on August 13, 2024

On July 26, 2024, OFCCP published [Directive 2024-01: Expedited Conciliation Procedures](#) (the “Directive”). The Directive is intended to “outline updated procedures for an expedited conciliation option, giving contractors and the agency flexibility in the resolution of violations.”

Background

Directive 2024-01 rescinds and replaces DIR 2019-02, Early Resolution Procedures, which established the OFCCP’s early dispute resolution procedures. OFCCP explains that the Directive “provides guidance consistent with the [Pre-Enforcement Notice and Conciliation Procedures](#) final rule,” published in August 2023. The differences between the Directive and DIR 2019-02 are modest, begging the question of why OFCCP felt it was necessary to issue the Directive, which is only the fourth directive issued by the agency during the Biden Administration.

The Directive provides procedures for short-circuiting OFCCP audits and resolving violations in a more expedited fashion. The procedures differ for discrimination and non-discrimination violations, as discussed below. The decision to offer an early resolution option rests with OFCCP, and federal government contractors and subcontractors (“Contractors”) need not agree to engage in early resolution discussions.

Early resolution makes sense for OFCCP; it provides the agency with a method to resolve violations more expeditiously by bypassing its standard procedures, such as its pre-determination notice process. As the Directive notes, expedited resolution helps “OFCCP to maximize its resources.” The Directive also advances OFCCP’s efforts to expand its jurisdiction, emphasizing the option to use early resolution to reach “enterprise-wide” relief – in other words, to expand the scope of relief beyond the specific establishment under review to multiple establishments or the entire company.

While it is clear why OFCCP would find early resolution attractive, the question is: why should Contractors? The answer is unclear, and will largely depend on the facts and circumstances of the audit and the alleged violations. What *is* clear is that when presented with the option to engage in early resolution procedures, Contractors should carefully consider the option before agreeing to engage.

Non-Discrimination Violations

Under the Directive, OFCCP may seek to resolve non-discrimination violations against Contractors, including for “recordkeeping, applicant tracking, failure to implement audit and reporting systems, and failure to conduct self-analysis,” through an Expedited Resolution Conciliation Agreement (“ERCA”). “If the [C]ontractor has multiple establishments, OFCCP may seek an ERCA with an enterprise-wide resolution.” The Directive envisions ERCAs will include a three-year monitoring period during which Contractors will submit “progress reports.”

The Directive notes that ERCAs may require a Contractor to “review all, or a negotiated subset, of its remaining establishments for the similar violation(s) during the progress report monitoring period.” The Contractor would then “report the results of its analysis, findings, any corrective actions, and will provide OFCCP with all supporting documents and information reasonably related to such a review.”

The main benefit to Contractors for entering into an ERCA is that the establishment(s) covered by the ERCA will not be rescheduled for a compliance evaluation for a three-year period from the effective date of the ERCA. This is one year longer than OFCCP’s current guidance providing a [two-year moratorium](#) for establishments that have completed a compliance evaluation. However, it is almost certain that the Contractor will be subjected to the ERCA’s progress report monitoring for that three-year period. Further, if an audit is scheduled at an establishment *not* covered by the ERCA, the evaluation will proceed under traditional conciliation procedures.

Discrimination Violations

OFCCP may also offer to resolve discrimination violations through an ERCA at any time following the completion of the desk audit and before the issuance of a Notice of Violation. Where the Contractor has multiple establishments, “OFCCP may seek an ERCA with a negotiated subset of establishments or on an enterprise-wide basis.”

The Directive sets forth the “typical[]” process for assessing whether to pursue “expedited conciliation” for a discrimination violation:

1. “Within 14 calendar days of completing the desk audit, when possible, the Investigator must discuss the desk audit findings and potential for expedited conciliation with the district and regional office management.” If it is agreed expedited conciliation is appropriate, “the district office will proceed with the evaluation in anticipation of seeking to resolve the matter through expedited conciliation.”
2. The district office may conduct additional investigation to ensure it is confident of any findings before offering expedited conciliation.” This can include “interviews, and “additional requests for information,” such as “electronically available information to refine the indicators and identify potential affected applicants and/or employees, applicant flow logs, and relevant data from human resource information or payroll systems.” The Directive indicates that Contractors will generally be provided with 14 calendar days to provide “readily available information” to OFCCP, but it does contemplate this period may be adjusted to “another reasonable and mutually agreed upon timeframe.”
3. Upon receiving the additional information, “the Investigator should complete a refined analyses within 14 calendar days. If the refined analyses indicate potential discrimination,” OFCCP “may contact the [C]ontractor to offer expedited conciliation.”
4. If the Contractor agrees to engage in expediated conciliation, “the parties must meet within 14 calendar days of the agreement to discuss OFCCP’s findings, proposed remedy, and corrective actions.” The Directive indicates that this process is intended to provide “an opportunity for the [C]ontractor and OFCCP to conciliate likely violations before proceeding with the compliance evaluation and an on-site investigation,” but makes clear that “OFCCP may continue compliance evaluations while expedited conciliation is pending.” As part of expedited conciliation efforts, the Contractor “may provide additional information for OFCCP to consider.”

The Directive provides that “[c]onciliation of an ERCA shall ideally last no more than 60 calendar days from the initial meeting,” but notes this period may be extended “by OFCCP, as long as the parties are making substantial progress towards an agreement.” The Directive provides examples of “substantial progress,” including “situations where the [C]ontractor submits all documentation OFCCP requested; OFCCP has conducted interviews; or OFCCP and the [C]ontractor have exchanged case valuations.” The expedited conciliation process may be shortened by OFCCP if it finds “the [C]ontractor fails to negotiate in good faith or if negotiations otherwise fail,” in which case OFCCP will discontinue ERCA negotiations and continue the compliance evaluation.

The Directive contemplates that an ERCA “may require the [C]ontractor to review all, or a negotiated subset, of its remaining establishments for the similar violation(s) during the progress report monitoring period, and if necessary, implement corrective actions at those establishments to eliminate the violation(s) and prevent recurrence. This may include job offers to affected class members OFCCP has found to meet certain qualifications, salary adjustments, and/or other appropriate corrective actions.”

Upon agreeing to an ERCA, “OFCCP will not schedule any of the [C]ontractor’s establishments covered by the ERCA for a new compliance evaluation for a three-year period, concurrent with monitoring, from the effective date of the ERCA.”

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