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# OFCCP Incentivizes Employers to Choose Early Resolution of Audits

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As we reported last Friday, OFCCP has kicked-off 2019 with a band – issuing three directives in a single day.

Yesterday we reported on the first of three new Directives OFCCP issued to kick off fiscal year 2019. Today we cover the second Directive – Directive 2019-02: Early Resolution Procedures.

Under Directive 2019-02 (effective November 30, 2018), OFCCP will offer contractors the opportunity to *voluntarily* remedy compliance deficiencies found in establishment-based compliance evaluations, in exchange for avoiding additional, *non-voluntary* OFCCP audits for 5 years. OFCCP's goal with this program is to promote early compliance, increase Agency efficiency and limit the taxpayer and contractor resources being spent on lengthy OFCCP investigations. However, the 5-year "get out of audit free" card may not be enough to incentivize contractors to allow OFCCP to expand its jurisdiction beyond the establishment under audit.

The Directive established new Agency processes for the early resolution of three types of establishment-based audit violations:

1. **Non-Material, Non-Discrimination Violations** – Small issues, without serious compliance violations, that can be corrected during the desk audit stage. Potential qualifying violations may include failing to list supervisors on workforce analysis reports or failing to identify how employees know they have access to view AAPs. Under the new Directive, these violations should be resolved in the audit closure letter without a conciliation agreement or any progress reporting.

2. **Material, Non-Discrimination Violations** – For more serious, non-monetary violations that cannot be corrected during the desk audit stage, such as recordkeeping, applicant tracking and failing to conduct self-analyses, OFCCP will offer the contactor the opportunity to enter an Early Resolution Conciliation Agreement with Company-Wide Corrective Action ("ERCA"). Under an ERCA, the contractor would be required to investigate whether the discrepancy impacted other parts of the organization and if so, apply corrections throughout. In exchange, OFCCP would not audit the establishment under review for 5 years, though other establishments could still be audited.

3. **Material, Discrimination Violations** – OFCCP will seek voluntary, company-wide relief for material, discrimination violations. If the contractor agrees, OFCCP has established a 60-day process for data exchange, analysis refinement and conciliation of an ERCA to cover the entire company or an appropriate subset. Under the ERCA, OFCCP would monitor compliance and require progress reporting for a 5-year period, during which all establishments covered by the ERCA are free from new OFCCP audits.

This approach is consistent with the OFCCP's theory that systemic or system-based violations found in an establishment-based review likely have an impact beyond the establishment under review. Incentivizing contractors to remedy such issues voluntarily would be the most efficient and reliable way to address the problem, but will the incentive offered be enough for contractors? As OFCCP begins implementing ERCA in 2019, contractors will have to pay close attention to certain questions:

- If a material technical or discrimination violation is found, but the contractor declines to extend the investigation to cover additional establishments, what happens? Will the contractor face an increased likelihood of being selected for additional audits?

- What is to prevent a contractor from rejecting an ERCA and remedying issues privately before any additional OFCCP audits?
- While a contractor under an ERCA may be free from additional audits for 5 years, what involvement will OFCCP have in scrutinizing the potentially enterprise-wide compliance corrections and progress reporting? And what happens if additional issues are discovered by OFCCP during that non-audit review?
- What happens if there is a change in the White House? If a contractor provides OFCCP with company-wide data now and enters an ERCA, will an Agency under new leadership honor its commitments not to commence new audits?