THE
NATIONAL LAW REVIEW

OFCCP Implements Early Resolution Procedures To Expedite Compliance Audits

Article By
Connie N Bertram
Polsinelli PC
Government Contractor Update

- Government Contracts, Maritime & Military Law
- Labor & Employment

- All Federal

Monday, January 14, 2019

The Early Resolution Procedures (ERP) Directive (2019-02) appears to be designed to address a long-standing frustration of OFCCP regarding the structure of the compliance audit process: that it is generally limited to a single establishment or functional unit. Through its compliance audits, OFCCP reviewed a single establishment or functional unit of a contractor, focusing on its technical compliance, progress towards goals, and hiring, promotion, termination and compensation data. When OFCCP identified a technical violation or a discriminatory practice, it did not have a mechanism for addressing similar violations at other establishments or functional units of the contractor.

The ERP Directive offers OFCCP and contractors a mechanism for undertaking a mini-audit focused on specific technical violations or findings of discrimination uncovered during the desk audit phase. After the desk audit (for technical violations) or a truncated on-site (for potential findings of discrimination), OFCCP would propose an Early Resolution Conciliation Agreement (ERCA) that resolved the violation at both the establishment under audit and at other establishments of the contractor covered by the ERCA. The OFCCP would not issue a Notice of Violation (NOV) if OFCCP and the contractor entered into an ERCA.

With an ERCA, OFCCP would agree not to subject the contractor for audit for five years at either (1) the original establishment if the ERCA involved technical violations or (2) all establishments covered in the ERCA if the ERCA resolved discrimination allegations. However, during this period, the contractor would be required to provide periodic reports to OFCCP consistent with the terms of the ERCA. Also, OFCCP would have the right to investigate individual claims of discrimination and suspected violations of the ERCA. OFCCP would reserve the right to initiate an enforcement action and void the ERCA if a contractor violated it. The five-year moratorium on audits also would not relieve the contractor of its ongoing obligation to comply with OFCCP affirmative action and non-discrimination obligations.

The Directive offers advantages for the contractor beyond the potential 5-year moratorium on audits. Contractors should take advantage of the ERP Directive to try to resolve potential violations early in the audit process. In addition to conserving resources, the contactor avoids the disruption of on-site inspections, employee interviews and responding to extensive document and data requests.

Contractors will likely find that their interest and ability to resolve OFCCP's concerns through the ERP will depend on the nature of the violation claimed and the number of establishments impacted by it. If OFCCP identifies a technical violation, like the failure properly to collect applicant flow data, a contractor should have an interest in resolving the issue quickly through an ERCA and addressing the compliance problem at all of its establishments.

Allegations that a contractor has engaged in discriminatory practices present a more challenging situation. In many situations, OFCCP's findings will stem from a fundamental dispute between the contractor and OFCCP regarding the methodology used by OFCCP. For instance, for compensation discrimination, the contractor may object to the factors or analytical tools used by OFCCP in its multiple regression analyses.

It would be a tough pill for a contractor to swallow to require it to make compensation adjustments or changes in its policies at all or a portion of its establishments in that situation. However, if the alleged violation involves a policy or practice that the contractor is willing to abandon (or perhaps already has), such as a pre-employment test, resolving the audit and entering into a five-year ERCA may be a desirable option.

The ERP Directive is applicable to all current OFCCP compliance audits in which a Pre-Determination Notice (PDN), Notice of Violation (NOV) or Show Cause Notice (SCN) has not been issued as of November 30, 2018.

Source URL: https://www.natlawreview.com/article/ofccp-implements-early-resolution-procedures-to-expedite-compliance-audits