

CLIENT ALERT

OFCCP Remains Active - New Scheduling Letters and Agency Directives Will Impact Audits

Apr.23.2020

Despite the coronavirus pandemic, the Office of Federal Contract Compliance Programs (OFCCP or “the Agency”) remains busy, and there are several recent developments of which all contractors should be aware. The Office of Management and Budget (OMB) has finally approved the Agency’s new Scheduling Letters, and the OFCCP will soon begin using those for compliance evaluations, compliance checks, and focused reviews. The Agency also recently issued three new Directives – Efficiency in Compliance Evaluations, Pre-Referral Mediation Program, and the Ombuds Service Supplement. Contractors should pay careful attention to the requirements in the new Scheduling Letters when responding to new audits, and should keep in mind the opportunities identified in the three new Directives whenever interacting with the OFCCP.

New Scheduling Letters

In April 2019, the OFCCP proposed significant changes to the Scheduling Letters that begin each compliance review, compliance check or focused review. The contracting community was somewhat relieved when the Agency withdrew many of their proposed changes in its June 2019 submission to OMB, though some concerning changes remained. Contractors will be happy to learn that the final Scheduling Letters approved earlier this month include very few substantive changes from the prior versions. Changes in the new Compliance Evaluation Scheduling Letter include a requirement that contractors include a “description of the review” of its personnel processes and a “schedule of the assessment” of its physical and mental job qualification standards. Most notable, however, is what the new Compliance Evaluation Scheduling Letter does not include. The letter approved by OMB does not include the proposed requirement that contractors provide a list of the names and addresses for their three most recently awarded subcontracts and does not require a contractor to provide, along with promotions data, the “workforce representation of women and minorities in the job group from which the person(s) was promoted.”

The revised Section 503 Focused Review Scheduling Letter adds a requirement for contractors to provide current year results if they receive a scheduling letter more than six months into their AAP year, similar to obligations that already existed in the Compliance Evaluation Scheduling Letter. The Letter also contains the same requirements regarding personnel processes and mental and physical job qualifications standards adopted in the Compliance Evaluation Scheduling Letter. Most notably, the new Section 503 Focused Review Scheduling Letter does not include the proposed requirements that contractors provide detailed applicant and employee data, or compensation data. The Agency’s Compliance Check Scheduling Letter remained essentially the same as before.

The OMB also approved the Agency’s first VEVRAA Focused Review Scheduling Letter, which is nearly identical to the revised Section 503 Focused Review Scheduling Letter. The OFCCP identified 500 establishments for VEVRAA Focused Reviews in its November 2019 Corporate Scheduling Announcement List (CSAL) Supplement. Contractors should now expect those reviews to begin shortly.

New Directives

The OFCCP's new Directive (DIR) 2020-02 "Efficiency in Compliance Evaluations" follows up on the Agency's prior efforts to make compliance evaluations more efficient and transparent. The Directive notes that the Agency has "established an operational goal of completing evaluations within 180 days absent preliminary findings of discrimination, or to issue a PDN in alleged discrimination cases no later than one year from the issuance of the scheduling letter." Compliance officers are expected to "provide contractors with a general status update at least once a month during a compliance evaluation." The status of compliance evaluations will be tracked through the Agency's Case Management System (CMS), and CMS will send reminders to compliance officers on a regular basis and will alert Regional Directors and the Directors of Program Operations and Enforcement when a compliance evaluation remains open for 12 months without the issuance of a Pre-Determination Notice (PDN). Though contractors may often be tempted to "let sleeping dogs lie" when it comes to OFCCP audits, the Directive also states that a contractor that has "generally provided all information requested by OFCCP" may "request that OFCCP conduct a review of an open compliance evaluation to determine and address any reasons for a delay" if the evaluation remains open for one year without the issuance of a PDN or it remains open for two years and has not been referred to the Office of the Solicitor. Contractors may wish to consider this if they feel an evaluation is dragging on for an unreasonable period of time.

The Agency's Directive (DIR) 2020-03 "Pre-Referral Mediation Program" establishes a mediation program to revolve findings of discrimination prior to referrals to the Office of the Solicitor for enforcement. Following on the OFCCP's Directive 2019-02 "Early Resolution Procedures," which is intended to encourage early resolution of compliance evaluations prior to the issuance of a PDN, this Directive is intended to offer an opportunity to resolve "later in its review process" but prior to enforcement. The Directive notes that the pre-referral mediation program is intended to be an "opportunity to mediate as a last attempt at obtaining timely remedies and avoiding the delay and expense of litigation" and is "not intended as a substitute for the conciliation period between a Notice of Violation (NOV) and Show Cause Notice (SCN)." Though the Directive notes that "each mediation is unique and the chosen mediator may wish to institute their own process," the Directive establishes "suggested steps and procedures that would apply to most mediations," including how the mediator will be chosen, timeframes, and expectations. The Directive notes that "the mediator will not make a ruling or execute a final decision, but will assist the parties in weighing their options and finding mutually satisfactory outcomes." Contractors should consider utilizing this new mediation option if they find themselves at odds with the OFCCP after multiple attempts at resolution, and believe a neutral third-party may be useful.

Finally, the OFCCP's Directive (DIR) 2020-04 "Ombuds Service Supplement" builds on the Agency's Directive 2018-09, which established an Ombuds Service, by establishing an [Ombuds Service Protocol](#). The Protocol outlines "the fundamental tenets of the Ombuds Service," establishes the goals of the Service, and details the Ombuds Service's Standards of Practice regarding confidentiality, neutrality, independence and informality. Any contractor considering the use of the Ombuds Service should carefully review the Protocol to understand the Ombuds Service's approach, and what it will and will not do.

Overall, the recent developments are welcome news for contractors and may provide opportunities to resolve audits more quickly.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kris D. Meade

Partner – Washington, D.C.

Phone: +1 202.624.2854
Email: kmeade@crowell.com

Rebecca L. Springer

Partner – Washington, D.C.
Phone: +1 202.624.2569
Email: rspringer@crowell.com