

## CLIENT ALERT

### OFCCP's December 30, 2019 Notice of Proposed Rulemaking – Significant Substantive Issues for Contractors

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The Office of Federal Contract Compliance Programs (OFCCP or the “Agency”) has issued a [Notice of Proposed Rulemaking](#) (NPRM) that sets forth contemplated changes to its resolution mechanisms, the evidence it will rely on in reaching potential resolutions, options for early resolution, and an administrative update pertaining to the title of the Agency’s head. Comments on this NPRM are currently due on January 29, 2020. The OFCCP, which evaluates federal contractors’ compliance with affirmative action and non-discrimination requirements, states that the goal of the proposed rule is to “provide federal contractors and subcontractors with greater certainty” about its procedures in evaluating compliance and resolving employment discrimination. Though this may not sound like a significant Agency action, a close read of the preamble to the proposed rule and the language of the proposed revisions reveals the importance of the proposed changes, particularly with regard to the OFCCP’s approach to statistical evidence.

First, the stated purpose of the NPRM is to codify procedures for the OFCCP’s two formal notices to contractors of potential violations: the Predetermination Notice (PDN) and the Notice of Violation (NOV). Under the proposed rule, if a compliance evaluation by the OFCCP indicates preliminary findings of discrimination, the OFCCP will issue a PDN only after first considering several factors, including whether the unexplained disparity is both “practically” and “statistically” significant, and whether non-statistical evidence demonstrates an intent to discriminate. It will issue PDNs in discrimination matters premised on statistical evidence if: (1) the variance is statistically significant at more than two standard deviations but less than three standard deviations and there is corroborating, non-statistical evidence; or (2) if the variance is at or above roughly three standard deviations, even in the absence of corroborating non-statistical evidence. The requirement that the variance be “practically significant” – an undefined term, as noted below – pertains to both scenarios. A contractor has 15 calendar days to respond to the PDN – a period that may be extended by the OFCCP for good cause. Then, under the proposed rule, if a contractor does not sufficiently respond to the PDN within the time allowed, the OFCCP may issue an NOV, which would “requir[e] corrective action and invit[e] conciliation through a written agreement.”

Second, the NPRM’s treatment of the principle of “practical significance” tracks the [FAQs](#) the OFCCP issued in 2019 and the evolving federal jurisprudence relating to that concept arising under Title VII of the Civil Rights Act of 1964. However, the NPRM’s only discussion of the concept of “practical significance” – aside from the express requirement that the Agency proceed with a PDN only if “practical significance” is found – is contained in a footnote in the preamble. That footnote simply states that “practical significance refers to whether an observed disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group.” The Agency refrains from citing to any of the cases arising under Title VII or Executive Order 11246 that address “practical significance.”

Third, the preamble of the NPRM suggests that “early resolution procedures” (known as “Early Resolution Conciliation Agreements” or ERCA) established by Directive 2019-02 will continue to be available to the Agency and contractors as a method of resolving compliance evaluations. However, the NPRM does not codify those procedures. Instead, the preamble simply states

that the proposed revisions “allow OFCCP and contractors to explore expedited conciliation options.” It remains to be seen whether OFCCP will, in practice, seek to efficiently resolve audits through ERCAs. Because ERCAs provide a moratorium on audits for the life of the five-year ERCA and for two years more, ERCAs continue to be a potentially attractive option for contractors.

Finally, the NPRM presents one additional, less impactful change: the proposed rule would update references to the official title of OFCCP’s Agency head from “Deputy Assistant Secretary” to “Director.”

Although the NPRM is framed as simply an effort to clarify and codify existing processes, the OFCCP expressly seeks comment for “improving certainty in setting parameters for statistical evidence, including methodologies, minimum sample sizes, data groupings, methodological limitations, and ways to improve objectivity.” These are often the key, hot-button issues in OFCCP audits and in existing OFCCP litigations. Interestingly, aside from endorsing tests of statistical significance and addressing the instances in which non-statistical evidence is warranted, the OFCCP’s NPRM does not propose “minimum sample sizes,” appropriate “data groupings” or “methodological limitations” and does not explain how the Agency seeks to “improve objectivity” when it comes to its use of statistical methodologies. In short, contractors should be aware of the gravity of the OFCCP’s proposed changes and controversial issues on which it seeks comment since the NPRM, if adopted, will impact all of the Agency’s audits of employment practices ranging from hiring and promotion to compensation. Contractors and other stakeholders must decide promptly whether to weigh in, given the NPRM’s tight 30-day window for comment.

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](mailto:kmeade@crowell.com)

**Rebecca L. Springer**

Partner – Washington, D.C.  
Phone: +1 202.624.2569  
Email: [rspringer@crowell.com](mailto:rspringer@crowell.com)

**Jillian Ambrose**

Associate – Washington, D.C.  
Phone: +1 202.624.2710  
Email: [jambrose@crowell.com](mailto:jambrose@crowell.com)