

### OFCCP Directive Mandates Full Desk Audits

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The U.S. Department of Labor's Office of Federal Contract Compliance Programs (the "OFCCP") took steps to strengthen its enforcement efforts on February 15, 2011, when it revealed a newly issued directive – Directive 295 – instituting a new compliance evaluation process called Active Case Enforcement ("ACE"). Effective January 1, 2011, Directive 295 requires the OFCCP, in connection with every compliance evaluation, to perform a full desk audit to comprehensively analyze a supply and service federal contractor's affirmative action programs ("AAPs") to ensure compliance with Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans' Readjustment Assistance Act. As a result, contractors selected for a compliance evaluation will be subject to greater scrutiny.

Directive 295, signed by OFCCP Director Patricia Shiu on December 16, 2010, supersedes a directive in place since 2003 that permitted a tiered "Active Case Management" compliance evaluation process. The purpose of the 2003 directive was to concentrate agency resources on identifying and remedying cases of systemic discrimination. Under that protocol, a compliance evaluation would be closed if an abbreviated desk audit of a contractor's AAPs revealed no indicators of systemic discrimination, and the agency would proceed with a full desk audit only if such indicators were present. With Directive 295, the abbreviated desk audit has been eliminated.

#### The ACE Compliance Evaluation Process

The ACE compliance evaluation process is part of the OFCCP's "new, comprehensive and multi-faceted enforcement strategy" aimed at allowing the OFCCP to effectively use all of its investigative tools. Pursuant to Directive 295, a compliance evaluation will consist of any one, or any combination, of the following investigative procedures:

- **Compliance Review:** A comprehensive analysis and evaluation of a contractor's hiring and employment practices, the written AAPs, and the results of the affirmative action efforts undertaken by the contractor. Such a review may proceed in three stages – (1) a desk audit, (2) an onsite review, and (3) an offsite analysis. In addition, the OFCCP will contact and review information received from the Equal Employment Opportunity Commission; the Department of Labor's Veterans' Employment & Training Services, Occupational Safety and Health

Administration, and Wage and Hour Division; and state and local fair employment practice agencies.

- **Offsite Review of Records:** An analysis and evaluation of the AAPs, and other documents related to the contractor's personnel policies and employment actions.
- **Compliance Check:** A determination of whether the contractor has maintained appropriate records.
- **Focused Review:** An onsite review that focuses on one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

Regardless of the investigative procedure to be followed, **a full desk audit will be performed with every compliance evaluation.** This will entail the OFCCP performing comprehensive analyses of the contractor's AAPs and will include an impact ratio analysis to determine if there is adverse impact in hiring, promotions, and terminations; a compensation analysis to determine if there are pay disparities; and an assessment of the reasonableness and acceptability of each AAP. In addition, the OFCCP has stated that, at a minimum, every 25<sup>th</sup> contractor selected for a compliance evaluation will undergo a full compliance review (consisting of a desk audit, an onsite visit, and, where necessary, an offsite analysis).

### **Action Steps Contractors Should Take Now**

The OFCCP's new enforcement approach may have costly repercussions for those contractors that have not been proactive in implementing and maintaining their AAPs. Accordingly, contractors should consider taking the following action steps:

- Implement and maintain the AAPs. This includes:
  - performing statistical analyses to determine the existence of adverse impact in the selection process and pay disparities; and
  - preserving personnel and employment records, including documentation of outreach efforts.
- Determine if indicators of potential discrimination exist against an individual or a class of two or more members. (Indicators include statistical indicators of possible discrimination, anecdotal evidence to support possible discrimination, patterns of individual discrimination, and patterns of systemic discrimination.)
- If such indicators exist, assess and eliminate, where possible, inferences of discrimination.

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