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OFCCP Adopts New Audit Procedures and Strategy

The Department of Labor's Office of Federal Contract Compliance ("OFCCP") is charged with enforcing the affirmative action and equal employment opportunity obligations applicable to federal contractors. OFCCP intends to establish a more "robust" enforcement scheme, issuing a Directive this month that discontinues its active case management ("ACM") procedures previously used for contractor compliance evaluations. OFCCP Director Patricia Shiu signed the Directive, which was posted on the agency's website on December 8, 2010.

Established in 2003, the ACM procedures were originally designed to streamline the OFCCP audit process by employing what became known as an "abbreviated desk audit" of federal contractor written affirmative action plans and personnel data. The abbreviated desk audit looked for "indicators of systemic discrimination;" i.e., discrimination involving 10 or more individuals. Without evidence of such discrimination, the agency normally closed its evaluation. The ACM also had built-in quality control measures that required a full desk audit of every 25th contractor, as well as a full onsite evaluation for every 50th contractor scheduled for the abbreviated desk audit.

Director Shiu and other proponents of the recession have indicated that the ACM procedures have limited the OFCCP's discretion in performing its enforcement obligations. The text of the Directive itself states that: "While ACM has identified a number of systemic cases since its implementation, it has also caused OFCCP to narrow the focus of its enforcement efforts and has eroded OFCCP's enforcement authority." (241 DLR AA-1 12/2/10). The agency has identified the need to gain greater flexibility to combat, for example, individual cases of discrimination that may have been overlooked with the ACM's focus on systemic cases of 10 or more.

The recession of the abbreviated desk audits creates a period of uncertainty for federal contractors. OFCCP has promised more "robust" enforcement, which may indeed mean more frequent onsite evaluations and full desk audits. OFCCP seems intent on focusing not only on systemic discrimination, but also on those cases that may involve only a single individual. Contractor compliance evaluations should become more focused under the new administration - and that may lead to enhanced enforcement activities.

Federal contractors that are accustomed to the technical compliance aspects of the abbreviated desk audits are advised to focus on their broader affirmative action and EEO responsibilities. Companies should make sure that management is properly trained in OFCCP law and compliance. In addition, internal annual reviews of all aspects of OFCCP compliance will be more important than ever as enforcement efforts increase in frequency and complexity.

Venable is available to assist with all OFCCP compliance and enforcement issues.

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