



## Legal Alert: OFCCP Outlines New Audit Procedures

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Recently, the Office of Federal Contract Compliance Programs (OFCCP) issued new procedures for conducting supply and service compliance reviews. While the directive is dated December 16, 2010, it was not released by the OFCCP until February 2011. The new procedures are in effect for supply and service evaluations scheduled on or after January 1, 2011.

Since July 25, 2003, the OFCCP compliance evaluations have been processed under the Active Case Management (ACM) procedure. With a directive issued December 2, 2010, the OFCCP rescinded the ACM process because "it did not allow OFCCP to effectively use all of its investigative tools." The contracting community has been awaiting the issuance of new procedures for conducting supply and service audits. The new procedures are entitled Active Case Enforcement (ACE) procedures.

The ACE directive begins with a definitions section, which defines the following processes: compliance check; compliance evaluation; compliance review; focused review; full desk audit; full compliance review; offsite review of records; and preaward compliance evaluation. These various terms define the scope of the audit. While the OFCCP will use different terms to describe each audit, the ACE directive makes clear that all supply and service contractors selected for review will be required to submit their affirmative action plans (AAP) and supporting documentation to the OFCCP within the time specified in the scheduling letter. The next step will be a full desk audit. **Selection Procedure**

Under the ACE procedure, the OFCCP will continue to use the neutral Federal Contractor Selection System (FCSS) to select supply and service contractor establishments for compliance evaluations. A neutral selection criteria will then be employed to designate which type of investigative procedure will be conducted for each establishment. For instance, the list will identify whether an establishment will undergo a compliance review, an offsite review of records, compliance check, or a focused review. The directive further instructs each OFCCP regional/district/area office to schedule the establishments for review in the strict sequential order identified on the FCSS list. **OFCCP Cooperation With Other Agencies**

Simultaneous with mailing the scheduling letter to a selected contractor, the OFCCP will contact the EEOC and the state/local fair employment practice agency to determine the nature, status, and outcome of any complaints filed against the establishment. The contractor will then submit its AAP and supporting data. The OFCCP will then conduct a full desk audit under the Executive Order, the Rehabilitation Act, and Vietnam Era Veterans

Readjustment Assistance Act (VEVRAA). The OFCCP will also review its own records for the previous three years to assess the contractor's recent compliance history and determine if there are any "patterns of noncompliance." "Patterns of noncompliance" will be based on the OFCCP's data and information obtained from the EEOC, state/local agencies, and/or any other agencies such as the Department of Labor's Veterans Employment and Training Services and the Wage and Hour division. **Desk Audit to Onsite to Audit Closure**

As with compliance reviews for the past several years, during the desk audit the OFCCP will determine whether there are "indicators of potential discrimination or violation" which will require an onsite investigation. In the past, the OFCCP considered statistical and anecdotal evidence to determine whether "indicators" exist. However, under the ACE procedure, indicators of potential discrimination and/or violations will also include: patterns of individual discrimination; patterns of systemic discrimination; patterns of major technical violations, such as recordkeeping deficiencies or the failure to maintain an AAP; and noncompliance with other labor and employment laws, such as wage and hour laws. In addition, an onsite may occur if the OFCCP determines that the submitted AAP or supporting documentation is insufficient to determine compliance. If no indicators are found, the OFCCP may close the review. However, if the compliance review has been designated by the national office as a "quality control review" or "focused review," the compliance officer must conduct an onsite even in the absence of indicators. During an onsite review, the OFCCP will examine data and documentation relating to the indicator, but the ACE procedures make clear that the scope of an onsite is not limited to the indicators. In addition, during an onsite review, the OFCCP will also determine the contractor's compliance with the Executive Order 13496 (the mandated posting which informs employees of their rights to organize).

If during the desk audit minor technical violations have been identified but no indicators exist as to potential discrimination, the compliance officer will attempt to remedy the deficiencies. If the deficiencies have been remedied, a letter entitled "Closure for No Apparent Violations or Technical Violations" will be issued. If the conclusion of the review results in major technical violations and/or discrimination remedied through a conciliation agreement, the audit will close with the "Closure Letter for Substantive Violations."

#### **Employers' Bottom Line:**

Effective January 1, 2011, federal contractors can expect to experience more onsite reviews. Under the ACE procedure, a full compliance review which includes all three stages of a compliance review (full desk audit, onsite, and offsite analysis) will be conducted of every 25th contractor establishment. These establishments will be identified as "quality control compliance review establishments" on the list provided to the regional office.

In keeping with her statement that "it is a new day at the OFCCP," Director Shiu is warning the federal contractor community that aggressive audits will continue, that the scope of audits will continue to be very broad, and that more onsites will be conducted. Since every audit will begin with a full desk audit, contractors will want to ensure that their AAPs and supporting documentation are complete and accurate prior to submission to the OFCCP.

If you have any questions regarding affirmative action obligations or other issues addressed in this Alert, please contact the author, Karen Tyner, [kytyner@fordharrison.com](mailto:kytyner@fordharrison.com), any member of Ford & Harrison's Affirmative Action Compliance and Plan Development practice group or the Ford & Harrison attorney with whom you usually work.