



Everything You Want to Know About the Revised PDN Final Rule

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On August 4, 2023, the Office of Federal Contract Compliance Programs (OFCCP or the agency) published a **Final Rule** (2023 Rule) titled “Pre-enforcement Notice and Conciliation Procedures.” The rule primarily affects the procedures that OFCCP must follow when it identifies discrimination during a compliance evaluation. These procedures were put in place by a previous **Final Rule** (2020 Rule) published November 10, 2020.

In sum, the 2023 Rule differs from the 2020 Rule through the rescission of several key components, as well as modification or clarification of a few items. The 2023 Rule does not create any new requirements but may make it more difficult for contractors to meaningfully respond to OFCCP’s allegations of discrimination. Overall, OFCCP believes these changes will lead to more effective enforcement and greater focus on “*preliminary findings of potential discrimination.*” The specific changes are covered in detail below.

Pre-enforcement Notice Background

While the vast majority of OFCCP compliance evaluations end amicably with Notices of Compliance (also referred to as “Notices of Closure”), federal contractors may be faced with potential enforcement proceedings/litigation. OFCCP has several pre-enforcement notices it may use at this stage.

First, prior to enforcement proceedings, OFCCP generally must issue a Show Cause Notice (SCN), which gives a contractor 30 days to show why enforcement proceedings should not be initiated. While OFCCP can issue a SCN after it has completed a compliance evaluation, the SCN can also be issued earlier in the evaluation (for instance, if a contractor refuses to submit an AAP). When OFCCP seeks to remedy substantive violations, a SCN will be preceded by a Notice of Violation (NOV) and a conciliation process between OFCCP and the contractor. The NOV is issued when OFCCP has completed its compliance evaluation and has found one or more violations of the laws it enforces. The NOV will lay out the violations that OFCCP has found, along with required corrective actions. OFCCP will invite the contractor to commence the conciliation process. If OFCCP has found potential violations that are non-discriminatory in nature (called “technical violations”), the NOV will likely be the first pre-enforcement notice the contractor receives.

If, however, OFCCP found violations that were discriminatory in nature, the agency sometimes issued another pre-enforcement notice, called the Predetermination Notice (PDN), before issuing a NOV. The PDN would notify the contractor of the agency’s preliminary findings of discrimination and, in turn, give the contractor time to respond. If the contractor failed to respond to the PDN or their response failed to alter the agency’s alleged findings, OFCCP would begin the conciliation process by issuing a NOV.

Prior to 2018, OFCCP’s issuance of a PDN before a NOV was not required. OFCCP Directive 2018-01, which is still in effect, removed district- and regional-level discretion in determining when to issue PDNs before NOVs and required OFCCP offices to have all PDNs reviewed by OFCCP’s National Office. In November 2020, OFCCP issued the 2020 Rule that codified the agency’s use of PDNs, in line with Directive 2018-01, and described what types of evidence the National Office must use to support the regional and district offices’ preliminary findings of individual or systemic discrimination. The 2020 Rule was in line with Director Craig Leen’s “CERT” initiative (Certainty, Efficiency, Recognition, and Transparency) and had broad support from the federal contractor community.

The 2023 Rule is a distinct deviation from the 2020 Rule; we delve into the differences below.

Evidentiary Standards

Under the 2020 Rule, when issuing a PDN or NOV, OFCCP must provide the contractor with the underlying theory of discrimination, the qualitative and quantitative evidence it relied on for the violation(s), and demonstrate that the unexplained disparity is both statistically and practically significant. Additionally, upon the contractor’s request, OFCCP was required to provide information on the model and variables used in statistical analyses and an explanation for why any variable proposed by the contractor was excluded from

the analysis. The 2020 Rule stated this was to provide greater clarity and certainty to Federal contractors.

The 2023 Rule retains the requirement that OFCCP issue a PDN and NOV prior to initiating enforcement for discrimination cases, however the evidentiary standards outlined above were rescinded. These standards are discussed in further detail in this section.

Theory of Discrimination

The 2020 Rule required that OFCCP indicate in a PDN or NOV which theory of discrimination the violation(s) were based on: disparate impact or disparate treatment. Disparate impact occurs when practices are nondiscriminatory on their face (i.e., facially neutral) but have a disproportionately negative effect on members of a legally protected group. An example of this would be an employment test that disproportionately screens out a certain protected class of applicants. This is commonly referred to as adverse impact and it is not illegal as long as the employer can demonstrate that the practice is job-related and consistent with business necessity. Disparate treatment occurs where members of a race, sex, or ethnic group have been denied the same employment, promotion, membership, or other employment opportunities as have been available to other employees or applicants.

Knowing and communicating the theory of discrimination is important as it impacts the type of evidence required and party responsible for the burden of proof. For example, if OFCCP identifies that a specific pre-employment test was causing disparate impact, the contractor could focus its efforts on demonstrating that either the test did not cause adverse impact or that it was job-related and consistent with business necessity. Without the theory of discrimination, contractors would not know which part of the pre-employment process OFCCP was claiming was discriminatory and how OFCCP believed it was discriminatory.

The 2023 Rule rescinded this requirement, however, claiming that the theory of discrimination is not necessary at the pre-enforcement stage. OFCCP states that the “agency need not provide the specific theory of proof or satisfy rigid evidentiary standards to provide preliminary notice of findings of discrimination,” but for “proof at trial” would gather relevant evidence. OFCCP does not explain why it cannot gather relevant evidence during its compliance evaluations and instead needs to rely on discovery in enforcement proceedings.

Qualitative & Quantitative Evidence

In general, the 2020 Rule required OFCCP to disclose both qualitative and quantitative evidence in PDNs and NOV's in sufficient detail to “allow contractors to investigate allegations and meaningfully respond.”

Qualitative evidence was defined in the 2020 Rule as including the various types of documents, testimony, and interview statements that OFCCP collects during its compliance evaluations relevant to a finding of discrimination and clarified the purposes for which it would be used. Quantitative evidence was defined as a statistical test that showed that a disparity in selection rates or compensation was statistically significant.

The 2023 Rule rescinded both the definitions of and the requirement to disclose quantitative and qualitative evidence in sufficient detail to allow contractors to meaningfully respond, calling them confusing and stating they created more problems than benefits. OFCCP found that these definitions led to “increased disputes” with contractors during audits, preventing efficient resolution. OFCCP changed the disclosure requirements to “describe the preliminary findings” in a PDN and “identify the violations found” in the NOV, removing the requirement that contractors be able to “meaningfully respond.”

Statistical Model

As a matter of transparency, the 2020 Rule required that OFCCP provide the underlying model and variables used in any statistical analysis, as well as information on the exclusion of data or variables. Many commentors believed this allowed for contractors to better replicate OFCCP's analyses, especially with regard to how they might code certain variables. The 2023 Rule removes this requirement, citing the inefficiencies the agency believes it created during audits. The 2023 Rule states that “the agency needs to have discretion to ascertain where providing further details about its modeling is likely to be productive.” The 2023 Rule goes on to explain, however, that OFCCP will explain its analysis in sufficient detail for the contractor to replicate the analysis.

Although the 2023 Rule no longer requires OFCCP to provide the model and variables, **Directive 2018-05**, which is still active, does require OFCCP to provide underlying data in some situations:

OFCCP will attach to any Pre-Determination Notice (PDN) for preliminary discrimination findings (see Directive 2018-01) the individual-level data necessary for the contractor to replicate the [pay analysis groups] (PAG) and regression results. The attachment will be in electronic format, such as MS Excel. The PDN provides the contractor a formal opportunity to offer a non-discriminatory explanation for OFCCP's preliminary findings prior to a finding of a violation. The PDN and the response will be reviewed by the national office. OFCCP will also attach the individual-level data necessary for the contractor to replicate the PAGs and regression results in any subsequent Notice of Violation for discrimination findings if different from the PDN. (Footnote omitted)

As a reminder, directives are sub-regulatory and can be rescinded at any time by the Director. However, at present day, it is the policy of OFCCP that a PDN must be accompanied by the underlying data and model for compensation violations at the very least.

Some commenters have noted that the removal of this requirement, and evidentiary standards in general, will make it more difficult to replicate OFCCP's approach during self-audits.

Practical Significance

Practical significance refers to whether a disparity in employment opportunities or outcomes reflects meaningful harm to the disfavored group. This measure focuses on the contextual importance of the difference rather than a likelihood that it was due to chance. For example, in the large groupings that OFCCP typically favors for compensation analysis, it is possible that a very small difference in pay can nonetheless be statistically significant because of the large size of the group. A measure of practical significance would indicate whether or not that small difference is practically meaningful. The 2020 Rule codified practical significance as an evidentiary standard for pre-enforcement actions, citing the expectation that it would help the agency ensure it is effectively using its limited resources.

The 2023 Rule rescinds the evidentiary requirement for practical significance, citing concerns that there is no professional consensus among experts regarding an appropriate threshold and claiming the case law is unsettled on whether Title VII of the Civil Rights Act of 1964 (Title VII) requires it. OFCCP states that it will continue to utilize practical significance "where appropriate," although it is no longer required by regulation to do so.

Logistical and Language Changes

Response Time and Early Resolution

Directive 2018-01 initially gave federal contractors 15 calendar days to respond to OFCCP's preliminary findings of discrimination as outlined in the PDN. When the 2020 Rule was still in the rulemaking process, several commenters noted that 15 calendar days was not enough time to fully respond, especially if the agency shared more information with the contractor as outlined in the proposed 2020 Rule. In the final 2020 Rule, OFCCP extended the PDN response deadline from 15 to 30 calendar days, with the possibility for extensions based on "good cause."

The 2023 Rule reverts back to the PDN response deadline of 15 calendar days but retains the language regarding possible extensions for good cause. The 2023 Rule states the shortened deadline "allow[s] OFCCP to move compliance evaluations along expeditiously, while providing contractors with a reasonable period to review and respond...and the opportunity to obtain an extension if needed."

Per **OFCCP's FAQ**, the following are examples of good cause:

- *extended medical absences of key personnel;*
- *localized or company-specific disaster affecting records retrieval such as a flood, fire, or computer virus;*
- *unexpected military service absence of key personnel; or*
- *unexpected departure of key affirmative action official.*

It seems unlikely that the additional 15 days contractors had to respond under the 2020 Rule had a meaningful effect on the length of OFCCP's compliance evaluations.

Consistent between the 2020 and 2023 Rules is OFCCP's willingness to engage in early resolution or "expedited conciliation." When federal contractors are faced with potential violations, the agency remains committed to offering contractors the opportunity to skip the PDN and NOV and begin the conciliation process. While early resolution is a positive for contractors who agree with the violations the agency alleges or see merit in concluding the compliance review, contractors who do not have sufficient time to understand or substantiate OFCCP's findings of discrimination may not find the opportunity for early resolution as enticing. Thus, OFCCP's goals for a more "streamlined, effective, and flexible pre-enforcement and conciliation process," may, in turn, result in fewer contractors interested in early resolution.

Reasonable Efforts Standard

Currently, OFCCP's regulations require it to make "reasonable efforts" to resolve violations through conciliation. OFCCP aims to revise its "reasonable efforts" standard to explicitly state that it is the same as a similar requirement that applies to the Equal Employment Opportunity Commission (EEOC) under Title VII.

Additional Violations

The 2023 Rule explicitly states that, after a PDN has been issued, if the agency identifies additional violations, the existing PDN will not be amended nor will another PDN be issued. Instead, the additional alleged violations will be provided to the contractor in a subsequent NOV or SCN, wherein "OFCCP will provide the contractor an *opportunity to conciliate* additional violations identified." (emphasis added) Note, an "opportunity to conciliate" is not necessarily an opportunity for rebuttal.

The 2023 Rule codifies OFCCP's ability to issue a SCN without first issuing a PDN or NOV. Interestingly, the agency retains its ability to modify or amend a SCN if additional violations are found after its issuance.

PDN Issuance Prior to On-site Review

Finally, OFCCP's commitment to streamlining compliance evaluations through the 2023 Rule goes so far as to allow the agency to issue a PDN "when it has preliminary findings of potential discrimination," including after the desk audit phase and before an on-site review has been conducted. "This provides contractors the opportunity to share additional information about their compliance in response to the concerns raised by OFCCP before the agency, if appropriate, issues a Notice of Violation." One might counter, though, that the purpose of Compliance Officers' requests for information and on-site reviews are for the contractor to share additional information, context, and responses to the agency's concerns. The use of a PDN so early in the investigation process essentially puts the onus on the contractor to disprove "preliminary findings" of discrimination that OFCCP has not even started investigating.

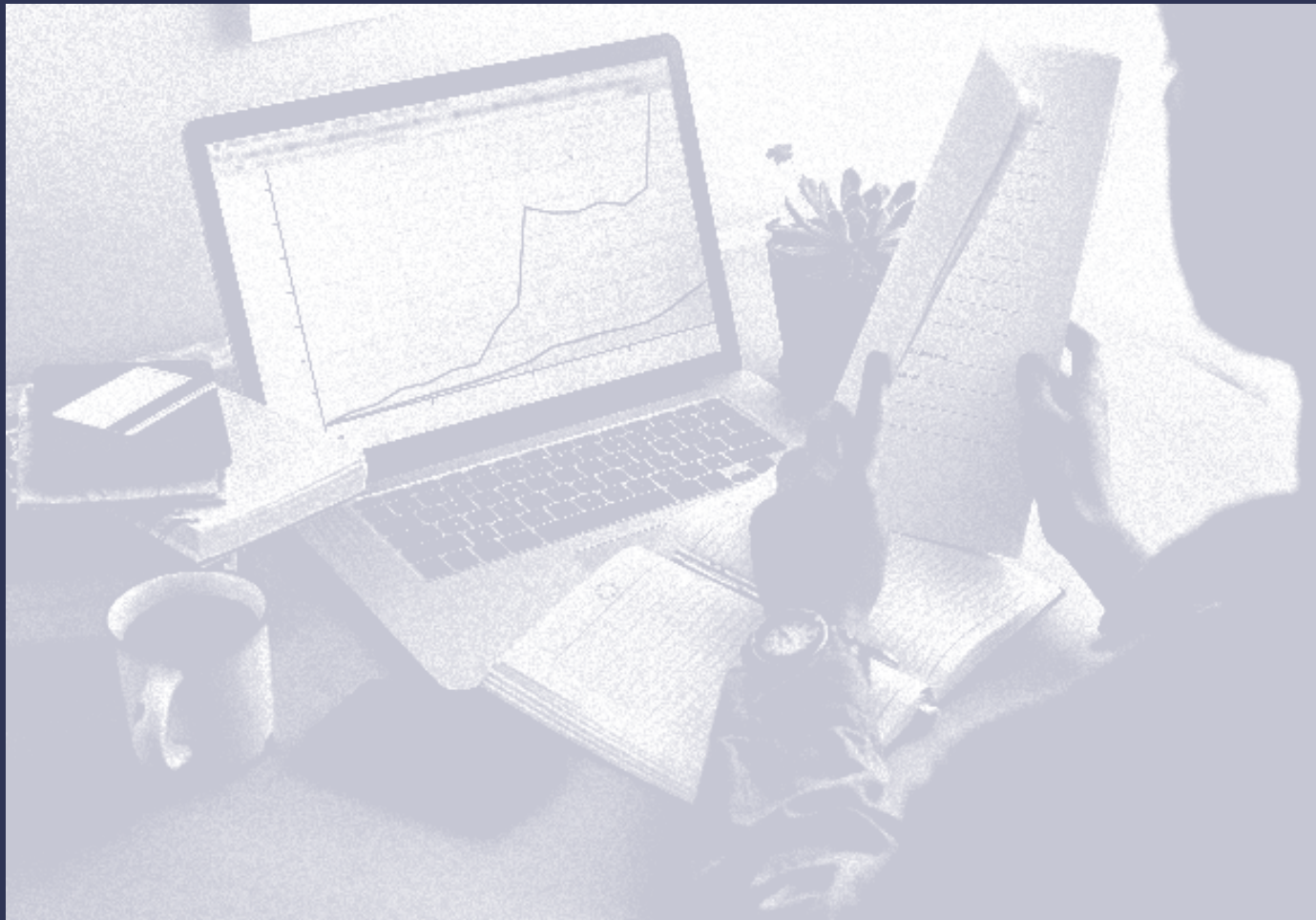
Looking Ahead

OFCCP has had a few challenging years. As the agency navigated a pandemic like most federal contractors with which it works closely, OFCCP has conducted low numbers of compliance evaluations and has brought in fewer financial settlements for affected class members. While the 2023 Rule seems to cite contractors and their unwillingness to cooperate with the agency as the reason for these low numbers, there are myriad external and internal factors at play for OFCCP.

Although the 2023 Rule is not effective until September 5, 2023, federal contractors who have recently been in the pre-enforcement stage of an audit will notice little change. Over the last year, OFCCP has been steadily moving away from providing underlying data, models, and general transparency in these reviews. Additionally, many offices across the country are suggesting early resolution earlier and earlier in the compliance evaluation process. It is important to note, however, that any PDNs or NOV's issued prior to September 5th will be covered by the 2020 Rule.

Nobody benefits from long, arduous compliance evaluations nor does anybody benefit from audits that are rushed and based on the most preliminary of investigations either. Similarly, if the agency's goal is to identify and remedy discrimination, it is unclear how removing the requirements that allowed contractors to meaningfully respond advances this goal.

While OFCCP claims to still be adhering to its goals of Certainty and Transparency in the 2023 Rule, it is hard not to recognize that this rule continues to roll back both. In doing so, the agency does a disservice to its relationship with the contractor community and diminishes its own resources and abilities to remedy true discrimination when it occurs.



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