



OFCCP Issues Contractor Friendly Directives That Aim to Streamline Investigative Processes and Decrease Contractor Guesswork

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Directly in line with the U.S. Department of Labor's Office of Federal Contract Compliance Program's (OFCCP) new policy emphasis on [agency transparency](#), accountability, efficiency and collaborative resolution, the OFCCP [released three new helpful directives](#) on November 30, 2018 concerning the agency's investigative procedures and avenues for increased communication with federal contractors. The three directives, titled [DIR 2019-01](#) (regarding "Compliance Review Procedures"), [DIR 2019-02](#) (regarding "Early Resolution Procedures"), and [DIR 2019-03](#) (regarding "Opinion Letters and Help Desk") were issued to "provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy [and] procedures." While each directive serves its own unique regulatory function, together these directives represent OFCCP's commitment to consistency in enforcement and cooperation with the federal contractor community. As a whole, they should be viewed as beneficial to contractors aiming to comply with the law, but minimize the "gotcha" approach recently favored by the agency.

DIR 2019-01, "Compliance Review Procedures"

The first of the newly issued OFCCP directives, DIR 2019-01, concerns the manner in which the OFCCP conducts compliance reviews. The purpose of DIR 2019-01 was to rescind DIR 2011-01, an Obama-era policy issued in December of 2010. The previous policy, DIR 2011-01, issued by former Director Patricia Shiu, outlined the Active Case Enforcement (ACE) for Supply and Service (S&S) compliance evaluations. Under the ACE procedures, full OFCCP desk audits were required, and there was an increased frequency of mandatory onsite reviews. However, as a result, investigations were more thorough and the "overall processing time increased."¹ These were trends that the current Acting Director, Craig Leen, aimed to address.

With the focus on increasing transparency and efficiency, starting in 2017, the OFCCP began posting its S&S scheduling list methodology and established procedures to shorten the time to complete a full desk audit. Citing these procedural changes, along with the facts that the OFCCP has embedded the "valuable components of ACE" into its standard operating policies, and that the Federal Contract Compliance Manual (FCCM) was updated in August 2014 to incorporate key aspects of ACE, the OFCCP concluded that "there *is no longer the need* for the ACE directive as a freestanding guidance document."²

¹ https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html

² https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html

In addition to rescinding DIR 2011-01 as an independent guidance document, DIR 2019-01 also lays out specific procedural policies that aim to clarify the scope of investigations. Specifically, DIR 2019-01 notes that those federal contractors that have previously undergone a compliance evaluation “will be *exempt* from another neutrally scheduled compliance evaluation, for 24 months from the date of closure of the compliance evaluation or the date OFCCP accepts a final progress report,”³ unless a separate OFCCP policy mandates such an evaluation, or unless a different exemption period is agreed upon by OFCCP and the contractor. Moreover, DIR 2019-01 limits the scope of onsite investigation to “the nature or scope of the indicators or concerns that triggered the onsite review.”⁴

DIR 2019-02, “Early Resolution Procedures”

In the same spirit of procedural efficiency, DIR 2019-02 was crafted to “resolve [S&S] compliance evaluations at the earliest stage possible with corporate-wide compliance”⁵ through OFCCP’s new Early Resolution Procedures (ERP). Under previous OFCCP policy, compliance evaluations were often lengthy, which had a negative effect on the percentage of federal contractors that the OFCCP could evaluate.⁶ Written with the intention to combat these trends and to reach more establishments, the OFCCP has written the ERP to achieve its “mutual goal of equal opportunity in federal contracting and [to] reduce the length of compliance evaluations through early and efficient resolutions.”⁷

DIR 2019-02 lays out the general guidelines in the implementation of OFCCP’s new ERP. The OFCCP envisions three separate scenarios where the ERP could be utilized, distinguishing between non-material/material violations, and material non-discrimination/discrimination violations. Each of these scenarios has its own procedures under the ERP, which are summarized below:

<i>Type of Violation</i>	<i>OFCCP-Provided Example(s) of Violation⁸</i>	<i>Procedure under ERP</i>
Non-Material Violations	An unacceptable affirmative action program element	<ul style="list-style-type: none"> If during a desk audit,⁹ the OFCCP finds <i>non-material</i> problems that can be corrected immediately during the desk audit, under the ERP, the OFCCP compliance officer (CO) will seek to resolve the evaluation during the desk audit, provide any compliance assistance to the

³ https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html

⁴ https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_01.html

⁵ <https://www.dol.gov/newsroom/releases/ofccp/ofccp20181130>

⁶ According to OFCCP data, in FY 2012, OFCCP concluded about 3,400 evaluations and in FY 2017 fewer than 1,000. This represented 2.8 percent and less than one percent of the universe of covered contractors, respectively. (Source: https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html)

⁷ https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html

⁸ These are only the examples provided within the OFCCP directives. A contractor’s unique situation may fit within a particular category even if it is not on this list.

⁹ A desk audit is a comprehensive analysis of all of a contractor’s written AAPs - Executive Order 11246 (EO 11246), Section 503 of the Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA) - and supporting documentation. These analyses include, but are not limited to, an impact ratio analysis, compensation analysis, and assessment of the reasonableness and

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		<p>contractor, and issue a closure letter referencing the non-material violations and their remedies.¹⁰</p> <ul style="list-style-type: none"> This procedure is only applicable if there are <i>no additional indicators</i> of potential discrimination, lack of good faith efforts or other material non-discrimination violations.
<p>Material Violations: Non-Discrimination</p>	<ul style="list-style-type: none"> Non-compliant record keeping Non-compliant applicant tracking Failure to implement audit and reporting systems Failure to conduct self-analysis 	<ul style="list-style-type: none"> This procedure is only applicable for contractors with multiple establishments. Upon completion of a desk audit, the OFCCP will seek to resolve such violations through an Early Resolution Conciliation Agreement with Corporate -Wide Corrective Action (ERCA).¹¹ As a multiple establishment contractor, the ERCA will require the contractor to review all, or a negotiated subset, of its remaining establishments for the similar violation(s) during the progress report-monitoring period, and if necessary, implement corrective actions at those establishments to eliminate the violations(s) and prevent recurrence. So long as the contractor and OFCCP agree to these terms, the OFCCP will not schedule a new compliance evaluation at the contractor's establishment for a five year period from the effective date of the ERCA.
<p>Material Violations: Discrimination</p>	<ul style="list-style-type: none"> Race, national origin religion, sex, sexual orientation, gender identity, protected veteran status or disability discrimination Retaliation based on any protected class 	<ul style="list-style-type: none"> If during the desk audit, the CO finds material discrimination-based violations, within 14-days, the CO will discuss the audit with OFCCP's district and regional offices, who will in turn contact the contractor to schedule further interviews. The CO will also collect further information.

acceptability of each affirmative action program. (Source: https://www.dol.gov/ofccp/regs/compliance/faqs/ACE_faqs.htm#Q15)

¹⁰ https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_02.html

¹¹ Under DIR 2019-02, OFCCP will maintain a sample ERCA template on its website. If an ERCA procedure may be applicable to you, check on the OFCCP website for any updates to the template. The OFCCP "preserves its discretion to change and update the sample ERCA template without public notice."

<i>Type of Violation</i>	<i>OFCCP-Provided Example(s) of Violation⁸</i>	<i>Procedure under ERP</i>
		<ul style="list-style-type: none"> • When the CO receives this additional information, the CO will “expedite and seek to complete a refined analysis in 14-calendar days.” • If the second analyses still indicate potential discrimination, the CO, Assistant District Director and/or District Director will contact the contractor to offer the ERP option. • If the contractor agrees to engage in ERP, the OFCCP and contractor will meet within 14-calendar days to discuss the OFCCP’s findings, proposed remedy, and corrective actions. This process should ideally last no more than 60-calendar days from the meeting between the OFCCP and contractor.

DIR 2019-03, “Opinion Letters and Help Desk”

Perhaps of most practical application for federal contractors is DIR 2019-03, which seeks to (1) establish an OFCCP process for issuing Opinion Letters which provide guidance on the application of OFCCP regulations to fact-specific situations, and (2) develop an easily accessible, searchable and publicly available source of Help Desk questions and answers.

Under DIR 2019-03, employees and employers alike can make direct requests to the OFCCP for Opinion Letters regarding their unique situations, or access a widely accessible reference tool in the Help Desk or OFCCP-issued FAQs. Under this initiative, any OFCCP stakeholders (i.e. contractors, their employees, job applicants and the public) can call or e-mail the Help Desk so that the Help Desk staff at the OFCCP can provide technical assistance. Together, these programs function to provide “additional compliance assistance” and guidance regarding OFFCP law and regulations “in a manner that employees and employers can easily access and reasonably rely upon.”¹²

What Does This Mean for Federal Contractors?

Together, these three directives are beneficial to federal contractors. Not only do the directives lay out clearer procedures for federal contractors to understand the OFCCP investigatory process, but they provide assurances that any potential investigation will be transparent, efficient and predictable. Under the new ERP, they provide federal contractors with outlets to avoid expensive and time-consuming investigations, so long as they are willing to cooperate with OFCCP.

Most importantly however, the directives help federal contractors to seek clarification on confusing issues. By allowing contractors to directly request Opinion Letters from the OFCCP, a contractor

¹²https://www.dol.gov/ofccp/regs/compliance/directives/dir2019_03.html

can lay out fact-specific potential legal issues to determine whether the contractor is compliant with the law. These Opinion Letters can be very beneficial to a federal contractor because the OFCCP has stated that it “would consider whether a contractor acted consistently with an Opinion Letter, Directive, FAQ or Help Desk answer when determining whether to cite a violation for related actions.”

Overall, these three directives showcase a new OFCCP, one that appears to listen more closely to federal contractors simply seeking to comply with the law while running a business.