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By J. Edward Moreno

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 - Contractors must certify complete affirmative action plans
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2. Contractors must certify complete affirmative action plans

The Labor Department's Office of Federal Contract Compliance Programs laid out its expectations from contractors during the auditing process, an effort aimed at implementing the Biden administration's equity enforcement initiatives.

The directive, which serves as guidance and doesn't amount to a formal rulemaking, rolls back several business-friendly directives from the Trump administration that gave companies more time to respond to inquiries from the federal contract enforcement watchdog.

"OFCCP is modifying these policies because they run counter to OFCCP's goal of conducting comprehensive compliance evaluations that foster consistent accountability and timely submission of required information," the directive said.

The OFCCP also clarified that when contractors use the agency's new online portal for certification of their affirmative action plans "they are certifying that they have developed and maintained complete AAPs." Contractors previously were required to have such plans, but the agency never confirmed that they existed unless a company was audited.

Earlier this month, the OFCCP proposed a rule that would ease limits on the agency's ability to bring pay bias claims. That proposal came after the agency said in another directive that it would more closely scrutinize the pay equity audits of companies that work with the federal government.

Preparing for Audits

The new directive allows the OFCCP to start conducting audits immediately after publishing its list of Corporate Scheduling Announcement Letters, which names the companies slated for audit each fiscal year.

The office rescinded a previous directive that gave companies at least 45 days after that list is published to prepare for audits.

In conjunction with the pay equity directive issued earlier this month, the OFCCP made clear that contractors should be prepared during the audits to hand over all information about their internal pay analyses. That directive also clarified that self-audits conducted by law firms are not privileged, and the OFCCP could ask companies to hand those over as well.

According to the OFCCP, the directive issued Thursday gives the agency more time to audit contractors and eliminates delays in the audit process.

When announcing the proposed rule on pay bias claims, OFCCP Director Jenny Yang last week said the agency wanted more flexibility in the auditing process.

Mickey Silberman, who represents federal contractors in OFCCP matters, said the dynamic will lead to more contentious audits and gives contractors less of an incentive to be proactive in complying with equal employment requirements.

"Contractors need to recognize that the rules of the game have changed," said Silberman. "Employers need to learn these new rules, and quickly, before the next round of audits come out."

'Four Pillars'

Under the previous administration, the OFCCP took a more cooperative approach to audits, said former OFCCP director Craig Leen, who led the agency under the Trump administration.

Leen, now a partner with K&L Gates LLP, called the directives being rolled back "the four pillars," which were aimed at promoting certainty, efficiency, transparency, and recognition for companies that overachieve in compliance. These approaches were popular among employers and civil rights groups and contributed to the agency's increased recoveries for workers under the Trump administration, he said.

"A collaborative approach is more productive than an adversarial one. An auditing approach is more effective than a prosecutorial one," Leen said. "Hopefully OFCCP will adhere to the CERT principles in spirit even if they have rescinded the directives."

The OFCCP hasn't completely retracted the previous administration's initiatives.

In the proposed rule announced last week, the OFCCP kept a Trump-era requirement that cements the agency's use of predetermination notices, which formally accuse a contractor of discrimination.

The agency also emphasized that it's committed to "providing transparency, efficiency, and clarity in its compliance evaluation process" and maintaining communication with contractors.

(Updated with additional reporting throughout.)

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