What Contractors Might Expect in an OFCCP Review “Focused” on Promotions or Accommodations

National Industry Liaison Group
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Briefing Objectives

• Provide background on OFCCP’s focused reviews generally
• Introduce two new types of focused reviews announced last month
• Summarize what we know (so far) about what these new types of reviews will entail
• Discuss the practical considerations and implications related to these new reviews
• Offer a few suggestions on how federal contractors can prepare
Background

• Focused reviews generally
  – One of four types of OFCCP compliance evaluations authorized by rule
    • Compliance review | off-site review of records | compliance check | focused review
  – Defined as follows:
    • An on-site review restricted to one or more components of the contractor’s organization
      or one or more aspects of the contractor’s employment practices [41 CFR 60-1.20(a)(4)]
  – Utilized in varying degrees since first introduced more than 20 years ago, but
    “reinvigorated” by agency directive in August 2018 [DIR 2018-04]
      • Initially, to “focus” greater agency (and contractor) attention on compliance with disability-
        and veteran-related requirements
      • But explicitly authorizes focused reviews under each of OFCCP’s three legal “authorities”
• Key elements of Directive 2018-04
  – OFCCP will go “onsite and conduct a comprehensive review of the particular authority at issue”
    • EO 11246 (race/ethnicity/gender) | Section 503 (disability) | VEVRAA (veteran status)
  – For Section 503 and VEVRAA focused reviews
    • COs to review policies and practices related to disability and veteran compliance
    • COs to conduct interviews with managers and others responsible for compliance
    • COs to conduct interviews with employees affected by policies and practices
    • COs to evaluate hiring and compensation data and handling of accommodation requests
  – For EO focused reviews
    • To ensure compliance EEO obligations “as to all of the protections” in the EO
Background

• Implementation of focused reviews under Directive 2018-04
  – First wave of focused reviews targets **Section 503** compliance
    • FY19 Corporate Scheduling Announcement List (CSAL) published in March 2019; identifies 500 headquarters establishments for Section 503 focused reviews
    • Reviews begin in May 2019 after OFCCP receives OMB approval for new scheduling letter and agency launches new Section 503 focused review landing page
  – Second wave of focused reviews targets **VEVRAA** compliance
    • FY19 CSAL “supplement” published in November 2019; identifies additional 500 federal contractor establishments for VEVRAA focused reviews
    • Reviews held up until OMB approved new scheduling letter in April 2020
Background

• Implementation of focused reviews under Directive 2018-04
  – Third wave of focused reviews targets **promotions** and **accommodations**
    • FY20 CSAL released last month identifies 500 federal contractor establishments for **promotions** focused reviews and an additional 500 for **accommodations** focused reviews
    • No OMB approval (yet) for scheduling letters to initiate these new focused reviews
      ▶ If agency follows same process as was used for Section 503 and VEVRAA focused reviews, new promotions focused reviews and accommodations focused reviews will not commence until scheduling letter(s) are cleared by OMB
Promotions Focused Reviews

• Promotions focused review (PFR) landing page launched this month
  – References “glass ceiling” as underlying policy concern
    • Barriers that “keep[] qualified individuals, such as women of color or people with disabilities, from rising to higher positions in their workplaces”
  – States that PFRs will
    • Examine “whether discrimination occurs at the intersection of race and gender”
    • Utilize scheduling letters tailored to obtain basic AAPs, support data, and “information applicable specifically to promotion opportunities, policies and practices”
    • Include CO review of policies and procedures, employee personnel files, and personnel data tracking promotion decisions
    • Include CO interviews with managers responsible for promotion decisions, and also potentially affected employees
Promotions Focused Reviews

• PFR landing page (continued)
  – PFRs also *may* include
    • Evaluation of “hiring and compensation policies, procedures, and data, as appropriate, to determine if qualified applicants are being steered into lower paying positions with limited upward mobility or otherwise prevented from advancing professionally”
  – Landing page signals that additional PFR resources are “coming soon”
    • Sample On-Site Review Guide
    • Sample Focused Review Report
• PFR “frequently asked questions” page fills in a few details
  – Defines promotion
    • Federal Contract Compliance Manual (FCCM): “[a]ny personnel action resulting in, for example, the movement to a position affording higher pay, greater rank, change in job title, or increase in job grade; an increase in pay, requiring greater skill or responsibility; or the opportunity to attain such. A promotion may be either competitive or noncompetitive.”
  – Defines PFR
    • Desk audit followed by on-site investigation; concentrates on “whether there is evidence of systemic discrimination in the advancement opportunities for qualified individuals”
  – Explains purpose of PFRs
    • Address glass ceiling issues, focus on under-represented or unrepresented groups, specifically mentions women of color and people with disabilities
Promotions Focused Reviews

• PFR “frequently asked questions” page (continued)
  – Offers suggestions for how contractors can prepare for a PFR
    • *Conduct* self-audits as required by 41 CFR 60-2.17(b)(2)
    • *Share* these self-audits with OFCCP as part of the focused review
    • *Examine* internal and external outreach and recruitment efforts “to determine if candidate pools are diverse and reflective of available candidates in the market or workforce”
    • *Take* action to address patterns of underrepresentation or lack of representation in promotions or promotion opportunities
Promotions Focused Reviews

• Practical considerations and implications related to PFRs
  – Roles and responsibilities of third-party and executive search firms
  – Internal or external “diverse slate” initiatives, policies, or requirements
  – How promotions *typically* analyzed in *AAP-related* analyses
    • “Representative” promotional disparity analyses
      ▶ Unrefined – by job group or sometimes title, denominator includes all incumbents at beginning of period monitored, includes both competitive and noncompetitive
      ▶ Refined – by job group or sometimes title, denominator refined to reflect certain moves into and out of analytical unit during period monitored
    • “Actual” promotional disparity analyses
      ▶ Mirrors actual selection processes; denominator includes all (and only) individuals eligible for promotion from and within each analytical unit
Promotions Focused Reviews

• Practical considerations and implications related to PFRs (continued)
  – Are promotions defined by policy? If so, how?
  – Is this definition consistent with how promotions are tracked in the HRIS?
  – How are promotional opportunities communicated to employees?
    • All opportunities posted?
    • Some opportunities posted (e.g., those below a certain level)?
    • No opportunities posted?
Accommodations Focused Reviews

• Accommodations focused review (AFR) landing page also launched this month
  – No specific underlying policy concerns identified, but AFRs consistent with overall objectives of focused reviews
  – States that AFRs will
    • Include both disability and religious accommodations, and ensure contractors are not discriminating against employees and applicants by denying accommodation requests
    • Include CO review of policies and procedures related solely to religious and disability accommodations
    • Include CO review of documentation related to accommodation requests and dispositions, with particular emphasis on denials
    • Include CO interviews with managers responsible for or involved in accommodation process, as well as with affected employees and applicants
Accommodations Focused Reviews

• AFR landing page (continued)
  – Landing page signals that additional AFR resources also “coming soon”
    • Best Practices
    • Sample On-Site Review Guide
    • Sample Focused Review Report
  – . . . and links to the EEOC’s website page providing guidance and additional materials related to religious discrimination
Accommodations Focused Reviews

- AFR “frequently asked questions” page provides a few more details
  - Defines AFR by way of explaining what COs will do during one
    - Review policies/procedures related solely to provision of religious/disability accommodations; review documentation relating to accommodation requests and dispositions with “particular emphasis” on denials; interviews with managers responsible for or involved in accommodation process and with affected employees and applicants
  - Explains why AFRs being conducted
    - “Bring attention to contractor nondiscrimination obligations in the areas of religion and disability, as part of the agency’s effort to ensure contractors comply with all aspects of the laws OFCCP administers”
Accommodations Focused Reviews

• AFR “frequently asked questions” page (continued)
  – Explains requirements for religious and disability accommodation
    • Must be provided unless contractor can demonstrate undue hardship
    • Offers examples of religious accommodations: providing space/time for prayers; allowing employees to wear religious head coverings or facial hair; adjusting schedules so that employees do not have to work on religious holidays or Sabbaths
      ► States that religious accommodation requests generally do not need to be accompanied by documentation proving “sincerely held religious beliefs”
    • Offers examples of disability accommodations: providing modified equipment and devices; changing work schedules; holding meetings in accessible areas
      ► States that disability accommodation requests may require submission of documentation of need for accommodation based on nature of disability
Accommodations Focused Reviews

• AFR “frequently asked questions” page (continued)
  – Explains requirements for *undue hardship*
    • For **religious** accommodations, must consider, at minimum
      ► Business necessity, financial cost/expense, resulting personnel problems [41 CFR 60-50.3]
    • For **disability** accommodations, must consider five factors
      ► Nature and *net* cost (including tax credits/deductions, outside funding)
      ► Facility’s overall financial resources, employee count, effect on expenses/resources
      ► Contractor’s overall financial resources, employee count, and number, type and location of facilities
      ► Contractor’s type of operation(s), including workforce composition/structure/functions and geographic separateness and administrative/fiscal relationship with facility
      ► Accommodation’s impact to facility’s operations, including ability of other employees to perform duties and impact on the facility’s ability to conduct business
Accommodations Focused Reviews

• AFR “frequently asked questions” page (continued)
  – Signals agency’s thinking on centralized religious accommodations process
    • Draws on experience with centralized processes/systems for disability accommodations
    • States that such systems “can be an efficient, high-impact way for contractors to better
      serve their employees”
    • But guides contractors to ensure that members of centralized team are “knowledgeable
      about how to handle religious accommodation requests in a legally appropriate way”
Accommodations Focused Reviews

• Practical considerations and implications related to AFRs
  – OFCCP has been routinely requesting information on accommodation policies and requests during compliance reviews
    • But contractors selected for an AFR should expect a far more probing examination of accommodation-related policies, practices, and data
  – Are accommodation requests managed/processed by a centralized team?
    • If so, has this operation of this team been impacted by the current pandemic?
  – Are standard forms used to document accommodation requests and/or how these requests are dispositioned?
    • If accommodation requests/determinations are documented, are they documented for all accommodations, or just those meeting certain criteria?
• Practical considerations and implications related to AFRs (continued)
  – What partnerships, if any, have been established with organizations that exist to help assess/provide requested accommodations?
  – Do managers receive any training or general information on compliance with EEO requirements related to religion and disability?
  – If an accommodation request is denied, can that decision be “appealed to” or is that decision reviewed by anyone else after the initial decision is made?
Discussion | Q&A

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