

OFCCP New Rule On Procedures for Resolving Alleged Findings of Discrimination Goes Into Effect December 10, 2020

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Quick Hit: OFCCP has published its [final rule](#) codifying the process by which it determines and notifies contractors of findings of discrimination. The rule, which goes into effect on December 10, 2020, adds significant detail regarding the evidence on which OFCCP must base such findings and what must be communicated to contractors when OFCCP seeks to pursue such findings.

Key Takeaways: The new rule is a welcome development for contractors, imposing significant new requirements before OFCCP can issue findings of discrimination.

First, any new findings must be reviewed by the Director or acting agency head to ensure they contain sufficient quantitative evidence that is practically significant, as well as qualitative evidence supporting the findings of discrimination. The involvement of the national office in this process will hopefully create some consistency in the manner in which the agency determines and pursues discrimination findings. Further, the detailed evidentiary predicate necessary for such findings will hopefully prevent compliance officers from pursuing discrimination findings grounded in inadequate evidentiary support.

Second, the agency cannot pursue the discrimination findings without first issuing the contractor a Predetermination Notice (“PDN”) which provides notice of this evidence in sufficient detail to permit a meaningful response. PDNs cannot be issued without approval of the Director or the acting agency head. Codification of the PDN process, previously introduced in an agency [directive](#), provides the contractor with meaningful notice of a potential finding of discrimination, the bases for that potential finding, and the opportunity to respond before the issuance of a Notice of Violation (“NOV”). Notably, upon request, OFCCP must provide the contractor with the model and variables used in any statistical analysis and an explanation for the exclusion from the analysis of any variables proposed by the contractor. In the past, the agency would often issue NOVs without prior notice to the contractor. In our experience, NOVs would often be driven by errors and misunderstandings, but OFCCP would rarely if ever admit a mistake – often creating an odd circumstance where OFCCP would not change its position that the contractor discriminated, but was willing to enter into a

conciliation agreement which would negate that finding either through silence or practically via a negligible backpay remedy. Now, contractors have the ability to demonstrate to OFCCP its preliminary finding is erroneous before the issuance of an NOV.

Third, OFCCP may not issue an NOV until after the 30-day period provided for the contractor to respond to the PDN. Moreover, the NOV must provide the same evidentiary detail provided in the PDN as well as address any of the issues raised by the contractor in its response to the PDN.

While this process should avoid some of the error-ridden NOV's issued in the past, it is possible that results-oriented compliance officers will use the contractor's PDN response to develop alternative bases for reaching the same (erroneous) result.

Contractors should become familiar with these new requirements and ensure OFCCP complies with them in any compliance evaluation. The rule is a positive step towards establishing a more transparent, efficient and fair process that, if implemented in good faith, should help contractors avoid having to fight with OFCCP over erroneous NOV's. Time will tell.

More Detail:

OFCCP has stated its new rule is meant to "increase clarity and transparency for Federal contractors, establish clear parameters for OFCCP resolution procedures, and enhance the efficient enforcement of equal employment opportunity laws." This is accomplished through detailed rules for issuing PDNs and NOV's.

PDN Process and Requirements:

The rule codifies the use of PDNs "if a compliance review . . . indicates evidence sufficient to support a preliminary finding of disparate treatment and/or disparate impact discrimination" and sets forth the required contents of PDNs. In other words, discrimination findings may not be pursued unless and until OFCCP engages in a process with contractors, which begins with the issuance of a PDN. Notably, OFCCP may not issue a PDN without approval of the Director or acting agency head, which should provide some manner of consistency and quality checking for PDNs.

In implicit recognition of the fact the agency's discrimination findings have not always appreciated the difference between disparate impact and disparate treatment theories of discrimination and the evidentiary burdens associated with each, the rule instructs that PDNs must indicate which theory the preliminary discrimination finding is based upon and identify certain evidentiary support for the preliminary finding depending on the theory pursued.

- For disparate treatment-based findings, the PDN must include:

(i) "quantitative evidence" (discussed below)

(ii) demonstrate that the unexplained disparity is "practically significant," and

(iii) provide "qualitative evidence" (discussed below) that when combined with quantitative evidence, "supports both a finding of discriminatory intent by the contractor and a finding that the contractor's discriminatory intent caused the disparate impact."

- For disparate impact-based findings, the PDN must include the three components required for disparate treatment-based findings, unless the qualitative evidence alone is “sufficient to support a preliminary finding of disparate treatment,” the evidence of disparity “is so extraordinarily compelling that by itself it is sufficient to support a preliminary finding of disparate treatment,” or the quantitative evidence of a disparity is practically significant but the contractor has denied OFCCP access to sources of evidence “that may be relevant to a preliminary finding of discriminatory intent.” Further, the PDN must identify “the specific policy or practice of the contractor causing the adverse impact, unless OFCCP can demonstrate that the elements of the contractor’s selection procedures are incapable of separation for analysis.”

“Quantitative evidence” is defined by the rule as including “hypothesis testing, controlling for the major, measurable parameters, and variables used by the contractor . . . related to the probability of outcomes occurring by chance and/or analyses reflecting statements concluding that a disparity in employment selection rates or rates of compensation is statistically significant.” Statistically significance is met by (i) a “standard deviation of two or more,” (ii) a “Z statistic [with] a value greater than two,” or (iii) a “probability value [of] less than 0.05.” Quantitative evidence is not limited to statistical analyses, but applies to cohort or other analyses of small groups of individuals. The rule defines “qualitative evidence” as including (but not being limited to) “testimony, interview statements, and documents about” discriminatory beliefs, intent, statements or acts, employment practices, compliance with legal obligations, and other relevant matters. The rule makes clear that qualitative evidence supporting a PDN “may not be based solely on subjective inferences or the mere fact of supervisory discretion in employment decisions.”

The PDN must disclose the quantitative and qualitative evidence “in sufficient detail to allow contractors to investigate allegations and meaningfully respond.” In addition, upon request, the agency must provide “the model and variables used in any statistical analysis and an explanation for why any variable proposed by the contractor was excluded from that analysis.” Although OFCCP has been increasingly transparent in recent years with regard to its modeling, as reflected in its 2018 [transparency directive](#), the requirement that it not only disclose its methodology, but also explain why it did not employ the contractor’s is a significant development. To be candid, based on past experience, OFCCP’s explanations in this regard are not always satisfying, but at least under the new regulation the agency will be forced to acknowledge and address contrary viewpoints at the pre-NOV stage.

Contractors will have 30 days to provide a response to the PDN.

NOV Process and Requirements

If OFCCP, after reviewing any response to its PDN, believes it “has evidence sufficient to support a finding of disparate treatment and/or disparate impact discrimination,” as required by the rule, or otherwise violated its obligations, the agency may issue an NOV requiring corrective action and inviting the contractor to conciliate the matter. Like the PDN, the NOV must disclose the qualitative and quantitative evidence upon which it is based, as well as its statistical models. In addition, the NOV must address “all relevant concerns and defenses raised by the contractor in response to the [PDN].”

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