January 14, 2011

Since Director Patricia Shiu took the helm at the Office of Federal Contract Compliance Programs ("OFCCP"), the agency has made a significant shift from the enforcement strategies adopted during the Bush Administration. The past six months have been particularly active as the OFCCP has announced several major enforcement changes and initiatives, including its intent to abandon the three-phase audit process, strengthen affirmative action for disabled individuals and veterans, end I-9 reviews during on site audits, and change how it audits contractors' compensation practices. More changes are sure to follow as OFCCP pursues its stated mission of implementing "full scale, aggressive enforcement efforts in FY 2011."

OFCCP abandons 2006 compensation guidelines

On January 3, 2011, the OFCCP published a notice in the Federal Register proposing to rescind two guidelines, the Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination ("Standards") and the Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with Respect to Systemic Compensation Discrimination ("Voluntary Guidelines"), which were both published in 2006 to address the review of compensation data. The OFCCP stated that it is rescinding the Standards and Voluntary Guidelines because they "limited OFCCP's ability to effectively investigate, analyze and identify compensation discrimination" and were largely unused by the contractor community.

The announcement came as no surprise to contractors. Director Shiu announced at the National Liaison Conference in August that OFCCP would be rescinding its 2006 compensation standards. In addition, the standards have not been consistently used by the OFCCP or the contractor community since they were adopted. At this point, no compensation standards have been announced, but the OFCCP indicated that it will continue to adhere to the principles of Title VII when investigating discrimination and will reinstitute the practice of exercising its discretion to develop compensation discrimination investigation procedures.

Given the lack of clear guidance, OFCCP regional offices have been left to their own devices to develop standards for auditing contractors' compensation data. The Chicago Region, for example, has been using "issue auditing" to audit the compensation practices of all of a contractor's establishments within its region. In addition, many of the regions have developed their own compensation trigger standards—including derivations of the old "DuBray" method and the various three-tiered compensation analyses. Hopefully, the official abandonment of the 2006 standards will result in the development of a uniform standard by OFCCP that contractors may rely upon in developing their affirmative action plans and undertaking self-audits.

OFCCP abandons three-phase audit process by nixing active case management directive

On December 2, 2010, the OFCCP officially rescinded its active case management ("ACM") directive adopted during the Bush Administration. The ACM directive was generally well-received by the contracting community because it resulted in shorter and fewer desk audits and onsite reviews. The ACM directive allowed OFCCP to concentrate its resources on identifying and remedying cases of systemic discrimination by conducting initial, abbreviated desk audits of contractors' affirmative action plans and personnel data. OFCCP did not conduct an onsite review unless the desk audit provided evidence of systemic discrimination or substantial technical non-compliance by a contractor. As a "quality control" measure, the ACM also required OFCCP to conduct full desk audits once in every 25 reviews and onsite evaluations once in every 50.

The cancellation of the ACM directive, however, signals a formal shift by the OFCCP towards aggressively pursuing more full-blown onsite compliance reviews. According to OFCCP, the reason for rescinding the ACM directive was because it caused "OFCCP to narrow the focus of its enforcement efforts and … eroded OFCCP's enforcement authority." Although the OFCCP has yet to announce its new procedures for conducting compliance evaluations, contractors should be prepared for the OFCCP to check whether they are complying with all of their affirmative action and EEO obligations. In certain regions, including the Chicago Region, OFCCP

is conducting mandatory on-site "mini-audits" of all contractors scheduled for review, focusing on technical compliance.

OFCCP aggressively pursues affirmative action requirements for persons with disabilities

Last Summer, the OFCCP issued an Advanced Notice of Proposed Rulemaking ("ANPR") inviting public comment on how OFCCP can strengthen the affirmative action requirements for disabled individuals under Section 503 of the Rehabilitation Act. Most significantly, OFCCP is considering requiring contractors to conduct utilization analyses and set goals for individuals with disabilities much like the analysis required for minorities and women under EO 11246. If adopted, undertaking this type of analysis could prove daunting because it is unclear what data can be used to determine availability of individuals with disabilities. The Census data in this area is incomplete and inaccurate and many individuals with disabilities decline to self-identify during the application process.

OFCCP continues sending CSAL letters for now

The National Industry Liaison Group confirmed that OFCCP will continue sending Corporate Scheduling Announcement Letters ("CSAL") to contractors in 2011. CSALs are notifications sent by the OFCCP alerting a contractor that two or more of its establishments are on the scheduling list for compliance evaluations during the current scheduling cycle.

The continued issuance of CSALs is welcome news for many contractors because it allows them an opportunity to conduct advance audit preparation and anticipate the resources required for compliance evaluations in the current scheduling cycle. Contractors receiving a CSAL notice should not limit their audit to only establishments listed on the notice because it is possible for unlisted establishments to be scheduled for a compliance review. Moreover, not all contractors are afforded the luxury of receiving a CSAL notice. In fact, CSALs are only mailed to parent companies with two or more establishments identified on the scheduling lists developed for a given scheduling cycle.

OFCCP discontinues I-9 audits

On November 29, 2010, Director Shiu announced in an internal videoconference that OFCCP will stop inspecting I-9 forms during onsite compliance reviews. OFCCP has historically reviewed I-9 forms under a memorandum of understanding between the Department of Labor and the Immigration and Customs Enforcement Agency ("ICE"). Despite this informal announcement, contractors should continue to properly complete and retain I-9 forms in accordance with applicable laws and regulations because ICE and other agencies will continue monitoring I-9 compliance.

Jurisdiction over health-care providers

On October 18, 2010, an Administrative Law Judge (ALJ) ruled in *OFCCP v. Florida Hospital of Orlando* that a nonprofit hospital with a government contract agreeing to provide medical services to military service members and their families as part of the TriCare program was subject to OFCCP jurisdiction. TriCare is a Department of Defense program for active duty and retired military service members and their families. Humana Military Healthcare Services, Inc. ("HMHS"), an HMO, contracted with TriCare directly to provide a network of health care providers for TriCare beneficiaries. Florida Hospital of Orlando ("FHO") was one of the health care providers that contracted with HMHS to provide the medical services to TriCare beneficiaries.

FHO had been operating under the assumption that contracts under the TriCare program were exempt from OFCCP's jurisdiction. The ALJ, however, found that FHO was a covered subcontractor because it agreed to provide part of the medical services under HMHS's contract with the government (rather than merely insurance). The ALJ also rejected FHO's argument that it was not a covered subcontractor because TriCare is federal financial assistance. Although the case is being appealed, healthcare providers with HMO contracts serving government employees and their families or with TriCare will need to comply fully with OFCCP affirmative action and EEO obligations.

Conclusion

Given the rapid pace at which OFCCP is evolving and the significant changes that are devised nearly every month, it is imperative for contractors to keep abreast of new developments as they occur to ensure compliance. If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

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