

Management Alert



OFCCP Winds Down Summer By Issuing New Guidance on Religious Discrimination and Announcing New Focused Review Process

By Annette Tyman, Lawrence Z. Lorber, and Michael Childers

Seyfarth Synopsis: The Office of Federal Contract Compliance Programs (“OFCCP”) began this month by issuing two new enforcement directives. The first, [Directive 2018-03](#), clarifies the OFCCP’s enforcement of religious non-discrimination in light of recent court decisions and executive orders. The second, [Directive 2018-04](#), creates focused reviews for Executive Order 11246 (“EO 11246”), Section 503 of the Rehabilitation Act (“Section 503”), and the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”). These two directives come just a week after the OFCCP released its much anticipated [publication](#) outlining what federal contractors can expect from the agency.

“What Contractors Can Expect”

On August 2nd, the OFCCP published the “What Contractors Can Expect” guidance which lays out the agency’s enforcement plans and echoes the message of transparency that the OFCCP announced when the new leadership took over and that Acting OFCCP Director Craig Leen recently reiterated to the contractor community during his opening address at the 2018 National Industry Liaison Group. In it the OFCCP assures contractors that they can expect:

- Access to Accurate Compliance Assistance Material;
- Timely Responses to Compliance Assistance Questions;
- Opportunities to Provide Meaningful Feedback and Collaborate;
- Professional Conduct by OFCCP’s Compliance Staff;
- Neutral Scheduling of Compliance Evaluations;
- Reasonable Opportunity to Discuss Compliance Evaluation Concerns;
- Timely and Efficient Progress of Compliance Evaluations; and
- Confidentiality

These expectations are consistent with the message of collaboration that the OFCCP has promised under the current administration. References to the neutral scheduling of compliance reviews and the opportunity to discuss concerns contained in the guidance echo previous actions taken by the agency in 2018.

The agency followed up on August 10th by issuing two new directives.

Directive 2018-03: Executive Order 11246 § 204(c), religious exemption

Directive 2018-03 clarifies the agency's position on religious non-discrimination under EO 11246 in light of recent cases involving the relationship between federal regulation and the Free Exercise Clause, including *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, and *Burwell v. Hobby Lobby Stores, Inc.* In its [press release](#), the OFCCP noted that this Directive also serves to align the agency's enforcement actions with recent executive orders issued by the White House protecting religious freedom and the ability of faith-based and community organizations to compete fairly for government contracts and grants. The Directive instructs OFCCP staff to take these policies into consideration when providing compliance assistance, processing complaints, and reviewing compliance with EO 11246.

In practical terms, this Directive may not impact the vast majority of interactions that occur between the agency and the contractor community, as it is directed to OFCCP staff. However, it does signal a change in the way that the agency reviews religious accommodations during compliance evaluations. It may also impact complaint investigations against certain employers which allege discrimination on the basis of religion or sexual orientation and gender identity. The Directive specifically notes that "[t]his Directive supersedes any previous guidance that does not reflect these legal developments, for example, the section in OFCCP's Frequently Asked Questions: Sexual Orientation and Gender Identity regarding "Religious Employers and Religious Exemption." See https://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html."

Directive 2018-04: Focused reviews of contractor compliance with Executive Order 11246 (E.O.), as amended; Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended; and Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended

While the impact of Directive 2018-03 appears to be fairly limited, Directive 2018-04 represents a major change in the way that the OFCCP enforces affirmative action and non-discrimination requirements, particularly under Section 503 and VEVRAA. The Directive calls for the agency to direct a portion of future scheduling lists to "focused reviews" of EO 11246, Section 503 and VEVRAA. The Directive further notes that in these focused reviews, "OFCCP would go onsite and conduct a comprehensive review of the particular authority at issue." The reviews would include "interviews with managers... as well as employees affected" by the particular regulation and also evaluations of "hiring and compensation data." The Directive instructs the OFCCP staff to develop a standard protocol for conducting the focused reviews as well as staff training, contractor education and compliance assistance materials. This policy suggests that the agency will be increasing its focus on the enforcement of Section 503 and VEVRAA which have historically received less attention than EO 11246 during compliance reviews.

What This Means for Employers?

Neither the "What Contractors Can Expect" policy, nor the directive clarifying the religious exemption signal any significant change for contractors. The creation of the focused reviews, however, puts contractors on notice that the OFCCP will be scrutinizing policies and practices that relate to disability and protected veteran status much more closely. In anticipation of the first round of focused reviews, contractors should ensure that their current policies and practices comply with the 2014 updates to the Section 503 and VEVRAA regulations. Contractors should specifically focus on the following:

- Implementing an audit and reporting system to measure the effectiveness of their affirmative action efforts and take any necessary remedial measures;
- Documenting requests for accommodations;
- Ensuring that an interactive process for requesting accommodations during the hiring process is in place;
- Soliciting protected veteran and disability status from applicants and new hires;

- Listing all job openings with state employment delivery services; and
- Reviewing job descriptions and qualifications to ensure that they do not screen out protected veterans or individuals with disabilities.

Contractors should also remember that in connection with both current compliance reviews and the new focused reviews, they may be asked to provide their most recent VETS-4212 Report. The deadline for filing the 2018 VETS-4212 Report is fast approaching on September 30, 2018.

It is unclear how the introduction of the focused reviews may impact desk audit submissions or whether these reviews will necessitate additional analyses for hiring or compensation. We anticipate further announcements from the OFCCP given its promise to provide contractor education and compliance assistance materials. We will continue to monitor these changes and will alert you as more develops.

In the meantime, if you have questions about best practices for OFCCP compliance and audit defense, please contact a member of Seyfarth's Organizational Strategy & Analytics Team, [Annette Tyman](mailto:atyman@seyfarth.com) at atyman@seyfarth.com, [Lawrence Z. Lorber](mailto:Lorber@seyfarth.com) at llorber@seyfarth.com, or [Michael Childers](mailto:mchilders@seyfarth.com) at mchilders@seyfarth.com.

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Seyfarth Shaw LLP Management Alert | August 15, 2018

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