



## DIRECTIVE (DIR) 2018-08

**A Directive (DIR) is intended to provide guidance to OFCCP staff or federal contractors on enforcement and compliance policy or procedures. A DIR does not change the laws and regulations governing OFCCP's programs and does not establish any legally enforceable rights or obligations.**

**Effective Date:** September 19, 2018

1. **SUBJECT:** Transparency in OFCCP Compliance Activities
2. **PURPOSE:** To ensure transparency in all stages of OFCCP compliance activities to help contractors comply with their obligations and know what to expect during a compliance evaluation, and to protect workers from discrimination through the consistent enforcement of OFCCP legal authorities.
3. **REFERENCES:**
  - a. Executive Order 11246 of Sept. 24, 1965, Equal Employment Opportunity, as amended (EO 11246).
  - b. Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503).
  - c. Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA).
  - d. Federal Contract Compliance Manual (FCCM) (Oct. 2014).
  - e. DIR 2018-01, Use of Predetermination Notices (Feb. 27, 2018).
  - f. DIR 2018-05, Analysis of Contractor Compensation Practices During a Compliance Evaluation (Aug. 24, 2018).
4. **AFFECTED POLICY:** The compliance evaluation procedures described in this directive supersede any procedures in the FCCM or other previously issued guidance to the extent they could be read to conflict.
5. **BACKGROUND:** OFCCP enforces EO 11246, Section 503, and VEVRAA. Collectively, these laws prohibit federal contractors and subcontractors from discriminating on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability or status as a protected veteran.<sup>1</sup> They also require federal contractors to take affirmative steps to ensure equal employment opportunity in their employment processes. Contractors also are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

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<sup>1</sup> Hereinafter, the terms "contractor" and "federal contractor" are used to refer to contractors and subcontractors with direct federal contracts and/or federally assisted construction contracts, unless otherwise expressly stated.

OFCCP recognizes that providing sufficient transparency and clear guidance on the agency's approach to compliance evaluations improves operational consistency and efficiency within the agency, facilitates more efficient resolution to matters under review resulting in fewer legal challenges, and supports contractors' ability to conduct meaningful self-audits so they can proactively identify and address issues with their employment practices. OFCCP is committed to providing further transparency as an essential tool for promoting and facilitating compliance, and ensuring that workers have equal opportunity to employment. This is important, as the number of compliance evaluations OFCCP can conduct is limited compared to the total number of contractors that fall within the agency's jurisdiction.

Compliance is best achieved through a mutual dedication on the part of contractors and OFCCP to transparency and access:

Contractors must:

- Ensure non-discrimination and affirmative action in the workplace through implementation of EO 11246, Section 503 and VEVRAA requirements;
- Submit affirmative action plans (AAP) and support data timely when scheduled for a compliance evaluation; and
- Allow OFCCP access to its records and establishments, in accordance with applicable law and contractual provisions.

OFCCP will:

- Be transparent and collaborative in educating contractors about how to comply with their requirements;
- Conduct high quality, consistent, and efficient compliance evaluations;
- Ensure there is open communication, cooperation, and intent to minimize unnecessary burden;
- Make considerable efforts to resolve violations through conciliation;<sup>2</sup> and
- Stand ready to pursue litigation vigorously when necessary.

In 2018, OFCCP took several steps to improve transparency, cooperation, and communication with federal contractors including: implementing a 45-day<sup>3</sup> scheduling delay to provide contractors more time to prepare for the audit and participate in one or more OFCCP compliance assistance events across the country; publishing OFCCP's supply and service scheduling methodology on the agency's public web site; issuance of Directive 2018-01 requiring the use of pre-determination notices providing contractors the opportunity to respond to potential violation findings before a Notice of Violation (NOV) is issued; and publically releasing "What Federal Contractors Can Expect," outlining OFCCP's commitment to clear, accurate, and professional interactions with OFCCP staff in carrying out compliance assistance, compliance evaluation, and complaint investigation activities. This directive extends OFCCP's transparency initiative to every stage of a compliance evaluation to facilitate consistency of operations, improve efficiency, and resolve collaboratively matters during compliance evaluations.

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<sup>2</sup> This Guidance does not impose additional conciliation burdens on OFCCP beyond those in the regulations at 41 C.F.R. § 60-1.20(b).

<sup>3</sup> All references to days in this directive are calendar days.

**6. ROLES AND RESPONSIBILITIES:**

- A. Regional and Field Managers: It is the responsibility of regional and district directors to ensure that regional and field staff conduct compliance evaluations and complaint investigations consistent with the policy and procedures stated in this directive.
- B. Regional and Field Staff: It is the responsibility of compliance officers and other employees that conduct compliance evaluations and complaint investigations to act in accordance with the policy and procedures stated in this directive.
- C. National Office: It is the responsibility of OFCCP's national office staff involved in the preparation and release of the scheduling list, and those that provide national office review and approval of documents, analysis, and case files to act in accordance with the policy and procedures stated in this directive.

**7. POLICY AND PROCEDURES:** Transparency should guide OFCCP staff during every stage of a compliance evaluation, from beginning to end.<sup>4</sup> As part of OFCCP's effort to implement this guiding principle, OFCCP staff must follow the procedures outlined below.

**a. Scheduling**

- i. Delay scheduling until 45 days after Corporate Scheduling Announcement Letters (CSAL) are issued, which will provide contractors more time to prepare for the evaluation and participate in a regionally sponsored compliance assistance event.
- ii. Publish on the Internet OFCCP's supply and service scheduling methodology to be more transparent about how OFCCP neutrally selects federal contractor establishments for a compliance evaluation.

**b. Pre-Desk Audit**

- i. Contact the contractor within 15 days of sending the Scheduling Letter, providing maximum time for contractors to receive the technical assistance they need to comply with the Scheduling Letter and Itemized Listing. During this follow-up call, establish the compliance officer as the primary point of contact for the evaluation, provide an overview of the basic steps in the compliance evaluation process so contractors know what to expect, offer technical assistance on OFCCP requirements and explain OFCCP's allowable one-time 30-day extension<sup>5</sup> for supporting data as well a Notice to Show Cause process if the contractor is unable to meet AAP(s) and supporting data submission deadlines.

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<sup>4</sup> This is subject to applicable privileges available to OFCCP as a government enforcement agency.

<sup>5</sup> A contractor response or submission, to this and other deadlines referenced in this directive, must be received within the days stated. If the due date falls on a weekend or holiday, the due date is the next weekday that is not a holiday.

- ii. OFCCP will provide a 30 day extension for contractors to provide supporting data related to the EO 11246, VEVRAA and Section 503 AAPs, provided that: 1) the contractor requests the extension any time prior to the initial 30–day due date for the AAPs and 2) the contractor timely submits the basic EO 11246, Section 503 and VEVRAA AAPs within the initial 30–day period after receiving the Scheduling Letter and Itemized Listing. See Directive 2018–07, Section 7 (stating that the AAP Verification Program includes "[r]equesting proffer of the AAP by contractors when requesting extensions of time to provide support data in response to a scheduling letter.")
- iii. OFCCP generally will not allow extensions for submission of the basic EO 11246, Section 503 and VEVRAA AAPs, which contractors are required to maintain and update annually, or allow extensions for submitting supporting data if requested after the submission date for the AAPs has passed. OFCCP, however, reserves discretion to grant such extensions in extraordinary circumstances.
- iv. Failure to submit AAPs and/or supporting data timely, with approved extensions, will result in immediate issuance of a Notice to Show Cause why OFCCP should not initiate enforcement proceedings. During this period, the contractor will have an additional 30 days to provide the AAPs and supporting data in response the Notice to Show Cause. A procedural Notice to Show Cause for failure to submit AAPs and/or supporting data does not require OFCCP National Office approval.
- v. A procedural Notice to Show Cause issued for failure to submit timely AAPs and support data need not be resolved with a conciliation agreement where the contractor ultimately provides the AAPs and support data, the desk audit has been completed and there are no other outstanding violations. The issuance of the procedural Notice to Show Cause for failure to timely provide the AAP(s) and supporting data, however, must be documented in the closure letter.

**c. Desk Audit**

- i. Upon receiving the AAP and/or support data, contact the contractor or their representative immediately to confirm receipt. Begin the desk audit promptly, ideally within five days after receiving the AAP.
- ii. Review the AAPs and supporting data submission to make sure they are complete and acceptable. Notify the contractor promptly of any incomplete or unacceptable desk audit submissions and allow the contractor 15 days to provide complete and acceptable submissions. Failure to provide complete and acceptable submissions in a timely manner will result in an immediate Notice to Show Cause why OFCCP should not initiate enforcement proceedings.
- iii. To minimize duplication of work and minimize the time it takes to complete a desk audit, begin the analysis of supporting data only after the AAP and supporting data are complete and acceptable.
- iv. Contact the contractor to request follow-up information at the desk audit only to fulfill, and if necessary clarify, the data requests required by the Scheduling Letter

and Itemized Listing. Requests for information that go beyond the requirements of the Scheduling Letter and Itemized Listing (e.g., data for indicator refinements, applications, manager interviews, etc.) should only occur after the desk audit has been completed and the conclusion of the desk audit has been recorded in OFCCP's case management system.

- v. Work to close reviews quickly where there are no indicators of discrimination or evidence of other violations. Ideally, and in the majority of cases, OFCCP would complete a typical desk audit within 45 days of receiving complete and acceptable AAP(s) and supporting data. By applying the above principles nationwide, OFCCP should significantly improve its ability to meet this goal.

#### **d. Pre-Onsite**

- i. As necessary, prepare supplemental requests for data and information beyond the items provided in response to the Scheduling Letter and Itemized Listing, to refine indicators and prepare for a potential onsite visit.
- ii. Supplemental information requests must include the basis for the request, be reasonably tailored to the areas of concern, and allow for a reasonable time to respond.<sup>6</sup>
- iii. Include a high-level summary of any preliminary indicators of discrimination in the onsite confirmation letter. See Attachment for sample language to include in the onsite confirmation letter.

#### **e. Offsite Analysis**

- i. Begin the offsite analysis immediately once the onsite is complete.
- ii. Maintain regular contact with the contractor or their representative, ideally at least once every 30 days, to keep them informed about the status of the evaluation.

#### **f. OFCCP Conciliation Efforts**

- i. Take a collaborative approach with contractors during the exchange of information to promote a shared understanding of the issues and to promote resolution. This includes sharing information and essential source data<sup>7</sup> in electronic format to assist the contractor in understanding and replicating OFCCP's findings, sharing factors used to calculate back pay, providing an overview or summary of anecdotal evidence or non-statistical findings to add context to the statistical results, and including Branch of Expert Services or the Office of the Solicitor staff, where applicable, to support conciliation efforts.

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<sup>6</sup> Tailoring the scope of a supplemental data request does not limit in any way OFCCP's authority to confirm compliance with other requirements or investigate other potential violations that it discovers during the course of the compliance evaluation.

<sup>7</sup> This involves data not subject to applicable government privileges.

- ii. Work with the contractor to find innovative remedies including, where appropriate, apprenticeship programs and proactive corporate-wide solutions, to ensure compliance that has a broad reach to workers and applicants.
- iii. Make good faith efforts to engage the contractor, and to meet in person when feasible prior to declaring that conciliation efforts are at an impasse.
- iv. Consistently applying these principles nationwide, coupled with contractor cooperation, should help OFCCP conclude compliance evaluations more efficiently.

8. **INTERPRETATION:** This Directive does not create new legal rights or requirements or change current legal rights or requirements for contractors. Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended, the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, OFCCP's regulations at 41 CFR Chapter 60, and applicable case law are the official sources for contractors' compliance responsibilities. Nothing in this Directive is intended to change otherwise applicable laws, regulations or other guidance or to restrict or limit OFCCP's ability to perform compliance reviews, request data, or pursue enforcement of any issue within its jurisdiction. This Directive is not intended to have any effect on pending litigation, nor would this Directive have altered the agency's basis for litigating any pending cases. The intent of this Directive is to provide greater clarity regarding the compliance review process, which will allow contractors to perform self-audits and come into full compliance in advance of compliance review or enforcement matter.

9. **ATTACHMENT:** Sample Language for Supply and Service Onsite Confirmation Letter.



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Craig E. Leen  
Acting Director  
Office of Federal Contract Compliance Programs

Attachment  
Sample Language for Supply and Service Model Onsite Letter

The Office of Federal Contract Compliance Programs (OFCCP) has completed its preliminary review of the documents and data (*insert name of contractor*) submitted in response to the Scheduling Letter dated (*insert date*). I would like to schedule an on-site review to further investigate (*insert name of contractor*)'s compliance with the equal employment opportunity requirements of Executive Order 11246, as amended, Section 503 of the Rehabilitation Act of 1973, as amended and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

As a result of our preliminary review of (*insert name of contractor*)'s scheduling letter submission, OFCCP identified at least the following areas for further investigation:

- (1) (*e.g., hiring practices in the Technician I job group*); and
- (2) (*e.g., compensation policies and practices with respect to women in the following pay analysis groups*)

Please note that these areas of investigation are based on preliminary indicators of potential violations noted during the desk audit. OFCCP has not determined that (*insert name of contractor*) is in violation of any of its laws. Further, identification of these preliminary indicators does not limit the scope of OFCCP's authority to confirm compliance with other requirements or investigate other potential violations that it discovers during the course of this compliance review.