



OFCCP'S EARLY RESOLUTION CONCILIATION PROCESS

PRESENTER(S):
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JOSHUA S. ROFFMAN
MANAGING ATTORNEY

MEET THE TEAM

Joshua Roffman is the founding and managing attorney of Roffman Horvitz—an employment law boutique law firm specializing in the intersection of employment law and data analytics. His practice focuses primarily on advising and overseeing the preparation of affirmative action plans, conducting privileged pay equity and other disparate impact analyses, and representing clients in various matters before the Office of Federal Contract Compliance Programs (OFCCP) in all six OFCCP regions.

Prior to starting Roffman Horvitz, Joshua managed the East Coast OFCCP unit of a large national employment law firm.



ALISSA A. HORVITZ
MEMBER ATTORNEY

MEET THE TEAM

Alissa Horvitz is a Member Attorney in the firm she co-founded with Josh Roffman. Alissa focuses her practice on representing clients in various matters before the OFCCP, preparing for and defending OFCCP audits and onsite visits, responding to OFCCP information requests, and conducting live and in-person training seminars on OFCCP compliance.

OUTLINE

- Context – Why a new directive?
- Directive 2019-02
- Early Experiences with Early Resolution Conciliation Agreements (“ERCA”)
- Hiring ERCA Self-Audit Process
- Compensation ERCA Self-Audit Process

CONTEXT – WHY A NEW DIRECTIVE?

- Under the Obama Administration, OFCCP would conduct extensive and thorough compliance evaluations, particularly in hiring discrimination cases
- If there was “top line” adverse impact, OFCCP would ask for the line-item back up in Excel
 - If there were no other quick and easy data analysis strategies that explained the adverse impact, the compliance review would proceed to a document request phase
- OFCCP would ask for all applications, interview notes, offer letters, background check results, drug test results, and the like
- Whether the information was maintained in hard copy or electronically, it would take herculean efforts to compile all this information, organize it, digest it, put it into databases, code up the databases, hire experts, run regression analyses, etc.

CONTEXT – WHY A NEW DIRECTIVE? (CONTINUED)

- Then OFCCP would conduct an onsite visit, which could be a week or two weeks
- There would be more information requests and more analyses
- The OFCCP would reach a conclusion about violations without soliciting the employer's input
- It was time consuming and costly
- Some contractors knew there would be no way to explain away the adverse impact, and they wanted to resolve their audits in a more efficient way, but there was no procedure to do that under existing directives and processes
- The OFCCP had to go through every step in its entirety

DIRECTIVE 2019-02

- Issued November 30, 2018
- Designed to “help contractors and OFCCP achieve their mutual goal of equal employment opportunity in federal contracting and reduce the length of compliance evaluations through early and efficient resolutions.”
- “ERP allows OFCCP and contractors with multiple establishments to cooperatively develop corporate-wide compliance with OFCCP’s requirements. Many multi-establishment contractors have centralized human resource systems and corporate-wide policies, so issues OFCCP finds at one contractor establishment may exist at others.”
- “For all compliance evaluations in which a Pre-Determination Notice (PDN), Notice of Violations (NOV), or Show Cause Notice (SCN) has not been issued as of the effective date of this directive, OFCCP staff may seek to resolve violations through the ERP and work with the contractor to develop corporate-wide corrective actions . . .”
- Compliance evaluations resolve through ERP do not require issuance of a PDN or NOV. They may proceed directly to conciliation.

THREE TYPES OF PROCEDURES, DEPENDING ON THE VIOLATION – (1) NON-MATERIAL VIOLATIONS

- Examples of non-material violations include an unacceptable AAP element or lack of good faith efforts.
- Compliance officer is authorized to seek to resolve the evaluation during the desk audit, provide compliance assistance to the contractor, and issue a closure letter referencing the non-material violations and their remedies.

THREE TYPES OF PROCEDURES, DEPENDING ON THE VIOLATION – (2) MATERIAL VIOLATIONS: NON-DISCRIMINATION

- Examples of material violations not involving discrimination include record keeping, applicant tracking, failure to implement audit and reporting systems, and failure to conduct self-analysis.
- OFCCP will be seeking corporate-wide corrective action through an Early Resolution Conciliation Agreement (ERCA).
- The ERCA requires the contractor to review “all, or a negotiated subset” of its remaining establishments for the similar violation(s) during the progress report-monitoring period, and if necessary, implement corrective actions.
- For only the facility that was being audited, it is relieved from compliance evaluations for five years.
 - You are wrapping in more facilities for self-audit and progress reports, but they are not off the hook for audits in this context.

THREE TYPES OF PROCEDURES, DEPENDING ON THE VIOLATION – (3) MATERIAL VIOLATIONS: DISCRIMINATION

Most of OFCCP's aged cases fell in this bucket

- Within 14 calendar days, where possible, of completing the desk audit, the compliance officer will discuss desk audit findings and potential for ERP resolution with district and regional office management.
- The district office will contact the contractor to schedule essential interviews with appropriate company employees, rejected applicants, and HR staff by phone or videoconference. The CO also will request electronically available information to refine the indicators, identify potential affected applicants and/or employees, and calculate the estimated monetary remedy.
 - This information may include, for example, applicant flow logs or relevant data from HRIS or payroll systems.
 - OFCCP generally will not request information that is not readily available or non-electronic during the early resolution process (ERP).
 - Contractors have 14 calendar days (or other reasonable and mutually agreed-upon time frame), to provide the information to OFCCP.

THREE TYPES OF PROCEDURES, DEPENDING ON THE VIOLATION – (3) MATERIAL VIOLATIONS: DISCRIMINATION (CONTINUED)

- Upon receipt of the electronic information, the CO will expedite and seek to complete a refined analysis within 14 days. If the refined analyses still indicate potential discrimination, the CO, Assistant District Director and/or District Director will contact the contractor to offer the Early Resolution Process option.
- The OFCCP reserved for itself the option to request data going back two years from the date of receipt of the scheduling letter and data coming forward to the present to evaluate whether the violation is continuing.
- If the contractor does not generally maintain its records in an electronic format or voluminous hard copy records are necessary to refine discrimination indicators, the compliance evaluation may not be appropriate for ERP.

THREE TYPES OF PROCEDURES, DEPENDING ON THE VIOLATION – (3) MATERIAL VIOLATIONS: DISCRIMINATION (CONTINUED)

- If the contractor agrees to ERP, the parties must meet within 14 calendar days of the agreement to discuss OFCCP's findings, proposed remedy and corrective actions. This is an opportunity for the parties to conciliate before an onsite visit.
- The contractor still is permitted to provide additional information for OFCCP to consider.
 - If the information eliminates the discrimination indicators, the CO can resolve any non-material or other material non-discrimination violations in accordance with the ERP procedures described above
 - If there are no remaining issues, the CO can close the review with a closure letter.
- For the establishment under review, OFCCP will seek, as applicable, make-whole relief for affected class members, which may include back pay, job offers to affected class members that meet minimum/preferred qualifications, salary adjustments, and/or other remedies and corrective action.

THREE TYPES OF PROCEDURES, DEPENDING ON THE VIOLATION – (3) MATERIAL VIOLATIONS: DISCRIMINATION (CONTINUED)

- The ERCA will require the contractor to review all, or a negotiated subset, of its remaining establishments for the similar violation(s) during the progress reporting period, and if necessary, implement corrective actions at those establishments to eliminate the violations(s) and prevent recurrence. This may include job offers to affected class members that OFCCP has found to meet certain qualifications, salary adjustments or other corrective action.
 - Example of how this played out in our client's circumstances.
- OFCCP will monitor implementation of the ERCA for a five-year period through semi-annual progress reports.
- For each facility that the employer includes in the ERCA, it will not be subject to a compliance review for a five-year period, concurrent with monitoring, from the effective date of the ERCA.
- If conciliation fails during the ERP, OFCCP will resume the audit, request any additional records and data it needs, and complete the compliance evaluation.

60 DAYS

- Conciliation shall ideally last no more than 60 calendar days from the initial meeting, subject to extension by OFCCP, and as long as the parties are making substantial progress towards an agreement.
- If there is no early resolution within this time frame, OFCCP may at any time request any additional data and records it needs to continue the compliance evaluation.

EARLY EXPERIENCES WITH ERCA

- Was not limited only to matters in which PDN, NOV, SCN had not yet been issued
- OFCCP had backlog of aged compliance reviews, some of which did have PDNs or NOVs issued
- In an effort to move some of the aged cases off the docket, OFCCP was inviting employers to enter into an Early Resolution Conciliation Agreement (ERCA)
- If the employer had one facility being audited, but was willing to wrap in other facilities, OFCCP was willing to negotiate an ERCA
- Initially, ERCA was not available to resolve only one location's audit; there is an initiative between NILG and OFCCP to allow ERCA to resolve just one compliance review

THE FIRST THIRTEEN EARLY RESOLUTION CONCILIATION AGREEMENTS

Company	# of Audit Locations	# of Locations Covered by ERCA	Hiring or Compensation	Jobs Covered	Demographic Groups	Monetary Remedy
American Airlines	2	2	Hiring	Fleet Service Clerk; Stock Clerk; Representative Club	Females; Blacks	\$296,000
Bank of America	8	5	Hiring	Client Services Rep; Financial Services Rep; Customer Relationship Manager; Senior Fraud Analyst	Females; Blacks; Hispanics	Over \$3 million
Cisco Systems	1	62	Compensation	Cross Functional, Customer Advocacy, Engineering, Marketing, Services, and Supply Chain roles	Females; Blacks; Hispanics	\$2 million + \$550,000 for five years
CoStar Realty Information	1	12	Hiring	Multiple	Blacks	\$249,000
Dell Technologies	20	FAAPs	Compensation	Principal Software Engineer	Females	\$7 million
Frontier Communications	1	11	Hiring	Consultant	Females	\$100,000
Goldman Sachs	1	FAAPs	Compensation	Multiple	Females; Asians; Blacks; Hispanics	Almost \$10 million
Intel Corporation	7	7	Compensation	Multiple	Females; Blacks; Hispanics	\$3.5 million + \$300,000 for five years
Merck & Company	1 FAAP	2 FAAPs	Compensation	Senior Customer Reps	Females	\$290,000
Performance Food Group	5	61	Hiring	Selector	Females; Blacks	\$599,989
Time Warner Cable	3 (16)	10	Hiring	Sales and Customer Service positions	Females; Blacks	\$745,000
US Foods	3	6	Hiring	Selector	Females	\$116,600
Verizon Communications	2 (7)	13 (10)	Hiring	Customer Service Specialist	Males; Asians; Blacks; Native Americans	\$675,000

HIRING ERCA SELF-AUDIT PROCESS

WHY IS THERE A SELF-AUDIT?

- If OFCCP is going to allow an employer to go five (5) years without being audited at each of its facilities, there needs to be something in exchange for the reprieve
- In lieu of OFCCP doing the auditing, the employer is going to do a self-audit
- The audit needs to replicate (in part) what OFCCP would have done had it conducted a compliance review
- The employer needs to get a baseline sense of how its processes are working, do a self-diagnosis of what is and isn't working, fix what was not working, conduct training, and reporting periodically to OFCCP on its decisions

WHAT DOES A SELF-AUDIT LOOK LIKE?

- The employer will evaluate the policies and procedures it currently uses to hire
- The employer will conduct on-site visits to the facilities, in order to ensure a comprehensive and thorough evaluation of the employer's hiring policies and procedures
- The employer will review its policies and procedures for hiring, its interview process, and applicant tracking system, in an effort to ensure that the employer's selection process is optimized to increase the number of [female or minority] hires

WHAT DOES A SELF-AUDIT LOOK LIKE?

(CONTINUED)

- Within sixty (60) days after the Effective Date of this Enhanced Compliance Agreement, the employer will submit to OFCCP a proposal that describes the methodology used in the evaluation.
- The proposal will estimate the time necessary to conduct a comprehensive evaluation of the employer's hiring practices and write a report containing its findings and recommendations
- The evaluation and recommendations will cover the following areas at the employer's facilities:
 - Procedures to recruit, screen, interview, select, reject and hire
 - Evaluation of recruitment efforts (methods and sources) and recommendations for additional strategies to increase the representation of qualified [female] applicants

WHAT DOES A SELF-AUDIT LOOK LIKE?

(CONTINUED)

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- Procedures to limit subjectivity and implicit bias in the hiring process, including identifying objective qualifications and criteria to be used to select and/or eliminate from further consideration persons expressing an interest in employment at each step of the hiring process (i.e., application screen, interview, post-offer screen, etc.)
- Procedures to ensure that persons expressing an interest in employment are tracked, and decisions are documented at each step in the hiring process.
- Procedures to ensure that documents are retained in accordance with 41 C.F.R. § 60-1.12(a) and Part 60-3
- Procedures to train all employees involved in the hiring process on the policies and practices related to THE EMPLOYER's selection of hires
- Procedures to ensure that adverse impact analyses are conducted in accordance with 41 C.F.R. Part 60-3, including evaluation the individual components and qualifications if statistical disparities exist

WHAT DOES A SELF-AUDIT LOOK LIKE?

(CONTINUED)

- A description of the evaluation conducted by the employer
- A summary of the employer's findings regarding its current policies, procedures, and practices related to recruitment and hiring
- Any additional recommended actions or revisions to the policies, procedures and practices to ensure equal opportunity for all persons expressing an interest in employment
- Recommendations for training for all individuals involved in hiring

THE MEETING WITH OFCCP

- Once the employer has conducted its self audit (within the first 60 days after signing the Enhanced Conciliation Agreement), it has to meet with OFCCP (this can be by teleconference)
- If OFCCP disagrees with any of the recommendations, the parties have to discuss the reasons for the disagreement and possible alternatives.
- After the parties agree to the scope and nature of the recommendations, if any, to be implemented, the employer has 180 days to fully implement the recommendations.
- The training program has to be presented to all individuals involved in the hiring process (i.e., recruiting, screening, interviewing, selection, rejecting, and hiring).
 - The training is mandatory for any HR recruiters, HR managers, and HR Directors who participate in the recruiting and hiring process
 - The employer has 90 days from the meeting to develop the training

TRAINING AND FOLLOW-UP

- All employees new to the workforce but who are expected to be involved in the hiring process, or are new to a manager or director hiring role have 90 days from their hire or promotion date to complete the training
- The employer has to submit progress reports every six months on hires and applicants
- If there is adverse impact in hiring, the employer has to investigate the cause of the disparities and take appropriate action, such as providing refresher training or making additional changes to the hiring process
- OFCCP and the employer will meet once a year during the 5 year period to discuss process in implementing the adopted recommendations, discuss concerns and continue to chart a path toward a mutually-beneficial partnership
 - This meeting can be waived by mutual agreement

PROGRESS REPORTS

- Documentation of the monetary payments to the affected class members
- Documentation of the hiring activity related to the shortfall
- Applicant and hire summaries
- Affirmative action plans for Women & Minorities, Protected Veterans, and Individuals with Disabilities in the Second, Fourth, Sixth, Eighth and Tenth progress reports

COMPENSATION ERCA SELF-AUDIT PROCESS

PAY EQUITY ANALYSES

- Run annual regression analyses on pay analysis groups
- Investigate statistically significant disparities
- Implement remedies to correct unexplained statistically significant disparities
- Meet annually with OFCCP regarding company's monitoring

QUESTIONS AND ANSWERS?



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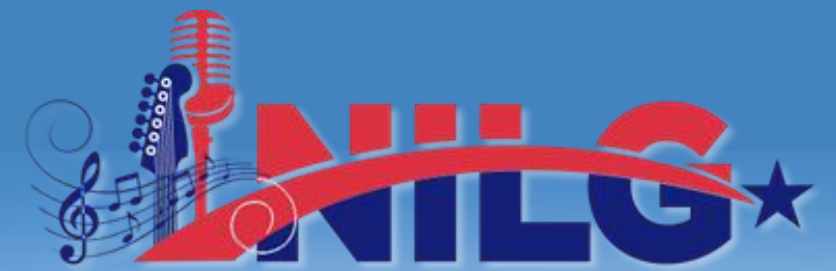
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