Insights: Alerts

DOL Announces New Discrimination Rule for Federal Contractors

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On August 3, 2023, the Department of Labor ("DOL") announced a new final rule, " Pre-enforcement Notice and Conciliation Procedures" to modify the procedures used by the Office of Federal Contract Compliance Programs ("OFCCP") when issuing pre-enforcement notices that rolls back the 2020 changes to employment discrimination enforcement for federal contractors.

The new rule largely reverts back to the standard the OFCCP used to determine whether federal contractors or subcontractors engaged in employment discrimination prior to a December 2020 rule, which had set out strict evidentiary and procedural rules for the agency to follow when investigating and enforcing allegations of discrimination.

Previously, the 2020 rule imposed strict notice requirements on the OFCCP and required the agency to provide specific types of both quantitative and qualitative evidence to contractors. It also required predetermination notices of preliminary findings and subsequent notices of violation to be approved by the OFCCP director before being issued to a contractor. Then, contractors had 30 days to respond to notices of violation.

The new rule rolls back the strict notice and evidentiary requirements established under the 2020 rule, though it still retains the mandatory requirement that OFCCP issue a predetermination notice and notice of violation to contractors in all matters in which the agency has made preliminary findings of potential discrimination and findings of discrimination. However, while these notices will still be subject to review by the OFCCP's national office, final approval no longer rests with the OFCCP director alone. Importantly, contractors will now have only 15 days to respond to notices of violation, during which they may have to try to pinpoint the OFCCP's concerns and address them without access to all the evidence previously mandated by the 2020 rule. Waivers for that deadline will only be granted for good cause.

According to the OFCCP, the new rule is intended to give it more flexibility, so it can pursue as many meritorious allegations of discrimination as possible and allow for more cases to be resolved through "conciliation and persuasion." However, what the new rule means for contractors is a return to a pre-2020 status quo where contractors were often left without a full understanding of the discrimination allegations against them. This gives the OFCCP significant leverage to push for settlements instead of contractors' risking the uncertainty of fighting back. Ultimately, because of the flexibility granted to the OFCCP in the new rule, much of the potential impact for contractors will come down to how the agency decides to implement the rule.

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