



## DIRECTIVE (DIR) 2019-02

**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:** November 30, 2018

1. **SUBJECT:** Early Resolution Procedures
2. **PURPOSE:** To promote early and efficient supply-and-service compliance.
3. **REFERENCES:**
  - a. Federal Contract Compliance Manual (FCCM) (Oct. 2014).
  - b. DIR 2018-06, Contractor Recognition Program (Aug. 24, 2018).
  - c. DIR 2018-07, Affirmative Action Program Verification Initiative (Aug. 24, 2018).
  - d. DIR 2018-08, Transparency in Compliance Activities (Sept. 19, 2018).
  - e. DIR 2018-09, OFCCP Ombud Service (Sept. 19, 2018).
4. **AFFECTED POLICY:** This directive supersedes contrary guidance in the current FCCM or any other agency guidance in conflict. OFCCP also will revise its case management system to incorporate these procedures.
5. **BACKGROUND:** OFCCP enforces Executive Order 11246, Section 503 of the Rehabilitation Act of 1973 (Section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (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.

OFCCP assesses federal contractor compliance with these laws primarily by conducting compliance evaluations. However, the number of compliance evaluations OFCCP can conduct annually covers a fraction of the total number of contractors that fall within the agency's jurisdiction. Based on 2016 EEO-1 Report data, about 20,000 companies and more than 120,000 individual contractor establishments fall within OFCCP's jurisdiction. This equates to about six establishments, on average, per federal contractor. Yet, OFCCP

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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.

reviews only a small portion of contractor establishments annually. In FY 2012, OFCCP concluded about 3,400 evaluations and in FY 2017 fewer than 1,000. This represents 2.8 percent and less than one percent of the universe of covered contractors, respectively. Where OFCCP found violations, corrective actions typically were limited to only that establishment.

Through recent initiatives, OFCCP has committed to fulfilling its mission with more transparency, certainty, efficiency, and recognition of high performing federal contractors.<sup>2</sup> With its careful stewardship of taxpayer dollars, OFCCP will use innovative approaches to increase contractor compliance, reach more establishments, and remedy violations more quickly for the benefit of employees, applicants and contractors.

This directive establishes OFCCP's Early Resolution Procedures (ERP) and outlines general guidelines for its implementation. These procedures will 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.

## **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 seek to resolve possible violations in compliance evaluations quickly, where appropriate, consistent with the policy and procedures stated in this directive. To support case resolutions through the ERP, regional and field managers should involve staff from OFCCP's Branch of Expert Services as well as the Office of the Solicitor (SOL). Regional and field managers must seek SOL and OFCCP national office review of ERP conciliation agreements, as appropriate, consistent with current practice.
- b. Regional and Field Staff: It is the responsibility of compliance officers and other employees who work on compliance evaluations to act in accordance with the policy stated in this directive.
- c. National Office: It is the responsibility of OFCCP's national office staff, involved in compliance evaluations, to act in accordance with the procedures stated in this directive.

## **7. POLICY AND PROCEDURES:** ERP provides a mechanism for OFCCP to maximize its resources, for the benefit of the agency, federal contractors, and workers. For all compliance evaluations in which a Pre-Determination Notice (PDN), Notice of Violation

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<sup>2</sup> See DIR 2018-06 (recognizing contractors that lead the way with implementable best practices for achieving diverse and inclusive workplaces); DIR 2018-07 (establishing a program to verify that contractors comply with annual AAP obligations), DIR 2018-08 (procedures to increase transparency in OFCCP's compliance activities), and DIR 2018-09 (announcing an Ombud Service to facilitate communication between OFCCP and stakeholders).

(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 following the procedures outlined below.<sup>3</sup> OFCCP strongly encourages contractors with multiple establishments to resolve issues OFCCP finds during compliance evaluations proactively with OFCCP through the ERP.

Compliance evaluations resolved through the ERP do not require issuance of a PDN or NOV. They may proceed directly to conciliation.

### Early Resolution Procedures

- Non-Material Violations
  - During the desk audit, if OFCCP finds non-material problems that can be corrected immediately during the desk audit, such as an unacceptable AAP element, and there are no additional indicators of potential discrimination, lack of good faith efforts or other material non-discrimination violations, the CO should seek to resolve the evaluation during the desk audit, provide any compliance assistance to the contractor, and issue a closure letter referencing the non-material violations and their remedies.<sup>4</sup> This is consistent with OFCCP's current practice.
- Material Violations: Non-Discrimination
  - Upon completion of the desk audit, if the contractor has multiple establishments, OFCCP will seek to resolve material non-discrimination violations through an Early Resolution Conciliation Agreement with Corporate-Wide Corrective Action (ERCA).<sup>5</sup> Examples of violations that fall into this category include, but are not limited to, record keeping, applicant tracking, failure to implement audit and reporting systems, and failure to conduct self-analysis.
  - The ERCA will require the contractor to review all, or a negotiated subset,<sup>6</sup> of its remaining establishments for the similar violation(s) during the progress report-monitoring period, and if necessary, implement corrective actions at those establishments to eliminate the violations(s) and prevent recurrence. In the progress reports, as outlined in the ERCA, the contractor will report the results of its analysis, findings, any corrective actions, and will provide OFCCP with all supporting documents and information reasonably related to such a review.
  - If the contractor and OFCCP agree to these terms, OFCCP will not schedule a new compliance evaluation at that particular establishment for a five-year period

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<sup>3</sup> OFCCP will address denial of access to requested data, information or facility through the standard process outlined in the FCCM rather than the ERP.

<sup>4</sup> See FCCM Letter L-4 – Notice Closing Compliance Evaluation No Violations Found.

<sup>5</sup> OFCCP will maintain a sample ERCA template on its website. OFCCP preserves its discretion to change and update the sample ERCA template without public notice.

<sup>6</sup> A negotiated subset, for example, may include establishments impacted by a particular policy or with common job functions as the establishment under review.

from the effective date of the ERCA.<sup>7</sup> The establishment will be under progress report monitoring for part of the five-year period, as outlined in the ERCA. If during the five-year period, OFCCP schedules a different establishment of the contractor for a compliance evaluation previously covered by the ERCA, OFCCP will conduct the compliance evaluation consistent with its normal policies and procedures.

- Material Violations: Discrimination
  - Upon completion of the desk audit, if the contractor has multiple establishments, OFCCP will seek to resolve material discrimination violations through an ERCA following the steps outlined below.<sup>8</sup>
    1. Within 14-calendar days, where possible, of completing the desk audit the Compliance Officer (CO) must discuss the desk audit findings and potential for ERP resolution with the district and regional office management. Upon concurrence, the district office will proceed with the evaluation in anticipation of seeking to resolve the matter through the ERP.
    2. The district office will contact the contractor to schedule essential interviews with appropriate company employees, rejected applicants, and human resource staff generally by phone or videoconference.<sup>9</sup> 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 human resource information or payroll systems.<sup>10</sup> OFCCP generally will not request information that is not readily available or non-electronic during the ERP.<sup>11</sup> The CO will give the contractor 14-calendar days, or other reasonable and mutually agreed upon timeframe, to provide the readily available and/or electronic information to OFCCP.
    3. Upon receipt of the additional information, the CO will expedite and seek to complete a refined analyses in 14-calendar days. If the analyses still indicate potential discrimination, the CO, Assistant District Director and/or District Director will contact the contractor to offer the ERP option.

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<sup>7</sup> The five-year scheduling exemption is limited to neutrally scheduled compliance evaluations. OFCCP retains the right to investigate complaints of discrimination at establishments covered by the ERCA. If the contractor violates the terms of the ERCA, OFCCP reserves the right to bring an enforcement action per the terms of 41 CFR 60-1.34 and the five-year scheduling exemption will be void. The terms of the ERCA or the scheduling exemption do not relieve the contractor from its annual or otherwise ongoing OFCCP requirements of equal employment opportunity through affirmative action and non-discrimination across its entire workforce.

<sup>8</sup> Depending on the complexity of the analysis, findings and additional information readily available from the contractor, not all cases may be suitable for early corporate-wide resolution through the ERP.

<sup>9</sup> While OFCCP may seek contractor input, the ultimate decision about appropriate employee, rejected applicant, and human resource staff interviews rests with OFCCP.

<sup>10</sup> Consistent with current practice, OFCCP may 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(s) is continuing.

<sup>11</sup> 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 the ERP.

4. If the contractor agrees to engage OFCCP in the ERP, the parties must meet within 14-calendar days of the agreement to discuss OFCCP's findings, proposed remedy, and corrective actions. This provides an opportunity for the contractor and OFCCP to conciliate likely violations before proceeding further with the compliance evaluation and an onsite visit.
  - a. During the ERP, the contractor may provide additional information for OFCCP to consider.<sup>12</sup> If OFCCP determines that the information eliminates the discrimination indicators, the CO should seek to resolve, if applicable, any outstanding non-material and/or material non-discrimination violations in accordance with the procedures outlined above. Otherwise, the CO will close the compliance evaluation with a closure letter.
  - b. 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 OFCCP has found to meet minimum/preferred qualifications, salary adjustments and/or other appropriate remedies and corrective actions. 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 report-monitoring period, and if necessary, implement corrective actions at those establishments to eliminate the violations(s) and prevent recurrence.<sup>13</sup> This may include job offers to affected class members that OFCCP has found to meet certain qualifications, salary adjustments and/or other appropriate corrective actions.
  - c. OFCCP will monitor implementation of the ERCA, results achieved, and ongoing compliance through semi-annual progress reports for a five-year period. In the progress reports, as outlined in the ERCA, the contractor will report the results of its analysis, findings, any corrective actions, and will provide OFCCP with all supporting documents and information reasonably related to such a review.
  - d. If the contractor and OFCCP agree to these terms, OFCCP will not schedule any of the contractor's establishments covered by the ERCA for a new compliance evaluation for the five-year period, concurrent with monitoring, from the effective date of the ERCA.<sup>14</sup>

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<sup>12</sup> Preferably, this information is in electronic format. However, if the information involves voluminous paper-based records, the compliance evaluation may not be appropriate for the ERP.

<sup>13</sup> Progress report monitoring is consistent with OFCCP's longstanding conciliation agreement monitoring practice. Consistent with this practice, if OFCCP finds that the contractor violated the terms of the ERCA during the progress report monitoring, OFCCP should issue a 15-Day Notice to the contractor to demonstrate in writing that it has not violated the ERCA unless OFCCP determines there is irreparable injury. If OFCCP finds that the contractor violated the terms of the ERCA, OFCCP reserves the right to bring an enforcement action per the terms of 41 CFR 60-1.34 and the five-year scheduling exemption will be void.

<sup>14</sup> The five-year scheduling exemption is limited to neutrally scheduled compliance evaluations. OFCCP retains the

- e. If conciliation fails during the ERP, OFCCP will immediately request any additional data and records it needs to continue the compliance evaluation.
5. Conciliation of an ERCA shall ideally last no more than 60-calendar days from the initial meeting referenced in Step 4, subject to extension by OFCCP, as long as the parties are making substantial progress towards an agreement. If there is no early resolution within this timeframe, OFCCP may at any time request any additional data and records it needs to continue the compliance evaluation.

8. **ATTACHMENTS:** None.



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