

We would like to know if OFCCP would oppose such a request.

To confirm, I will call you at 4:30 to discuss these issues, as we believe Judge Clark wants us to do. In the meantime, we will let the Court know we have not yet had the opportunity to discuss them with you, and therefore will follow up with the Court tomorrow instead of today to allow the parties time to discuss.

Thanks,  
Erin

**From:** Bremer, Laura - SOL <[Bremer.Laura@dol.gov](mailto:Bremer.Laura@dol.gov)>

**Sent:** Monday, March 11, 2019 1:24 PM

**To:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>

**Cc:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>

**Subject:** RE: OFCCP's Second Amended Complaint & Letter to the Court

Erin,

We don't understand your position. Judge Clark provided explicit instructions in his Order, which we carefully followed. Specifically, Judge Clark directed that "OFCCP must 1) remove the reference to a potential Affirmative Action Plan violation; 2) revise para. 46 to make clear that there is not an independent Affirmative Action Plan complaint; or (3) state the independent Affirmative Action Plan complaint in a separate paragraph, giving fair notice of the particular allegation it is making." (Order, p. 15.) OFCCP made no changes to the proposed Amended Complaint, other than those specifically directed by Judge Clark. Judge Clark explicitly instructed OFCCP to "clarify its reference to a violation related to the Affirmative Action Plan" and to submit a Revised Second Amended Complaint by March 18, 2019. (Order p. 16.) OFCCP did no more than make the Affirmative Action Plan complaint in a separate paragraph, as Judge Clark directed. OFCCP carefully followed the instructions in Judge Clark's Order, which did not include a requirement, or even suggestion, that the parties should further meet and confer prior to filing the Amended Complaint.

The violation related to the Affirmative Action Plan does not "go far beyond any claims asserted in the NOV or FAC," as Oracle states. It is related to the claims that Oracle did not develop and maintain various analyses Oracle was required to conduct or maintain records it was required to keep by the regulations. Your suggestion that Judge Clark implied that "leave to amend would not be appropriate" is inconsistent with the Order. Judge Clark rejected Oracle's argument that OFCCP must conciliate every time it brings a new claim arising out of the same compliance review at the same facility. (Order, p. 11.) With respect to the claim that Oracle failed to develop and maintain an AAP, the claim relates to the same facility, is similar to other claims, and is much simpler than the types of discrimination claims Judge Clark suggested could be added (which would require the development of substantial data and evidence).

The claim regarding the AAP is intertwined with the claim that Oracle did not maintain resumes and data, as required, as alleged in paragraphs 44-48. For example, Oracle's failure to maintain applicant data renders any AAPs it did develop and maintain inadequate. Moreover, in response to OFCCP's request that Oracle "Produce the YOUR AAPs for HQCA YOU are required to make AND maintain pursuant to 41 C.F.R. §§ 60-2.10(b) & (c) from 2013 to the present," Oracle responded, in addition to boilerplate objections, "Oracle objects to this Request on the grounds that the Request is unintelligible, vague and ambiguous as Oracle understands this Request; that is, 41 C.F.R. §§60-2,10(b) & (c) do not

require Oracle to make and maintain AAPs.” (RFP No. 173.) It is difficult to see how Oracle could be prejudiced from OFCCP adding this simple allegation, or that separate conciliation would be the most efficient means to handle the evidence of Oracle’s non-compliance that arose during discovery. This is an issue related to, and appropriately included in the current enforcement action. It requires limited additional discovery, and does not warrant separate conciliation and enforcement. It will not prejudice Oracle to include this claim.

Please advise if this addresses your concern. If not and you still believe that a telephone call is necessary to discuss the matter, please explain why by addressing the points raised above so that we can thoroughly understand Oracle’s position on this matter before we talk on the telephone.

Since I am tied up in meetings until about 4 p.m. this afternoon, please let me know your availability after that time to discuss.

Sincerely,

Laura C. Bremer  
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**From:** Connell, Erin M. <[econnell@orrick.com](mailto:econnell@orrick.com)>

**Sent:** Monday, March 11, 2019 8:42 AM

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**Cc:** Miller, Jeremiah - SOL <[Miller.Jeremiah@dol.gov](mailto:Miller.Jeremiah@dol.gov)>; Garcia, Norman - SOL <[Garcia.Norman@DOL.GOV](mailto:Garcia.Norman@DOL.GOV)>; Siniscalco, Gary R. <[grsiniscalco@orrick.com](mailto:grsiniscalco@orrick.com)>; Parker, Warrington <[wparker@orrick.com](mailto:wparker@orrick.com)>; Kaddah, Jacqueline D. <[jkaddah@orrick.com](mailto:jkaddah@orrick.com)>

**Subject:** FW: OFCCP's Second Amended Complaint & Letter to the Court

Laura,

Please let me know when you are available today to meet and confer regarding the new claim OFCCP has asserted in paragraph 47 of its revised SAC. Once again, you did not provide us an opportunity to review the revised SAC before you filed it – as reflected below, Norm sent it to us via email on Friday afternoon, and less than 20 minutes later confirmed it had been filed. This new claim – which appears to assert that Oracle did not develop, maintain, and make available to OFCCP an AAP during the audit – goes far beyond any claims asserted in the NOV or First Amended Complaint (FAC). We also don’t understand the basis for it, as Oracle plainly did produce its AAP. At page 11 of Judge Clark’s order, he acknowledges that “[a]t some point an ‘amendment’ is an entirely different claim,” and indicates that leave to amend would not be appropriate in such a circumstance. We believe this new assertion in paragraph 47 is just such a claim, and plan to promptly alert Judge Clark of our concern about it. To avoid unnecessary motion practice, we would