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DOL Discrimination Rule Could Drive Contractor Settlements

By **Daniel Wilson**

Law360 (August 4, 2023, 7:08 PM EDT) -- The U.S. Department of Labor's move to roll back 2020 changes to employment discrimination enforcement for federal contractors comes with few upsides for companies and experts say it could serve to railroad contractors into settling discrimination allegations.

The DOL Office of Federal Contract Compliance Programs rule finalized Thursday largely reverts 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.

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."

What that means for contractors, according to attorneys who represent those companies before the OFCCP, is a return to a pre-2020 status quo where they were often left without a full understanding of the discrimination allegations against them. That gives the agency significant leverage to push for settlements instead of contractors' risking the uncertainty of fighting back.

"As I see it, it gives OFCCP a lot more discretion to effectively scare a contractor into compliance without fully showing its hand," said Husch Blackwell LLP partner Michael Schrier, who frequently represents contractors on labor and employment issues.

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

The OFCCP argued that the 2020 rule imposed "inflexible" and overly strict evidentiary and notice requirements that had prompted "time-consuming" disputes with contractors.

But although the agency had said those 2020 requirements imposed an evidentiary burden it would not have to meet in court, they had in effect served as "more of a mechanism that [allowed] for the agency to prioritize issues, cases, matters to ensure that its resources [were] appropriately pushed into the right places" to address the most significant discrimination issues, said Posi Oshinowo, of counsel at Wiley Rein LLP, who frequently represents companies in employment law matters.

"I don't want to imply that there are instances where there are patterns that appear to demonstrate … that discrimination exists [and] that we should just ignore it, because it doesn't matter enough," he said. "But every agency has to make a decision, at some level, about whether or not an issue rises to a level that is sufficient to continue to investigate, to continue to devote resources to, and to ultimately impose legal liability as a result."

Those 2020 requirements had also served to help rein in mistakes and "abuses" by some OFCCP officials who had "too often" alleged discrimination "based on an incorrect understanding of the law, inaccurate perception of the facts [and] aggressive misuse of statistics," said David Goldstein, co-chair of Littler Mendelson PC's OFCCP practice group.

"The 2020 rule wasn't perfect, but it was a huge step in trying to get the agency to act more professionally and thoughtfully and more in alignment with the law," Goldstein said.

In addition to contractors now having to defend against discrimination allegations without the evidence mandated by the 2020 rule, there is also the potential for inconsistent enforcement under the new rule, attorneys said. Although predetermination notices to companies will still be subject to review by the OFCCP's national office, final approval for notices will no longer rest with the director alone.

That approval requirement been aimed at addressing "lingering criticism of the agency, which is that there are inconsistent standards between regions, and even between compliance officers," said Guy Brenner, leader of Proskauer Rose LLP's Washington, D.C., labor and employment practice and head of its government contractor compliance group.

Any inconsistency in enforcement could discourage some companies from wanting to do business with the government at all, in effect raising the cost of certain goods or services for the government, as well as potentially leading to some OFCCP officials "[squandering] taxpayer dollars in pursuit of frivolous claims," Goldstein said.

And although the new rule retains a requirement from the 2020 rule that predetermination notices are mandatory, not voluntary, before the OFCCP can issue a notice of violation, any potential benefit for contractors from those preliminary findings may be undermined by the shortened window they will have to respond to those notices.

Contractors will now have 15 days to respond, down from 30 days in the 2020 rule, during which they may have to try to pinpoint the OFCCP's concerns and address them without access to all the evidence mandated by the 2020 rule, or may otherwise have to address significant volumes of statistical analysis put forward by the agency.

Waivers for that deadline will be granted only in extraordinary circumstances, which means that contractors and their attorneys in many circumstances will find it difficult, if not impossible, to address the OFCCP's concerns effectively, said Andrew Turnbull, a Morrison & Foerster LLP partner who often represents contractors in OFCCP proceedings and on other labor and employment issues.

"It puts us at a disadvantage, because we can't really respond to that," he said. "I think that's the fear from a lot of contractors, that we're going to be back to that [situation of], 'We have no details; you're asking us to settle a case where we don't even know what you're asking.'"

Because of the broad flexibility granted to the OFCCP in the new rule, much of the potential impact for contractors will ultimately come down to how the agency decides to implement the rule, according to Husch Blackwell's Schrier.

"A lot of it is in the hands of OFCCP. … They could choose to apply the new rule in a cooperative way, or they could apply the new rule in a rather aggressive way," he said.

The OFCCP didn't directly respond to questions from Law360 on Friday regarding the concerns raised about its potential implementation of the new rule. In a statement, a department spokesperson instead largely reiterated the agency's reasoning laid out in the rule itself, such as that the 2020 rule "diverted agency resources away from investigating discrimination to procedural disputes caused by overly stringent evidentiary standards."

"OFCCP's Pre-enforcement Notice and Conciliation Procedures rule protects America's workers by enabling OFCCP to enforce the full scope of anti-discrimination protections entrusted to the agency," the spokesperson said. "OFCCP remains committed to open communication to ensure contractors understand the nature of any concerns identified in the pre-enforcement notices."

--Editing by Robert Rudinger.
