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OFCCP

Speakers Differ on Role of HR, Attorneys During Affirmative Action Audits by OFCCP

What role, if any, attorneys should have in compliance evaluations by the Labor Department's Office of Federal Contract Compliance Programs was debated by a human resources practitioner and management lawyers at a workshop sponsored by the National Employment Law Institute.

Besides arguing the merits of legal representation during audits by the agency responsible for enforcing affirmative action requirements for federal contractors, the presenters shared their experiences responding to audits. They were speaking at NELI's 32nd annual affirmative action briefing held Oct. 23-24 in Arlington, Va.

The topic has taken on greater significance for federal contractors with the agency's decision—approved by the White House Office of Management and Budget in late September—to make major revisions to the scheduling letter and itemized listing the OFCCP sends to contractors it decides to audit (188 DLR A-1, 9/29/14). The new version of the listing requests supporting documents under 22 categories versus 11 categories in the old listing.

HR Practitioners Can Handle Audit. A federal contractor who's been scheduled for a compliance audit should assemble a team to oversee it, said Candee Chambers, vice president of compliance and partnerships for DirectEmployers Association. The team should appoint a person to be the primary contact with the compliance officer during the evaluation.

That contact shouldn't be a labor law attorney, she added.

"Labor attorneys that I have worked with have confessed to me that they would prefer not to be the interface between the contractor and the agency," said Chambers, who is not an attorney.

For most audits, HR managers and professionals can serve as the interface between the contractor and the agency, Chambers said. She explained that she has been involved in numerous OFCCP audits and has rarely used a labor attorney to interact with a compliance officer on her behalf.

Some Attorneys Not Suited for Audit. She stressed that HR managers and practitioners for federal contractors must keep up with OFCCP affirmative action regulations and that members of the HR or affirmative action team should be well-trained in compliance matters related to the audits.

Chambers said she learned early in her career that it was her responsibility to compile cogent written affirmative action plans and to organize the supporting documents in a way that would satisfy the compliance officer. "I didn't have an attorney tell me to do these things," she said.

HR professionals and managers shouldn't assume that all labor attorneys understand OFCCP regulations on compliance reviews, Chambers said, recalling an instance when a labor attorney advised an HR practitioner to submit documents unrelated to the audit. Employment law attorneys don't "necessarily have affirmative action expertise," she added.

According to Chambers, the labor attorney's role in a compliance evaluation is to provide the audit team, especially its leader, with "good direction" to avoid problems.

She said she realized that HR practitioners and managers may also need to turn to a labor or employment law attorney "to figure out what the OFCCP is really looking for" in a supplemental document request.

Positive Relationship Essential. The person tapped to communicate with the compliance officer should be knowledgeable about compliance evaluations but also capable of building rapport with the compliance officers, Chambers said.

A positive relationship can reap rewards, such as getting a deadline extension or permission to resubmit a flawed document during the course of an audit, Chambers said.

An attorney who is perceived by a compliance officer as being abrasive and aggressive may fail to earn the contractors those types of perks, she said.

"Most compliance officers do not want an attorney telling them what to do during an audit," Chambers said.

"A lawyer who is directly involved in an OFCCP audit needs to take his or her armor off because you are not in a courtroom or battling a plaintiff's lawyer," John Fox, NELI co-chair, said.

"You need to downsize to the level and tone of the OFCCP compliance officer," he said. Some lawyers behave as courtroom litigators in an audit, which is bound to get a negative response from the compliance officer, he said.

Legal Assistance Needed in Some Cases. In-house and outside legal counsel should aid the audit team but not serve as the main point of contact for the compliance officer, said Brian W. Bulger, with Chicago firm Meckler Bulger Tilson Marick & Pearson.

An employment law attorney, however, may interact with the compliance officer during the initial stage of an

audit if the contractor is contesting the OFCCP's jurisdiction to conduct the audit, he said. An employer may also want an attorney present when a compliance officer conducts an on-site audit of the contractor's establishment, Bulger added.

"I think you do whatever the client wants," said Fox, who is an attorney with Fox, Wang & Morgan in Northern California. Some clients may prefer an HR professional to front the OFCCP audit, while others will turn to the legal profession, he added.

In the past, Fox held the belief that lawyers shouldn't handle OFCCP audits. Thirty years ago, large federal contractors had HR departments with the resources and expertise to spearhead the audits, he said.

"That was an era when lawyers were behind the curtain" when it came to their federal contracting clients undergoing OFCCP audits, Fox said. Back then, an HR manager may have had 10 to 15 subordinates with one person assigned to put together the contractor's applicant tracking system.

Some HR Teams Face Audit Fatigue. Fox said some contractors select a labor lawyer to oversee the audit because the HR team has expressed an unwillingness to do so.

A few larger contractors have told him that their HR teams are "tired of the abuse," said Fox. Some audits are intense and protracted.

Several workshop attendees acknowledged that some compliance officers are aggressive in seeking data and information during an audit, which creates a sense of being bullied during the audit. Chambers said she's never felt bullied by a compliance officer during an audit.

Parties Hold Different Views on Requests. Some OFCCP auditors are concerned that certain lawyers may not be responding earnestly to their document requests during audits. But the lawyers might not have thought their responses to such requests were inappropriate, Fox said.

"They tend to view an OFCCP's document request through the Federal Rules of Evidence, arguing that the auditor's document request did not specify that exact document," he said. "A lawyer can bring value to an OFCCP audit, but it has to be put in a special context of an audit and not as an opposing counsel to plaintiff," Fox said.

The OFCCP itself may be turning to lawyers for audit oversight. According to Fox, some regional solicitors at the OFCCP are taking a more active role in major and problematic compliance audits.

"If OFCCP truly wants to combat discrimination, then the agency should adopt the plaintiffs' lawyer model in which the agency's lawyers in the six regional offices conduct the audits, thus turning the compliance officers into paralegals who organize and gather the files," he said.

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