

# Contractor Audits Vary Nationwide With Vacancy at DOL Subagency

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By Jay-Anne B. Casuga

Large employers that do business with the federal government may find that Labor Department audits of its facilities differ by location, with some DOL regions taking a more aggressive approach than others, according to some management-side stakeholders.

Inconsistency in agency enforcement isn't something entirely new, but it can be more pronounced during political transition. The DOL's Office of Federal Contract Compliance Programs has been operating without appointed political leadership for nearly 10 months. The OFCCP's national office in Washington sets the agency's enforcement policies and priorities. Its six regional offices and their district offices conduct the actual audits that seek to uncover potential workplace discrimination.

"Since the change in administration, the regions are operating semi-autonomously," Mickey Silberman, a management attorney with Jackson Lewis in Denver, told Bloomberg BNA. Silberman is co-chair of the firm's affirmative action and OFCCP defense practice group.

And that can prove challenging for large contractors that have facilities nationwide. Depending on location, companies can face varying enforcement standards during audits, including differences in the nature and scope of employment data requests, as well as time frames given to respond.

"Employers want a set of rules to play by and they want consistency," Silberman said.

Former OFCCP Director Patricia Shiu stepped down last November. Thomas Dowd, a nonpolitical official, is the current acting director. The agency, which is facing potential budget cuts and a proposed merger with another civil rights agency, has been viewed by some employer-side advocates as more collaborative with contractors under Dowd's leadership.

The labor secretary has yet to name a political director, but a DOL official recently told Bloomberg BNA that the agency would be filling political vacancies "very shortly."

"The OFCCP's nationwide focus is on collaborating with the federal contractor community to ensure compliance," an agency spokesman told Bloomberg BNA. "The agency is aware that there is a strong desire for consistency and increased transparency in compliance evaluations,

and we know that both can reduce the amount of time that it takes to resolve cases, and the number of cases that end up in litigation.”

## **Pacific Region Seen as More ‘Aggressive’**

The OFCCP audits federal contractors for workplace affirmative action and nondiscrimination compliance. Its regions are the Mid-Atlantic, Midwest, Northeast, Pacific, Southeast, and Southwest and Rocky Mountain regions.

In the absence of new appointed leadership, some regions have been “staying the course” set by the Obama administration, Alissa Horvitz, a management attorney with Roffman Horvitz in McLean, Va., told Bloomberg BNA.

“Without a new appointment in the director role, the agency seems to be doing the same things it did for the past several years,” said Horvitz, who previously served as co-chair of Littler Mendelson’s OFCCP practice group.

During the Obama administration, the OFCCP was known for conducting fewer but more thorough audits. It performed deep-dive analyses of contractors’ hiring, pay, and other employment data to uncover indicators of potential discrimination.

The administration also made an effort to make nationwide enforcement consistency at OFCCP one of its priorities.

“I will give the agency credit: they made that effort and they were somewhat successful some of the time,” Silberman said.

But some regions still took varied approaches to audits, and some seemed to be more “aggressive” than others, he said. And that trend has continued during the political transition.

The Pacific Region, for example, seems to have a “quicker trigger” than others when it comes to asking contractors for more employment data and records as a follow-up to initial audit submissions, he said. The types of requests it makes aren’t seen “as a matter of course, in other regions,” he said.

“Even under Shiu’s leadership, the Pacific Region did things more aggressively,” Silberman said.

The Pacific Region so far has recovered the most settlement dollars from contractors since fiscal year 2015, according to a recent Bloomberg BNA analysis. The Pacific Region audits contractor facilities in eight Western states and Guam.

Audits from that region in the past few years have also led to agency administrative action against some big name tech companies, including Google, Palantir Technologies, and Oracle America. In the Google case, for example, the OFCCP asked the company to turn over salary

history information for some 25,000 workers. An administrative judge denied that request last month, and the agency may appeal the decision.

## **Inconsistency Tends to Be Part of Mix**

The agency arguably has grappled with nationwide enforcement consistency since its inception in 1978, when nearly a dozen individual agencies were consolidated into one.

“Consistency among regions has been a long-standing goal for OFCCP and I imagine most federal agencies,” Shirley Wilcher, the contractor watchdog’s director under the Clinton administration, told Bloomberg BNA. “Every administration struggles with it.”

Each region for years has “to a large extent done their own thing,” Candee Chambers, executive director of the DirectEmployers Association in Indianapolis, told Bloomberg BNA. Bloomberg BNA is an affiliate of Bloomberg L.P., which is a member of the association.

“It’s no different from corporate America,” Chambers said. “Every location has its own culture and their own way of doing things.”

## **Advice to Big Contractors: Build Relationships**

Until new leadership is in place, what should contractors with facilities nationwide do?

Silberman shared an old lawyer’s adage: “A good lawyer knows the law, a great lawyer knows the judge.”

The same holds true with OFCCP audits, he said. A contractor not only needs to know the law and its requirements, it needs to know the compliance officers auditing its facilities and their supervisors, in either the regional office or the district office.

“If you can plan your audit responses around known personnel at the agency, you can continue to be successful in these audits,” Silberman said.

Wilcher agreed that it’s advisable to get to know regional and local leadership “as there will be individual nuances in interpretation of regulations.”

Chambers added that it’s all about building relationships with the OFCCP.

Sometimes, law firms are the main contact between a contractor and the agency.

“Some law firms are great, but some go in like a litigator,” she said. “That’s not how to play this game. If you work with them, you both can get what you need.”

Both the agency and the contractor community appear to be embracing collaboration in recent months.

“I’ve not noticed a sea change in the way compliance officers are focusing on audits,” Horvitz said. “But I am definitely getting a more collaborative tone from every person I’m dealing with.”

The DOL spokesman said the agency plans to continue to build its contractor outreach and compliance assistance efforts.

“Engaging with the agency helps build the strong working relationships that lead to the best outcomes for both employers and employees in the federal contracting community,” he said.

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