

ALERT

Cautionary Tale on the Importance of Complying with OFCCP Compliance Evaluations

December 21, 2015

The U.S. Department of Labor (DOL) has filed a lawsuit against a government contractor, Convergys Customer Management Group Inc., to require the company to submit documents detailing the federal contractor's affirmative action plans and supporting documents for several company facilities. Specifically, the suit—filed with DOL's Office of Administrative Law Judges—requests that Convergys provide DOL's Office of Federal Contract Compliance Programs (OFCCP) with all documents and information requested, cooperate with scheduled compliance reviews, and fully comply with the requirements of all laws enforced by the agency. If Convergys fails to comply, DOL seeks to cancel its current federal contracts and ban it from future federal contracting.

In a similar lawsuit against Convergys, an Administrative Law Judge (ALJ) with DOL concluded on October 23, 2015 that the company violated DOL's regulations by failing to provide its written affirmative action plan and supporting data in response to scheduling letters sent by OFCCP to several company facilities. OFCCP had requested the information in connection with a desk audit it was conducting of the company, and the company failed to comply despite repeated requests for the documentation.

Convergys argued under the Fourth Amendment that: (1) OFCCP disproportionately selected it for a large number of compliance reviews not justified by a neutral selection process or reasonable cause to suspect violations; and (2) the document requests were broad and the number of its facilities scheduled for desk audit was unprecedented. The ALJ held that OFCCP's compliance evaluation

Practice Areas

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complied with the Fourth Amendment and that the scheduling letters were sufficiently limited in scope. The ALJ further held that Convergys had violated the equal opportunity regulations enforced by OFCCP by failing to provide its written affirmative action plans and supporting data upon request. In the event Convergys continued to refuse to provide the requested information, the ALJ directed DOL to take all administrative steps necessary to terminate all existing government contracts held by the company and to debar the company from receiving and participating in any future government contracts for at least three years or until the company complied. This case is a cautionary example of the strict penalties federal contractors may face for failing to comply with the regulations enforced by OFCCP. It also underscores how OFCCP has expanded its enforcement and review efforts.

OFCCP is responsible for enforcing Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). As amended, these laws make it illegal for contractors and subcontractors doing business with the federal government to discriminate in employment on the basis of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. In connection with these enforcement responsibilities, OFCCP can conduct compliance evaluations to determine if a contractor is maintaining nondiscriminatory hiring and employment practices and is taking affirmative action to ensure that applicants are employed and treated during employment without regard to any of the aforementioned categories. A compliance evaluation may consist of any one or any combination of the following procedures:

- Compliance review. A compliance review may proceed in three stages: (i) a desk audit of the written affirmative action plan and supporting documentation; (ii) an on-site review; and (iii) where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review.
- Off-site review of records. This is an analysis and evaluation of the affirmative action plan (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of Executive Order 11246 and regulations.
- Compliance check. This is a determination of whether the contractor has maintained records consistent with DOL's regulations. At the contractor's option, the documents may be provided either on-site or off-site.
- Focused review. This is an on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

In the event of the contractor's noncompliance with the nondiscrimination clauses, or any of the rules, regulations or orders enforcing Executive Order 11246, VEVRAA or the Rehabilitation Act, the contractor and subcontractor may be subject to harsh sanctions, penalties, and potential civil and criminal liabilities. Among the consequences of non-compliance are the following:

- Contractor may be debarred and declared ineligible for any future government contracts;

- Contract may be canceled, terminated, or suspended in whole or in part;
- For subcontractors, liability may exist if debarment causes the prime contractor to be in breach of the prime contract; and
- Where a violation is material, the Department of Justice (DOJ) may bring suit to enforce the regulations or enjoin noncompliance. DOJ is also authorized to bring a criminal action for the furnishing of false information to DOL.

Wiley Rein conducts mock audits for clients to assist in preparing for OFCCP audits. The reports and conclusions stemming from these mock audits are protected from disclosure under the attorney-client privilege and work product doctrine, and can provide an excellent vehicle to ensure compliance with OFCCP regulations.