

CLIENT ALERT: Recent OFCCP Equal Employment Opportunity and Religious Freedom Directives Affect Federal Contractors - By Joseph P. McConnell and Deepa K. Desai

Under policy directives issued by the Office of Federal Contract Compliance Programs (the “OFCCP”) on August 10, 2018, federal contractors’ compliance with workforce anti-discrimination regulations may come under increased scrutiny. Please read on for a brief overview of these directives and their effect on organizations that perform business with the federal government.

Directive 2018-03

Directive 2018-03 requires OFCCP personnel to take into account recent Supreme Court decisions and executive orders regarding the rights of individuals and organizations to exercise religious freedom. By way of background, the Supreme Court, in such cases as *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n* and *Burwell v. Hobby Lobby Stores, Inc.*, ruled that the government violates the Free Exercise clause of the Constitution when it demonstrates hostility to—and withholds widely-held public benefits based on—the sincerely held religious beliefs of a business. In addition, recent Executive Orders 13831 and 13798 make it clear that the federal government intends to prioritize the safeguarding of religious freedoms.

Directive 2018-03 references the language of these judicial decisions and executive orders and directs OFCCP staff as follows:

1. They “cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices,” but rather, “must proceed in a manner neutral toward and tolerant of...religious beliefs;”
2. They cannot “condition the availability of [opportunities] upon a recipient’s willingness to surrender his religiously impelled status;”
3. Faith-based and community organizations must be afforded the “fullest opportunity permitted by law” to compete on “level playing field” for federal contracts; and
4. They must respect the right of religious individuals and entities to practice their faith “without fear of discrimination or retaliation by the Federal Government.”

Directive 2018-04

Directive 2018-04 establishes that, beginning in fiscal year 2019 (beginning October 1, 2018), the OFCCP will conduct “focused reviews” of contractors’ equal employment opportunity policies and practices. These focused reviews will be conducted on-site and will center exclusively on three laws enforced by the OFCCP: (1) Executive Order 11246, (2) Section 503 of the Rehabilitation Act of 1973, and (3) the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (“VEVRA”). These laws make

it unlawful for federal contractors and subcontractors to discriminate against employees on the basis of such characteristics as race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or protected veteran status. These laws also put the onus on contractors and subcontractors to take concrete steps—for example, via the implementation of Affirmative Action Plans—to ensure equal opportunity in employment.

The OFCCP’s focused reviews will involve examining contractors’ equal employment opportunity policies and practices, hiring and compensation data, and procedures for addressing employee requests for workplace accommodations. As part of their reviews, on-site OFCCP compliance officers may also interview management and employees.

In accordance with the Directive, OFCCP staff will be establishing protocols and procedures for conducting focused reviews in the upcoming months.

What this Means for Employers

Directive 2018-03 prohibits discrimination against religious organizations in federal government contracting. The intent of the Directive appears to be that religious and/or faith-based organizations may plan any future contract-bidding with the assurance that they will be afforded the same opportunity as other entities in the realm of federal contracting.

Directive 2018-04 requires the OFCCP to publish answers to Frequently Asked Questions prior to beginning its “focused” equal employment opportunity reviews. It also requires the agency to provide staff and contractors guidance regarding the conduct of the focused reviews. Employers who compete for and perform work on behalf of the federal government, either as contractors or subcontractors, periodically self-audit their compliance with those laws that the OFCCP enforces (i.e., Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and VEVRA). With the issuance of Directive 2018-04 and the looming prospect of upcoming OFCCP reviews, employers should consider making self-audits a priority.

For more information about these directives and how they may affect your business, please contact your MBJ attorney.

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