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Contractors Shouldn't Panic Over Record OFCCP Recoveries

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The Office of Federal Contract Compliance Programs posted record recoveries from government contractors in fiscal year 2019, which closed at the end of September. An agency press release boasted that monetary settlements in fiscal years 2017 to 2019 marked the agency's highest three-year period on record, exceeding the prior seven years combined.[1]

This was a somewhat surprising turn under the current administration, since Republicans are viewed as business-friendly. Then again, the $40.6 million that the OFCCP obtained — 40% more than its next highest recovery year of $16 million[2] — is largely the result of audits that began during the Obama administration.

OFCCP Director Craig Leen has been active since taking office in December 2018. The hallmarks of his office have been engaging with the contractor community, issuing directives to revamp agency procedures, and emphasizing the four goals of transparency, certainty, efficiency and recognition. How then, with Leen's efforts to make audits more palatable for contractors, have outcomes for companies gotten worse?

An analysis of the 2019 settlements sheds light on the upward recovery trend. There may be far less cause for concern than the raw numbers would suggest.

First, as noted above, these are not Trump-era audits or complaints being resolved. They began during President Barack Obama's activist administration, and are only now — many years later — coming to a close. It won't be for several more years that one will be able to gauge the financial impact of Leen's OFCCP. In theory, his revised regulatory approaches should make it easier for contractors to understand and comply with legal obligations, which would reduce the number of perceived violations that could yield recovery.

Second, remember that these are voluntary settlements with employers, not awards obtained by the OFCCP in court. As anyone who has tried to find case law knows well, decisive legal victories are almost nonexistent for the OFCCP.

Companies deny wrongdoing throughout audits, and do not admit liability in settlement. This casts doubt on whether the OFCCP is actually advancing its mission of affirmative action, or simply strong-arming employers to submission.

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That segues into a third reason the 2019 recoveries may not mean doomsday for employers: Too much is being read into the seemingly large monetary payouts. Notable settlements fell heavily within the financial industry, where significant sums are still relatively trivial.

Many companies adopt a write-the-check philosophy to eliminate a business problem, rather than wage a protracted and frustrating battle with the OFCCP. The cost of a five- or 10-year audit, rife with changing demands and often perplexing positions from the agency, readily eclipses most of the settlements obtained. Getting rid of an OFCCP audit has become a cost of doing business where, as in litigation, merit may take second place to the economics of defense.

Fourth, a rise in recoveries does not necessarily translate to improved outcomes by the agency. The OFCCP still seems to struggle significantly with pay analyses, particularly in reconciling them with Title VII standards, by which it is bound.

The OFCCP lags behind the private sector when it comes to sophisticated statistical studies and access to qualified experts. Most district offices lack a dedicated in-house statistician, which means any complex analyses must be forwarded to the OFCCP's national office, where they wait in line to be handled by the small team of statisticians there.

The agency grapples with how to appropriately group employees for analysis and takes inconsistent stances on what pay factors to include. For instance, several OFCCP conciliation agreements have required contractors to include prior relevant experience as a factor in their remedial pay regressions. And yet, in other OFCCP offices, the agency has rejected use of prior experience as a pay factor. The rationale for the latter is the OFCCP's view that prehire experience should not influence pay after a person has become employed.

All this calls into question the OFCCP's credibility as an equal pay watchdog, notwithstanding the numbers it may post.

Finally, remember to see the forest as well as the trees. Large settlements are still the exception, not the rule. In the OFCCP's fiscal year 2020 congressional budget justification, the agency cites jurisdiction over 120,000 establishments from 20,000 contractors and subcontractors.[3]

The agency conducted 812 audits in 2018,[4] and identified about 4,000 establishments in its review lists for 2019.[5] So, even in an active year, less than 4% of establishments and fewer than 20% of contractors will be subject to an OFCCP audit. And, of those, only a fraction will result in findings of violations (an estimated less than 2% receive a notice of violation). Only a handful of those will result in settlements of any size.

In short, though contractors should closely monitor developments at the OFCCP, they need not panic over the financial recoveries touted by the agency for fiscal year 2019. The momentum is unlikely to hold through 2020, when fewer Obama-era audits remain to be resolved.

And, even if the OFCCP maintains its current focus on systemic discrimination cases (which, by definition, involve a class of purported victims), those audits take more time to complete and are unlikely to post outcomes within the year. 2021 and 2022 are likely to be far more telling on whether current audit practices will pay off for the OFCCP.

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In closing, the reminder to the OFCCP is that although alleged bad actors must face the legal consequences of their actions, the agency needs to accept that it is most improbable that a contractor is a bad actor. This is borne out by the OFCCP's own data showing that across both Republican and Democrat administrations, less than 2% of investigations done by the agency result in the finding of a violation.

Thus, in an attempt to find a violation that is not likely to exist by the OFCCP's own admission, the agency must resist the temptation to engage in overly creative and tortured data analysis that is costly and time consuming to contractors. As the OFCCP stated in Directive 2018-05 regarding compensation and statistical analyses when determining which cases to pursue, the agency should avoid bringing matters where the statistical data is not corroborated by nonstatistical evidence of discrimination.

Yes, contractors benefit from contracts with the federal government and therefore have a responsibility not to discriminate. However, for our benefit, the contractors provide goods and service that aid in keeping the U.S. safe, and they create jobs. Thus, the federal government has the responsibility to avoid unnecessary and invasive interference with the management and running of contractors' business.

Notes

[1] https://www.dol.gov/newsroom/releases/ofccp/ofccp20191025.

[2] https://www.law360.com/employment/articles/1213796/contractor-bias-deals-net-40m-in-2019-breaking-dol-record?.

[3] https://www.dol.gov/sites/dolgov/files/general/budget/2020/CBJ-2020-V2-10.pdf, OFCCP-13.

[4] Id. at OFCCP-15.

[5] https://www.dol.gov/ofccp/scheduling/FY2019-CSAL.xlsx (initial 2019 Corporate Scheduling Announcement List of March 2019): https://www.dol.gov/ofccp/scheduling/files/SL19R1-Sup-CSAL.xlsx (supplemental 2019 list for VEVRAA focused reviews).

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