

**STATEMENT OF CRAIG E. LEEN  
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**BEFORE THE**

**SUBCOMMITTEE ON CIVIL RIGHTS AND HUMAN SERVICES  
COMMITTEE ON EDUCATION AND LABOR  
U.S. HOUSE OF REPRESENTATIVES**

**September 19, 2019**

Chairwoman Bonamici, Ranking Member Comer, and members of the Subcommittee:

Thank you for giving me the opportunity to testify about the Office of Federal Contract Compliance Programs (OFCCP) and the critical work we do to enforce three equal employment opportunity authorities: Executive Order 11246, as amended (Executive Order); Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 793 (Section 503); and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA). Collectively, these authorities prohibit federal contractors and subcontractors from discriminating in employment because of race, color, religion, sex, sexual orientation, gender identity, national origin, disability, or status as a protected veteran. In addition, contractors and subcontractors are prohibited from discriminating against applicants or employees because they inquire about, discuss, or disclose their compensation or that of others, subject to certain limitations.

OFCCP has jurisdiction over approximately 120,000 contractor establishments and 25,000 firms or parent companies. Given the large size of the contractor and subcontractor population, OFCCP can only evaluate some of them each year. OFCCP carries out the vast majority of its work through neutrally scheduled compliance evaluations, complaint investigations, and proactive compliance assistance and education to contractors. As a result, OFCCP is implementing a comprehensive strategy that promotes compliance for all contractors through enforcement, compliance assistance efforts, compliance verification, and compliance incentives.

### **1. OFCCP's Four Guiding Principles**

Under this Administration, OFCCP developed four principles to guide agency strategies and activities to support a broader compliance strategy and promote compliance across the entire contractor community. These principles support OFCCP in working with federal contractors and subcontractors to ensure full compliance with its civil rights laws, while at the same time requiring contractors in violation of the law to remedy and correct the violation.

- **Certainty** – OFCCP believes it is essential to provide clear and certain guidelines consistent with the rule of law. Certainty ensures that contractors know what OFCCP expects of them so that they can comply. OFCCP provides clear guidance and in return expects cooperation and access in compliance evaluations when it seeks compliance verification.
- **Efficiency** – OFCCP aims to greatly reduce the time it takes to complete compliance evaluations and to process compliance decisions more efficiently. An unduly lengthy compliance evaluation process hurts both employees and employers, as it leaves evaluations open indefinitely without closure, conciliation, or remedies, and the uncertainty that comes with a prolonged audit despite the lack of a clear finding of wrongdoing. For Fiscal Year 2019, my first full year as Director, I am proud to report that OFCCP has completed non-monetary compliance evaluations (*i.e.*, a compliance review in which OFCCP finds no violation that would require a contractor to provide monetary make whole relief) within an average of 318 days, down from an average of 419 days for Fiscal Year 2016 . The agency has reduced the time undertaken for desk audit—the first step in the compliance review process in which OFCCP reviews information and data submitted by the contractor—to 42 days (a reduction of over 70% in less than a year), and is aiming to reduce the current average of five years the agency takes to complete monetary evaluations (*i.e.*, an evaluation that requires the contractor to provide monetary make whole relief, such as lost wages or benefits). In prioritizing the prompt completion of evaluations and in accordance with numerous recommendations made by the Government Accountability Office<sup>1</sup>, the agency will be better able to provide efficiency and transparency to the contractor community without sacrificing the thoroughness and quality of evaluations. As compliance is best achieved through a mutual dedication on the part of contractors and OFCCP, prompt completion of evaluations greatly depends on contractor cooperation.
- **Recognition** – OFCCP has announced and is developing incentive programs to recognize high performing contractors, those that go above-and-beyond the requirements of law, for their innovation and success in equal employment opportunity programs. These contractors serve as mentors to their peers. By recognizing best practices, encouraging innovative programs, and supporting peer mentorship, OFCCP will continue facilitating the ability of contractors to increase equal employment opportunities throughout the United States.
- **Transparency** – OFCCP is committed to transparency in its mission, policies, and practices. Transparency is the foundation of a relationship of respect, dialogue, and feedback between OFCCP and its stakeholders that helps the agency improve effectiveness in both compliance assistance and enforcement. Transparency also improves operational consistency and efficiency within the agency, allowing for a more collaborative and efficient approach to compliance evaluations. Furthermore, a

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<sup>1</sup> GAO Diversity in the Technology Sector 18-69 Report “Federal Agencies Could Improve Oversight of Equal Employment Opportunity Requirements” (<https://www.gao.gov/assets/690/688460.pdf>) and GAO Equal Employment Opportunity 16-750 Report, “Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance” (<https://www.gao.gov/assets/680/679960.pdf>).

culture of transparency supports contractors' ability to conduct meaningful self-audits that proactively identify and address issues with their employment practices. OFCCP will continue to ensure transparency by maintaining open communication and cooperation with contractors and by minimizing unnecessary burdens through the completion of high quality, efficient compliance evaluations. The agency will also expend considerable effort to resolve violations through conciliation, but will stand ready to vigorously pursue litigation when necessary.

## **2. OFCCP Record 2-Year Period of Recoveries**

The combination of proactive compliance assistance and effective enforcement works hand in hand. Indeed, in the first two years of the present administration, OFCCP recovered more than double the amount of back pay owed to workers and applicants than was collected over the prior two-year period. The first two calendar years of the Trump Administration was the highest two year period for monetary recovery in the history of the agency (\$45M: CY 2017 – 2018) – nearly double any two years in the Obama administration (\$25M: any two years).

## **3. Major Initiatives**

OFCCP expects that the numerous strategies and initiatives it has rolled out over the past two years, including regulatory reform, proposed in FY 2019, will yield improved results and performance in FY 2020. These strategies and initiatives will advance the efficiency of OFCCP's enforcement and compliance activities while reaching the broadest number of workers. These strategies and initiatives promote compliance across the entire contractor community through enforcement, compliance assistance efforts, compliance verification, and compliance incentives.

### **a. Regulatory Reform**

- In FY 2019, OFCCP published a notice of proposed rulemaking (NPRM) to implement legal requirements regarding the exemption for religious organizations (*Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious-Organization Exemption*). This exemption commits the federal government to respecting the sincerely-held religious beliefs of organizations that contract with the federal government, ensuring that conscience and religious freedom rights are recognized and protected. Besides ensuring that OFCCP regulations are in line with religious exemptions in other federal civil rights laws, recent Supreme Court rulings, and executive orders, protecting conscience and religious freedom rights will lead to a better functioning federal contracting market by encouraging greater participation.
- In FY 2020, OFCCP anticipates publishing an NPRM that would include limiting and otherwise altering the obligations of TRICARE providers covered by OFCCP's authorities. (*Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors: TRICARE and Certain Other Healthcare Providers*). This proposed rule will offer beneficial clarification that will improve the health of active service members and veterans and their families. OFCCP is concerned that health care providers are increasingly unwilling to accept federal contracts due to the regulatory

burden they expect to incur – which may result in active service members and veterans and their families having difficulty accessing health care services.

- In FY 2020, OFCCP anticipates publishing an NPRM entitled *Nondiscrimination Obligations of Federal Contractors and Subcontractors: Procedures to Resolve Potential Employment Discrimination* to codify existing procedures that OFCCP uses to resolve potential employment discrimination. This rule will increase clarity and ensure certainty for OFCCP’s stakeholders, and enhance the agency’s efficiency in remedying employment discrimination.

#### **b. Increased Compliance Evaluations and Efficient Resolution**

In FY 2019, OFCCP replaced the agency’s Active Case Enforcement (ACE) procedures, which established procedures to replace abbreviated desk audits with full desk audits, with new procedures. These new procedures emphasize that compliance reviews will be governed by OFCCP’s Federal Contract Compliance Manual (FCCM) and other directives and initiatives that shorten full desk audits and conciliate violations more efficiently. As a result, OFCCP is expecting to complete 1,500 compliance evaluations in FY 2020, and substantially increase the number of compliance evaluations it conducts annually to 3,000 in FY 2021.

- OFCCP replaced Directive 307 with Directive 2018-05 (Compensation Directive), which provides greater transparency and certainty for contractors by clarifying in a step-by-step manner OFCCP’s approach and method for compensation system evaluations. Contractors know to proactively use Pay Analysis Groups (PAGs) in accordance with principles indicated by OFCCP. If contractors apply these principles and create reasonable and sufficiently large PAGs, OFCCP will conduct its analysis using these contractor-provided PAGs, providing much greater certainty for contractors and encouraging proactive compliance that will benefit workers. OFCCP is also prioritizing enforcement matters where there is both statistical and non-statistical evidence of discrimination. [See Directive 2018-05.](#)
- In addition to the compliance reviews OFCCP typically conducts, OFCCP is conducting focused reviews and compliance checks. Focused reviews and compliance checks are types of compliance evaluations that allow OFCCP to target its review toward a specific part of a contractor’s compliance. This focus allows for the reviews to conclude swiftly, resulting in cost savings and quicker remedy. In FY 2019, OFCCP is conducting focused reviews for Section 503, and in FY 2020, the agency will conduct focused reviews for VEVRAA and promotion data under the provisions and corresponding regulations of Executive Order 11246. [See Directive 2018-04.](#)
- In FY 2019, OFCCP implemented Early Resolution Procedures (ERP), an initiative that allows OFCCP and contractors with multiple establishments to cooperatively develop corporate-wide compliance with OFCCP’s requirements, reducing the length of compliance evaluations through early and efficient resolutions. The efficiency of this program could greatly increase OFCCP’s capacity to conduct a greater number of compliance evaluations. [See Directive 2019-02.](#)

- OFCCP has also announced and is in the process of implementing the Voluntary Enterprise-wide Review Program (VERP) which enables the agency to blend its compliance evaluation and compliance assistance activities to work with high-performing contractors toward the mutual goal of sustained, enterprise-wide (corporate-wide) compliance outside of OFCCP’s neutral establishment-based scheduling process. VERP is responsive to the Government Accountability Office’s (GAO) recommendation for OFCCP to make requisite “changes to the contractor scheduling list development process” so as to focus its enforcement resources “on those contractors with the greatest risk of not following equal employment opportunity and affirmative action requirements.” [See GAO Report, “Strengthening Oversight Could Improve Federal Contractor Nondiscrimination Compliance,” September 22, 2016.](#) By closely following the GAO’s recommendations, OFCCP anticipates more program efficiency, increased findings of violations, and remedies for more workers harmed by discrimination. [See Directive 2019-04.](#)
- In support of the PMA IT Modernization Goal and in response to GAO’s recommendation to “develop a mechanism to monitor Affirmative Action Plans (AAP) from covered federal contractors on a regular basis,” OFCCP is reviewing how better to ensure that contractors are complying with their AAP obligations. OFCCP is considering a contractor certification mechanism, technology solutions to facilitate AAP compliance, and adjustments to our scheduling and review processes. [See Directive 2018-07.](#)
- OFCCP has many compliance evaluations that take over a year, and a number that take over five years. This hurts employers and employees, as it leaves cases open indefinitely without closure, conciliation, or remedy. This is especially troublesome in cases where no discrimination has been found. OFCCP typically defines an aged case as one that has been open for two or more years. In FY 2019, OFCCP implemented an aged case initiative to significantly reduce the age case rate from the current level of 20% (30% in 2017) to 10% or lower. OFCCP will accomplish its age case rate reduction goals by bringing to resolution cases that are four or more years old. OFCCP will endeavor to promptly resolve or refer to the appropriate agency those aged cases with specific findings attached. For those aged cases with no specific findings, staff will conduct a final review and make a timely determination whether to proceed with or close the case. This policy will best prevent any harm inflicted by holding a company to an audit for months or years on end without any specific findings of wrongdoing. Similarly, our policy of prompt resolution or referral for those cases with specific findings will provide a timely remedy to those workers who have suffered harm. In addition to addressing the issue of aged cases, OFCCP has also revised its procedures such that the time for completing desk audits in newly opened reviews has dramatically improved. Average desk audit times have dropped from 154 day prior to the 9/19/18 transparency directive to 42 days—a reduction of over 70% in less than a year. [See Directive 2018-08.](#)

**c. Compliance Assistance and Contractor Education**

OFCCP uses contractor education and compliance assistance as vehicles to reach out to a wider array of contractors and establish a culture of self-compliance. In FY 2019, OFCCP implemented

several compliance assistance initiatives to educate contractors about their legal obligations and to provide technical assistance so that they understand applicable laws and strive for self-compliance.

- OFCCP issued several directives and responses to Frequently Asked Questions (FAQ) addressing a wide variety of issues in order to facilitate contractor compliance.
- OFCCP hired an ombudsman to improve transparency in OFCCP compliance evaluation and assistance activities. The ombudsman will improve the efficiency and effectiveness of internal OFCCP operations by providing an independent perspective and improving communication between external stakeholders and OFCCP regional and district offices as necessary. [See Directive 2018-09.](#)
- Recently, OFCCP has joined a decades-long tradition at the Department of Labor by issuing its first opinion letters. Opinion letters provide fact-specific guidance to employers and employees to provide more certainty and clarity about how OFCCP exercises its regulatory authority.
- To further assist contractors, OFCCP expanded the services offered through its Help Desk – which provides compliance assistance to individual callers and inquirers. In FY 2019, OFCCP implemented its Contractor Assistance Portal (CAP). This portal is a place where federal contractors can find answers to questions about their obligations under OFCCP’s laws. OFCCP uses the portal to support contractors on their path to compliance, create a new contractor knowledge base, and deliver compliance assistance. Through this portal, contractors can dynamically search existing responses to frequently asked questions, review questions posted by other federal contractors, and post questions to an OFCCP expert. [See Directive 2019-03.](#)
- To further support contractors in their ongoing efforts to ensure equal employment opportunities, in FY 2019, OFCCP began developing a cloud-based learning management system (LMS) to deliver contractor training using a blended methodology (virtual webinars, self-paced learning, and online learning). LMS will ensure efficiency in the use of resources and promote accessibility for all contractors regulated by OFCCP. In FY 2020, OFCCP plans to launch the Contractor Compliance Institute, its virtual training program for federal contractors. The Contractor Compliance Institute will enable OFCCP to provide clearer compliance assistance and guidance so as to better help contractors understand their requirements, thus decreasing contractor noncompliance and increasing the effectiveness of the agency in carrying out its mission.
- OFCCP is updating and making its Federal Contract Compliance Manual more accessible on the agency’s website. This effort not only supports OFCCP’s transparency initiative, but also increases the efficiency of OFCCP’s compliance evaluations and improves the consistency of OFCCP’s enforcement and compliance assistance efforts.

#### 4. Focused Reviews

One of OFCCP's primary initiatives this year is focused reviews. The agency issued Directive 2018-04 on August 10, 2018, requiring that a portion of future scheduling lists include focused reviews for each of the three authorities that the OFCCP enforces –Executive Order 11246, Section 503, and VEVRAA. [See Directive 2018-04.](#)

##### a. Section 503

- The agency began this initiative by scheduling 500 Section 503 focused reviews at federal contractor corporate headquarters.
- Section 503 prohibits federal contractors and subcontractors from discriminating against employees and applicants on the basis of disability, and requires these employers to take affirmative action to recruit, hire, promote, compensate, and retain qualified individuals with disabilities.
- Numerous troubling statistics show why a focus on disability inclusion should be a top priority for OFCCP.
  - The labor participation rate for individuals with disabilities is approximately 20%, less than a third of the general labor participation rate.
  - The unemployment rate for individuals with disabilities is more than double that of the general unemployment rate and has been so for the past several years.
  - A wage gap exists for individuals with disabilities that is by some measures 30 cents or more on the dollar less than that of individuals without disabilities.
  - Compared with people without disabilities, earning inequalities for people with disabilities translate into lower pay and higher poverty rates.
- OFCCP created a Section 503 messaging campaign to announce the new Focused Review landing page, which highlighted Directive 2018-04, best practices, stakeholder resources, responses to FAQs, and other guidance to assist federal contractors. See landing page at <https://www.dol.gov/ofccp/Section503-FocusedReviews/>.
  - OFCCP worked closely with the Office of Disability Employment Policy (ODEP) in developing its leading Section 503 best practices and stakeholder resources, consisting of:
    - A Centralized Accommodation System;
    - Accessible Online Recruiting Tools;
    - CEO Leadership through Correspondence and Video;
    - Coordination with State or Local Vocational Rehabilitation Agencies;
    - A Comprehensive and Welcoming Self-Id Program;
    - Disability Inclusion Programs;
    - Employee Resource Groups; and
    - A Chief Accessibility Officer.
- OFCCP offered extensive compliance assistance to federal contractors nationwide via town hall sessions, agency presentations, direct requests, and other forms of

correspondence. Town hall sessions allow stakeholders to pose questions and make recommendations to OFCCP officials and will continue throughout the course of the fiscal year while the focused reviews are ongoing.

- OFCCP developed comprehensive Section 503 focused review training for OFCCP staff and delivered external Section 503 focused review federal contractor training on September 11, 2019.
- OFCCP is rolling out Section 503 onsite focused reviews in the fall, with an online forum made available to contractors wishing to submit inquiries on September 6, 2019. The agency will launch a series of disability events agency-wide in October.
- A small trained National Office team will participate in a sample set of Section 503 focused reviews in listening mode only to gather and collect information to assist with identifying additional best practices and the development of training and compliance assistance, including a technical assistance guide for stakeholders. During these focused reviews, OFCCP goes onsite and conducts a comprehensive review of the particular authority at issue. For example, in a Section 503 focused review, the compliance officer reviews policies and practices of the contractor related solely to Section 503 compliance. The review includes interviews with managers responsible for equal employment opportunity and Section 503 compliance (such as the ADA coordinator) as well as employees affected by those policies.
- OFCCP is also making the President's initiatives on mental health a material part of its focused reviews. Specifically, OFCCP is focusing on best practices that highlight training resources, accommodation policies, psychiatric treatment, counseling services, suicide prevention hotlines, mental health and wellness campaigns, etc., as it relates to promoting equal employment opportunity for individuals with disabilities. OFCCP intends to provide further information on these issues on its landing page by the end of FY 2019.
- In FY 2019, OFCCP launched the Excellence in Disability Inclusion Award Program, a joint initiative between OFCCP and ODEP, to annually recognize companies not only embracing their obligations under Section 503 of the Rehabilitation Act, but exemplifying best practices for disability inclusion. The application period for this award closes on November 1, 2019.

**b. VEVRAA/Executive Order 11246**

- The agency intends to issue a scheduling list of 500 VEVRAA focused reviews at federal contractor corporate headquarters in early FY2020.
- VEVRAA prohibits federal contractors and subcontractors from discriminating against employees and applicants on the basis of protected veteran status, and requires these employers to take affirmative action to recruit, hire, promote, compensate, and retain qualified protected veterans.

- In honor of Veterans' Day, OFCCP will issue its first VEVRAA focused review supplemental scheduling list in November 2019 and launch a series of VEVRAA focused events. OFCCP's VEVRAA focused reviews will focus on protected veterans, spouses of protected veterans, and protected veterans with disabilities.
- OFCCP will partner with DOL's Veterans' Employment and Training Service (VETS) to identify best practices and contractor resources, develop a VEVRAA focused review landing page, and offer training and compliance assistance.
- In preparation for the VEVRAA focused reviews, OFCCP held a VEVRAA/Uniformed Services Employment and Reemployment Rights Act (USERRA) town hall (in collaboration with the U.S. Department of Veterans Affairs and VETS) on August 7, 2019, allowing the contractor community to pose questions to officials, as well as interact with others in breakout sessions. Participating individuals provided recommendations for OFCCP that it will consider integrating into its VEVRAA focused reviews.
- In FY 2020, OFCCP will use the same framework to roll out the Executive Order 11246 focused reviews, which will primarily focus on promotions for women to executive level positions within the workplace.

## **In Conclusion**

The United States Department of Labor is committed to preserving the American dream. No American should suffer unlawful discrimination, and every American should be free to work hard and advance on merit without unlawful discrimination.

OFCCP collaborates with federal contractors and subcontractors who seek in good faith to achieve full compliance with their affirmative obligations. Conversely, OFCCP will continue to pursue vigorous enforcement against those contractors who fail to ensure equality of opportunity. This approach has, we believe, reduced discrimination and furthered OFCCP's mission—ensuring contractors' comprehensive and proactive compliance with civil rights requirements and the rule of law.