



Litigating an Administrative Proceeding Against OFCCP

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Agenda

- **Why Is This Important?**
- **Pre-Litigation Issues**
- **Enforcement**
- **Possible Outcomes of Enforcement**
- **Common Pitfalls**
- **Take-aways**

ABOUT THE PRESENTERS



Michelle Duncan is a Principal in the Affirmative Action Compliance and OFCCP Defense practice group at Jackson Lewis P.C. Michelle focuses her practice on representing employers in affirmative action and employment discrimination matters before OFCCP. Since joining Jackson Lewis, Michelle has assisted employers in numerous OFCCP audits and complaint investigations throughout the country.

Michelle joined the firm after working for nearly fourteen years as a trial attorney with the U.S. Department of Labor, Office of the Solicitor. During her tenure with the U.S. Department of Labor, Michelle was widely regarded as a leading expert on OFCCP litigation. She litigated numerous OFCCP cases and provided ongoing counsel to high-level OFCCP officials. Michelle offers unique insights into the inner-workings of OFCCP and the Solicitor's Office as well as what she is seeing in audits today.



ABOUT THE PRESENTERS



Daniel V. Duff III is a Principal in the Long Island office of Jackson Lewis P.C., and a member of the Firm's Affirmative Action Compliance and OFCCP Defense Practice Group.

Mr. Duff has over eighteen years of experience in advising clients in a wide array of employment law and litigation areas, with a focus on affirmation action, diversity, EEO and wage & hour matters. He has defended numerous OFCCP compliance evaluations and onsite, as well as handled cases/administrative proceedings involving claims of race, gender, age, disability and sex discrimination including class and collective action cases. Mr. Duff has broad experience dealing with the OFCCP, EEOC, as well as a variety of state and local employment fair practice agencies. He has significant appellate practice experience, including defending appeals to the New York State Court of Appeals and the United States Supreme Court.

Mr. Duff is admitted to practice in New York State, the U.S. District Court for the Southern, Eastern and Western Districts of New York and the Supreme Court of the United States.

Mr. Duff received his B.A. in History from the College of the Holy Cross and his J.D. from Cornell Law School.





Why Is This Important?

Why Is This Important?

- **OFCCP is using aggressive enforcement tactics**
 - **More intense scrutiny in almost every review**
 - **Adverse Impact**
 - **Compensation**
 - **Specific minority analyses**
- **Two significant cases filed by OFCCP in 2016-2017**
 - ***Oracle***
 - ***Google***



The End of the Obama Administration/Dawn of the Trump Administration

- **OFCCP's aggressive approach continued through the end of the Obama administration and largely continues during the Trump transition period**
- **Obama administration exhibited willingness to push the boundaries of case law**
- **Slew of complaints filed in the waning days**
- **What might we expect from the Trump administration?**
 - **Focus on compliance with existing law instead of expansion of jurisdiction and law.**
 - **Still expect to see cases brought if significant violations cannot be successfully conciliated.**
 - **May see more open dialogue/transparency between OFCCP and the contractor community.**

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Pre-Litigation Issues

What Happens When OFCCP Alleges Violations?

- **Predetermination letter (Maybe)**
- **Notice of violation**
 - **Technical violations (Record-keeping, postings, etc.)**
 - **Denial of Access**
 - **Discrimination**
- **Litigation holds; insurance coverage discussion with client; formal docketing/damage assessments**
- **Response/Position Statement**
- **Mandatory conciliation**
- **When conciliation efforts “fail,” OFCCP issues a show cause notice**
 - **30 days to comply or show cause why enforcement proceeding should not be initiated**





Enforcement

Solicitor's Office

- **OFCCP generally refers matter to Solicitor's Office to bring enforcement proceedings**
- **Solicitor's Office reviews OFCCP's investigative file and determines whether to bring the case to enforcement**
 - **Involved at the pre-enforcement stage (NOV, SCN and sometimes before)**
- **Solicitor's Office analyzes the case**
 - **Is the case litigation worthy? Case load considerations?**
- **Is the legal analysis reviewed by the National Solicitor's Office?**
- **During this period, very little communication with the employer**

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Litigation

- **Administrative Complaint is filed with the Office of Administrative Law Judges**
 - **Part of the U.S. Department of Labor**
 - **Presides over hearings concerning labor-related matters**
 - **Whistleblower complaints**
 - **Black Lung**
 - **Wage and Hour**
 - **Executive Order 11246**
- **An Administrative Law Judge (ALJ) is assigned to the matter**
 - **Agreements reached after this point are resolved through a Consent Decree which is approved by the ALJ**





Tripartite Procedural Rules Scheme

- **Primary:**
 - 41 CFR § 60-30 et seq. (“OFCCP Rules”)
 - *If silent...*
- **Secondary:**
 - Updated Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (“OALJ Rules”)
 - *If silent...*
- **Last Resort:**
 - Federal Rules of Civil Procedure (“FRCP”)
- **Example – B&H Case – 25 Interrogatory Limit**

Litigation

- **Litigation before an ALJ is similar to federal court litigation**
 - **Formal proceedings with rules of practice**
 - **Motion Practice**
 - **Motion for summary judgment**
 - **Motion to compel discovery**
 - **Other motions**
 - **Heavy reliance on testifying experts**
 - **Formal discovery**

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Formal Discovery

- **Broad Authority to Conduct Discovery**

- **Interrogatories & Requests for Production**

- **Data, documents, email correspondence, company policies, etc.**
- **Everything that was previously submitted to OFCCP *plus more***
- **Analyses**
 - **Compensation Analyses**
 - **Adverse Impact Analyses**
- **Are they privileged???**

- **Be prepared for OFCCP assertion of deliberative process and government informant privileges.**



Formal Discovery

- **Depositions**

- **Any party may take the testimony of any person having personal or expert knowledge of the matter**
 - **Employees**
 - **Supervisors**
 - **Management (CEO?)**
 - **Third-party vendors**

- **Entry Upon Land**

- **Solicitor's Office and/or expert can inspect the facility**
- **Can they record their visit?**



The Hearing

- **Hearing before the ALJ**
 - **Opening Statements**
 - **Fact Witness Testimony**
 - **Expert Testimony**
 - **Exhibits**
 - **Closing Arguments/oral argument**
- **May last days (or weeks)**
- **Rules of Evidence**
 - **Rules of evidence governed by the OALJ's Rules at 29 CFR Part 18, Subpart B.**
 - **Location?**



Regular v. Expedited Calendar

- **Cases may proceed on a regular or an expedited hearing basis**
- **Expedited Hearings – 41 CFR § 30.31-37**
 - **Defendant must request hearing in its answer (due 20 days after service of Complaint in either normal or expedited hearings)**
 - **Failure to do so “constitutes a waiver of the hearing.”**
 - **The hearing “shall be convened within 45 days of receipt of the request and shall be completed within 15 days thereafter, unless more time is needed**

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When Are Expedited Hearings Appropriate

- **§ 60-30.31**

“Expedited hearings may be used, inter alia, when a contractor or subcontractor has violated a conciliation agreement; has not adopted or implemented an acceptable affirmative action program; has refused to give access to or supply records or other information as required by the equal opportunity clause; or has refused to allow an onsite compliance review to be conducted.”

- **Very limited discovery - requests for admissions; depositions only allowed if court permits.**





Possible Outcomes of Enforcement

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- **Consent Decree**

- **Agreement between the parties to resolve the matter**
 - **Timing varies (after discovery, during hearing, after hearing before decision issued)**
- **Waive right to appeal**

- **Recommended Decision**

- **Issued by ALJ after a hearing after receipt of post-hearing briefs**
- **Parties may file “exceptions” to the recommended decision**
 - **Exceptions filed with the Administrative Review Board**



Possible Outcomes of Enforcement

- **Final Administrative Order**
 - **Administrative Review Board issues final order**
 - **Enjoins violations**
 - **Requires contractor to submit to appropriate remedies**
 - **Failure to comply with order shall result in immediate cancellation, termination and suspension of contracts and/or debarment**
- **Appeal rights to federal court**
- **Can OFCCP enforce Final Order while matter is appealed to federal court?**
- **Standard of review?**

Remedies

- **No monetary fines**
- **Make-whole relief for discrimination violations**
 - **Backpay plus interest**
 - **Job offers to “victims of discrimination”**
- **Non-monetary relief**
 - **Changes to policies, practices**
 - **Compliance Consultant**
 - **Progress Reports**
- **OFCCP’s “big stick”**
 - **Contract cancellation and debarment**





Common Pitfalls

Common Pitfalls

- **Not knowing the facts and data of your case**
 - **OFCCP employs statisticians, builds databases, runs analyses (best/worst-case scenarios), conducts interviews**
 - **Are you prepared to rebut the Agency's findings?**
 - **Have you run the appropriate analyses?**
 - **Have you spoken to the people involved in the processes?**
 - **Are your positions supported by fact?**

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Common Pitfalls

- **Employer's are often unfamiliar with the process**
 - **No statute of limitations, no time limits on bringing litigation**
 - **Unaware of the rules that apply to enforcement matters**
 - **Surprised by the formality of the process**
 - **Shocked by the resources the Department is willing to spend**

Common Pitfalls

- **Destruction of evidence/discovery material**
 - **Recordkeeping obligation**
 - **2 – 3 years**
 - **Plus, once a compliance evaluation begins, the obligation extends until it has been resolved**
 - **Hard copy documents and electronically stored information**
 - **Need for litigation hold process**
 - **When? CSAL, Scheduling letter, NOV, SCN, Complaint?**
 - **Presumption that missing evidence would have been harmful**

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Common Pitfalls

- **Use of Experts**
 - **Consulting vs. testifying experts**
 - Are your exploratory analyses privileged?
 - **Retaining the right expert**
 - Statisticians
 - Labor Economists
 - Industrial Psychologists (or, testing experts)
 - **Is your expert familiar with OFCCP?**



Common Pitfalls

- **Failing to involve the right decision-makers**
 - **Who to get involved?**
 - HR
 - Legal
 - Outside Counsel
- **Failing to assess all of the risks**
 - **Monetary Liability (case budget through appeal/damage analyses)**
 - **Litigation costs (experts, attorneys, company resources)**
 - **Press release**





Take-Aways

Take-Aways

- **Don't be bullied by OFCCP – the Agency has the burden of proof**
- **If litigation looks possible, do your research on the issues and the process**
- **Gather as much informal discovery as possible prior to litigation**
- **Remember litigation holds and insurance notification.**
- **Know that the Solicitor's Office is often a check on OFCCP**
 - **Very few OFCCP cases are litigated in any given year**
- **Assemble your litigation team early and have a plan to aggressively defend against any meritless allegations**

Questions?





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