

The New OFCCP: Which of Trump's Policy Directives Will Be Dropped After Biden Takes Office?

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In the first episode of our OFCCP-focused podcast series, Carlton Fields attorney Rae Vann and BCGi's Matt Nusbaum discuss the possible fate of several Trump-era OFCCP policy directives under the incoming Biden administration, and what these changes may mean for employers.

Transcript:

Rae Vann: Good day and welcome to our inaugural (no pun intended) OFCCP podcast series, which will feature much debate, discussion, and hopefully some practical analysis by and between seasoned OFCCP policy experts and practitioners. My name is Rae Vann and I am an employment lawyer and shareholder in the Washington, D.C. office of Carlton Fields. With me today is my dear friend and colleague, Matt Nusbaum, who is Senior Consultant and Director of the BCG Institute, or better known as BCGI. But perhaps more importantly, Matt is a leading expert nationally in all things OFCCP. Matt, welcome and thanks so much for joining us.

Matt Nusbaum: Thanks, Rae. I'm very excited to be here.

Rae Vann: We wanted to talk today about what contractors can and should expect from OFCCP, both from a policy as well as an enforcement perspective from the incoming Biden administration, given the many new directives, FAQs, technical assistance guidance, updates to the FCCM. And that's all on top of a few notable rulemakings. The OFCCP - I think you would agree, Matt - has been pretty busy in the last three years. And yet, it seems that President-elect Biden is certainly wasting no time, having announced just a few days ago, his intention to nominate Boston mayor Marty Walsh as his Secretary of Labor. So, Matt, with all of that said, I want to get your perspective and expert insight on this. First, what can we expect out of OFCCP on day 1, on January 21st? Recognizing that these aren't normal times, right, is there anything we can glean from the last presidential transition, maybe, regarding what the next few months may look like in terms of OFCCP policy development, audits, enforcement, not least of which staffing changes, right?

Matt Nusbaum: Yeah, Rae. I'm fairly confident that one of the many things we should have learned by now is not to necessarily look to the past to predict future events. That said, the OFCCP has not historically been at the top of anyone's to-do list when taking office. And I think there's a mountain of critical issues facing this incoming administration. If I had to lay a bet, I would bet on a career personnel person keeping the ship pretty much on course until a new labor secretary is in place. We have one named, but as you know the confirmation process may get a little sticky and may take some time. And so once the labor secretary is actually in place, then we need to appoint an OFCCP director. And this process usually takes months. And so in the meantime it's the career personnel who are going to keep the ship running. And even into the new tenure I think a little bit of the new OFCCP director - whoever that may be - they're going to need to spend some time getting the lay of the land and deciding what to keep and what to change.

So in the meantime, I suspect that the OFCCP will continue on with audits and complaint investigations in line with what we've already seen, in line with what we're used to from this administration by and large. I would be surprised if the agency actually started scheduling new types of audits such as promotion or accommodation focused reviews because going down that road in any meaningful way requires a level of dedication that's not guaranteed in the new administration. That's not the way I would hold the line if I were interim in charge.

The only exception I think is likely to be Executive Order 13950 banning certain types of training by federal contractors. Most people I've talked to agree that rescission of that order will happen sooner rather than later. It was a big enough issue to land in transition briefing books and such and does not require new appointees or even much effort on part of the incoming administration. In fact, I wouldn't be surprised to learn that a rescission order is already drafted. Even so, more pressing issues could delay action there as well. In the meantime, it's been enjoined nationally by a federal district court judge and the Department of Labor has put it on ice. So it's not quite dead yet, but it should really have its affairs in order.

Rae Vann: Well, about the executive order. As you know, Director Leen shared shortly after the hotline went into effect that the agency had already received 100 or so complaints that it was in the process of investigating. So any thoughts as to what happens to those open complaints? And, of course, when we talk about EO 13950, we're talking about President Trump's executive order banning "divisive training."

Matt Nusbaum: Right. Yeah, the question is, what's the effect of the injunction and does the OFCCP have any other authority to act? And I think the answer is, it's going to sound like a punt, but it's yes and no because it depends on the contents of the complaint. Right? Any complained of activity directly tied to the order's enumerated prohibitions is dead on arrival. As we've noted, the order has been enjoined from going into effect pending federal court litigation, and the Department of Labor has suspended all enforcement and investigation activity pending the outcome.

The wrinkle is that the OFCCP has always had the authority to evaluate and critique the contents of employee training materials relevant to a contractor's equal employment opportunity and affirmative action obligations. They just haven't done that historically. The OFCCP's regulations implementing Executive Order 11246 don't explicitly address training content. In fact, those regulations don't technically require any training at all, much less attempt to explicitly regulate it. But there's always been the possibility that training content could result in a hostile work environment claim under a traditional Title VII framework. That's a pretty big hill to climb for the OFCCP, though, so it's not surprising that they haven't really gone there.

But if the agency receives a complaint involving something that could give rise to a Title VII hostile work environment claim, I think they'd be more likely to pursue it regardless of the fate of EO 13950.

Same as they would if they got a complaint about actual discrimination occurring in a training setting. But if something like that does pop up, I think the OFCCP would likely refer that to the EEOC anyway. They'll have the deeper bench there and more clear authority.

Now, I have my own feelings about EO 13950 and the apparent politics behind it that I won't go into, other than to say I look forward its demise.

That said, I also hope that people take some lessons from it. I think it's important for us as EEO and AA practitioners to learn from this and the larger federal political landscape over the last several years that leaving people behind, leaving people out of the conversation can be an impediment to our goals. And finger-pointing and shaming are typically not effective ways to win over hearts and minds. I'm not saying we need to coddle people who just can't quit their racism habit. I'm saying, though, that if you just throw them off the train and try to forget about them, leave it to them to catch up, that's a mistake. Anyone paying any attention to the last several years should understand that it doesn't take too many of those people to derail the whole train, and that's what we're risking when we shut the door on them. We have to find better ways to communicate to broader audiences about what we're trying to do and what is expected of them. And as hard as it might be for some of us to do, we might need to start by realizing it isn't really our job or responsibility to change people. That might not be realistic. But we can be clear about how people are expected to behave in the workplace. You don't actually have to believe in EEO or affirmative action to abide by the law. You can feel however you want about it, like you can feel however you like about the company's dress code or attendance policy. Go ahead and feel your feels, but noncompliance has consequences. I've got a lot of thoughts in this topic, so I'm going to cut myself off because I could go on for another hour. But I think like in so many other areas, now needs to be a time to reflect and reassess our approach. What has worked, what hasn't and what might help us find a better way forward? Because over half a century after the Civil Rights Act was enacted, we're still struggling with basic compliance with the law. We need to do better and I think we can.

Rae Vann: Great perspective, Matt. Thank you for that and it provides a really good segue into our next discussion topic. So you mentioned in terms of, you know, the practical – OFCCP personnel, career staff basically running the ship, taking the helm until we have a political appointee in place at OFCCP. How do you see those Trump policy directives and enforcement statements and positions being enforced by the career staff? So I guess if you can start with sort of an overall discussion of the impact, generally, of the Trump administration on OFCCP enforcement and then what of those changes in policy or enforcement direction you think are likely to have lasting impacts?

Matt Nusbaum: That to me is the really interesting thing here. For those of us who've been in this industry long enough to experience OFCCP enforcement under different administrations or who are students of history, we're used to the OFCCP being more "active" under Democratic administrations

and, shall we say, more business-friendly under Republican ones. So, the conversation around transitions has always been about predicting what will change, how, and how quickly.

Here though, the OFCCP has sort of broken the mold for the agency under Republican rule. Current OFCCP Director Craig Leen, who has served as director for the majority of the Trump administration, could fairly be described as an activist compared to past directors appointed by Republicans.

He did a lot of things my more liberal colleagues had on their wish lists for years. As a personal example, I had advocated strongly during the Obama administration for a contractor's Bill of Rights. I thought it was important for the agency to lay down some bedrock principles for how the agency expected to be treated by contractors and vice versa. Frustratingly though, it was repeatedly just dismissed out of hand. It didn't gain any traction until I brought it up at an OFCCP town hall meeting under the current administration. But before Ondray Harris was appointed director, so the meeting was conducted by the career interim at the time. I thought it would be a good soft ball, you know, something the agency could do with minimal effort but still signal to the contracting community that better relations were on the way. So, I wasn't overly surprised when the agency finally picked it up and ran with it, but I was shocked when the new administration expanded on it. That ended up serving as the foundation on which now-Director Leen has built a relatively strong policy framework in the form of OFCCP directives. In particular, directives regarding transparency, efficiency in compliance evaluations, reigning in the arguably abusive use of predetermination notices, the creation of the Ombuds service and reinstating contractor recognition awards.

You know, except for more efficiently run audits, these are things more typically associated with Democratic administrations. But director Leen also undertook herculean efforts to bring substance and meaning to affirmative action programs for individuals with disabilities. Even after the OFCCP's massive overhaul of the disability and veteran AAP regulations under Obama back in 2014 introducing quantitative metrics, those AAPs remained largely a paperwork exercise – until Director Leen instituted disability and veteran focused reviews and the agency started taking a deep dive in those areas.

So, I actually think that a lot of what Director Leen accomplished will have legs in the new administration. There's now a pretty solid framework in place that serves both the agency and the regulated community fairly well by balancing their respective interests. I'd be surprised and saddened if the OFCCP simply reverts to the gotcha tactics we saw under previous director Patricia Shiu. I know that's what many are afraid of and what many are predicting, but I'm not so sure.

Rae Vann: Is that to say that you believe that the career staff has bought into the Leen-era directives and enforcement initiatives in a way that will allow those changes to really have a lasting impact?

Matt Nusbaum: To an extent, yes. Traditionally I think the thinking has been that the career people inside agencies like the OFCCP tend to lean toward more liberal views of the regulations and stricter compliance, stricter enforcement and Director Leen has not taken his foot off the gas or the agency's foot off the gas when it comes to enforcement. If anything, they've kind of put the pedal down a little bit. And, you know, I think that a lot of what Director Leen tried to do - you know, bring the agency back within the four corners of the law and establish Title VII jurisprudence and then build back from there a very robust enforcement process and framework - I think speaks to a lot of the career people at the OFCCP who see their duty as serving the applicants and employees, the citizens that the OFCCP is trying to protect. And so I think that there's a real handshake there and less tension within this current OFCCP between maybe some career officials who might lean a little farther to the left and an OFCCP director appointed by a Republican president. I would have to really search through the history books to find a similar situation where there is potentially so much harmony between both sides of the aisle, so to speak.

Rae Vann: Yeah, I have to agree with you. It really was a function of placing guardrails around the enforcement mechanism and philosophy and strategy to better align it with legal and regulatory principles and requirements. Yeah, I agree with you there. On the other hand, though, there invariably have to be some policy directives or initiatives that won't sit so well with a Democratic administration. Can you think of any of those that are likely to get to ax from the Biden administration OFCCP?

Matt Nusbaum: Not to beat the dead horse, but it's kind of fun. Obviously, Executive Order 13950 is going to go the way of the dodo pretty quickly, but that wasn't a Leen directive. He did pick it up and run with it I think surprisingly hard, but that's going to go away.

In a similar vein, the OFCCP took some pretty concrete steps to implement Trump policy priorities regarding religious exceptions. There, I would expect some clarification and probably some tweaking but not necessarily a rescission. I think rescinding directives and regulations there would run too great a risk of signaling hostility toward religious organizations, which I don't think is going to be the aim of the incoming administration. But the new administration is likely to interpret federal jurisprudence in this area a bit differently than the current one. So, I would expect them to align here accordingly.

I also think we'll see some changes to the way the voluntary enterprise-wide review program and early resolution procedures have been implemented. I don't think the concepts are necessarily going away, but this is where I've seen the most business-friendly policy creep in. There are some ERP settlements that I've seen that just look like relatively cheap get-out-of-jail-free cards in which remedies were agreed to for violations at one location and then similar locations appear to be shielded from repercussions for any similar findings. I don't think that's the way it will work under a

Biden administration. I think we'll see the OFCCP require contractors to agree to a remedial framework for other locations covered by such settlements.

Other than that, I honestly don't see much that the new administration should likely ax altogether from Leen's various directions. Like I said, the vast majority of them were already on left-leaning wish lists in the first place: transparency, accountability, predictability. These are all good things, both for the agency and the regulated community, that I hope won't vanish from the landscape.

Rae Vann: Well, and you speak about the religious exceptions. I imagine it's a lot more difficult, at least in theory, to get rid of a rulemaking that went through notice-and-comment rulemaking than it is to basically jettison a policy directive or a set of FAQs that the incoming administration might not agree with. Speaking of regulations, what about the much touted resolution procedures final rule that went into effect last month. Can you just describe it? Was it controversial? Do you see any reason for the incoming administration to try to change it? And if so, how?

Matt Nusbaum: Yeah, let me take that in reverse order. First, yes, rolling back regulations is much more difficult than changing sub-regulatory guidance such as an OFCCP directive, but it's not insurmountable.

As for the rest, this is going to sound like I'm punting, but I really don't know what the new administration's reaction will be to the new rule. On the one hand, it provides some clarity, predictability, and much-needed structure. On the other hand, it can be seen as unnecessarily tying the agency's hands and eliminating flexibility that might be needed to address unique situations. So it cuts both ways.

In general, I think that framework is pretty solid and should be something any administration could work with. There are things I would tweak here and there and my guess is that lots of practitioners have different things on their wish lists here, but the fact that it was a regulatory action makes minor tweaking I think maybe less likely in my opinion. If a major overhaul or outright rescission is called for, I think the agency would go for it. But many of the minor tweaks I and others are discussing like specific definitions of things, like qualitative evidence and practical significance, can probably be effectively addressed by enforcement discretion. I'd need to analyze it a bit more closely to determine if there is anything the OFCCP is likely to feel they really need to change there, but that might be a good indicator of the direction the new administration might be taking. If the agency focusses on making major changes to (or outright rescinding) the new resolution regulations, that could very well signal a larger shift than what I've been envisioning.

Rae Vann: Right. I agree. And I know this is a bit out of scope, but just in terms of what contractors should be doing now to prepare themselves, gird themselves for what may be coming, can you speak very briefly to - you know, I think about the resolution procedures final rule and the slap back that

OFCCP experienced in the *Oracle* ruling with respect in particular to the manner in which it analyzed compensation data and found alleged violations, compensation discrimination in that case. How do the two jibe and what can contractors take away from those two things in just preparing themselves, again, for the incoming administration?

Matt Nusbaum: Rae, I think that compensation analysis and compensation discrimination enforcement has for a long time and will continue to be the biggest wild card and the biggest question mark when it comes to OFCCP enforcement. There is a years-long running battle with the OFCCP national office about proper and improper ways to analyze compensation data that businesses and organizations tend to keep for the purposes of trying to uncover discrimination or practices that are unfair.

Rae Vann: Really – going back to Joe DuBray, right?

Matt Nusbaum: Right. And, you know, I work with Dr. Dan Kuang, who actually helped formulate California's regulations in that area and is a large voice with the national office. And it's just sort of a constant conversation. I think the labor economists and mathematicians that are advocating for sound practices and sound analysis approaches and things like that have made a lot of headway actually under this administration. They're not fully happy, obviously. And I think if I had to lay a prediction, you know, seal it in an envelope, open it later, and hopefully call me Nostradamus, I think we'll probably see those conversations change a little bit. And that's my biggest fear, is that we'll see the OFCCP kind of slip back into a mode of focusing exclusively on analysis, procedures, and methodologies that fit what it is they're trying to find as opposed to analyses and methodologies designed to uncover truth. And it's a constant conversation. Like I said, I think we've made significant headway in the last several years. I don't know where that's going to go, though. It was really under the pressure of Director Leen that the economists and mathematicians in the national office really started engaging with people outside of the agency and outside experts to help inform their policies. And they have a little bit. That's good progress, but I think with Director Leen on the way out and whoever replaces him has some decisions to make about where the OFCCP wants to go when it comes to analyzing compensation.

Whatever it is they land on, you know, I think a predictable framework that is repeatable by the contracting community is going to be a net win for everyone. We can complain about this or that little difference in the way that we would prefer the analysis methodology to work, but at the end of the day, contractors really need to be able to perform self-critical analyses in-house so that they know what the OFCCP would see in an audit, not in order to get around the audit. And this is the biggest thing that the OFCCP needs to understand: the desire here in the contractor community is not to have a roadmap for getting around the regulations, but to have a roadmap for getting to compliance. That's the #1 complaint that I hear day in and day out from my members and the clients of the

consulting company that I work for and pretty much everyone in the community is that we're just at a loss of what it is we're supposed to do.

Rae Vann: Yes.

Matt Nusbaum: How can we comply? And we have to have an answer to that. Nobody's going to be fully happy with the answer, and we've gotten a lot closer to that sort of answer under the current administration. I hope we can continue that work and that we don't backslide.

Rae Vann: Well, I think that's one promising aspect to the resolution procedures final rule, right? It provides some level of predictability but also with respect to the practical significance discussion, it focusses OFCCP on the practical. Right? And I agree with you completely. Most responsible contractors engage in these pay equity and compensation self-analyses to ensure that they're doing the right thing, to ensure that they're paying fairly and equitably and in a manner that is competitive and matches their company's philosophy. Right? OFCCP has to learn to defer to an employer's judgment as to how it structures its compensation, as to how it establishes its compensation philosophy because there can't be a cookie cutter approach to compensation discrimination analysis. Would you agree with that?

Matt Nusbaum: I would agree wholeheartedly. And I think one of the biggest things to come out of the current administration is a return to the OFCCP making a distinction between good actors and people who are acting in good faith and potentially bad actors. And it's not necessarily overly popular the farther left you go, but I think that that's important for the agency to do and to exercise that discretion. We saw the complete absence of it pretty much under Director Shui and I think that was pretty problematic actually. I sympathize with the OFCCP, though, and I should recognize that I'm in a fairly privileged position of working with organizations that want to comply. People don't pay money for association memberships and, you know, pay tremendous amounts of money to have third party contractors help them with their AAPs because they're trying to get around the law. So the organizations that I work with are compliance-minded. And I have to recognize that that is a subset of the larger contracting community and that the OFCCP sees a lot more than I do of contractors who either didn't know they were contractors and don't really understand their obligations and those that do perfectly understand them and are trying to get around them and trying to subvert them and things like that. I don't see that kind of activity. I'm in the very privileged position of being able to say to a potential client or a potential member, "I am not here to help you get out your obligations. If that's what you want, I can refer you to someone who does that kind of work, but that's not what I do." And so in a sense that keeps me in a fairly privileged position, and the OFCCP sees the ugly side of it quite a bit. So I do sympathize with them.

But I also know that they see the good side of it because I'm very often helping advise these organizations that do come to me and other organizations trying to comply. I advise them through

audits and on a fairly regular basis, so I know that they are being presented to the OFCCP and that they see the other side. And it's critically important for the OFCCP to recognize there's a difference between dealing with an organization that is trying to comply in good faith and an organization that just wants this to go away. And making that distinction is absolutely critical and is something that I hope that continues into the next administration as opposed to treating every organization as presumptive criminal. I don't think that that's very useful.

I think, you know, kind of to tie back to EO 13950, you know, the idea that everyone is doing something wrong is not a good way to go about it. And the idea of finger pointing and shaming people is just not very effective. That's why...

Rae Vann: Right.

Matt Nusbaum: ...certain provisions of that executive order did not necessarily ruffle my feathers as hard as others because, yeah, I shouldn't be asking people to stand up in a training and publicly admit that they are racist and sexist and, you know, should be taken out back and beaten with a wet noodle. I don't know anybody who actually does that. That may be a myth...

Rae Vann: That's right.

Matt Nusbaum: ...that worked its way into the executive order.

Rae Vann: That's right.

Matt Nusbaum: But it's just not productive and neither is it productive for an enforcement agency to just assume that the organization is breaking the law. We just need to look hard enough to find it.

Rae Vann: That's right. We don't need the new OFCCP director coming and announcing that he or she is the new sheriff in town. That strikes the wrong tone that we don't need in an enforcement environment.

Matt Nusbaum: Well, you know, sometimes you need a sheriff. And when it's appropriate, absolutely. Send in the sheriff wearing the white hat at high noon with the gun on their belt and go for it. But it's not always appropriate is my point. And so, yeah, focusing exclusively on the stick side of enforcement as opposed to the carrot side and working with organizations to strengthen their affirmative action programs, to strengthen their self-monitoring so that we don't have to waste government tax-payer resources is a good thing. And so when I see somebody who just wants to wear the sheriff badge and proclaim that that's their duty, that worries me. It absolutely worries me. But sometimes it's necessary. So they need a little bit of both. They need to be able to strike a balance there, and I think we're on the road to that and I'd like to stay on that road.

Rae Vann: Oh, boy. This was a great discussion. I hope you enjoyed it. I know our audience members will enjoy it immensely. Thank you so much for all of your insight. We could talk for hours and hours more about these issues. I'll probably have you back to talk about *Oracle*. But in the meantime let me just thank you once again, Matt, for joining us and thank you to all of our audience members who are listening. Again, my name is Rae Vann with Matt Nusbaum. And we look forward to connecting with you once again on yet another OFCCP item of interest. Thank you.

Matt Nusbaum: I look forward to it, too. Thank you so much, Rae.

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