

Contractor Watchdog to Boost Construction Focus With Portal (1)

- Portal part of revamp of construction contractor audits
- Agency has new approach for on-site evaluations

By J. Edward Moreno | May 9, 2022 5:19PM ET

(Updated with Yang's previous role with the EEOC on paragraph 15.)

Construction companies will be required to report information about their subcontractors in a new online portal the Labor Department's contractor watchdog plans to roll out this summer, the office's director said.

The portal is part of a revamp of the way the DOL's Office of Federal Contract Compliance Programs selects construction companies for audits, OFCCP Director Jenny Yang told Bloomberg Law during a one-on-one interview. Construction contractors would use the portal to report their subcontracts and dates, and the OFCCP would use that information schedule audits, she said.

The OFCCP enforces anti-bias laws and affirmative action obligations among federal contractors. Yang told House lawmakers in April that the OFCCP plans to home in on construction companies in response to the \$1 trillion infrastructure law passed last year.

The new portal for construction companies would complement one the agency announced in December to certify all contractors' affirmative action plans.

Contractors previously were required to have such plans, but the agency never confirmed their existence unless a company was audited. The affirmative action portal also will be used for contractors to upload their full AAPs during a compliance evaluation, Yang said during the Friday interview.

"We are very interested in using technology to collect greater information about the contractor universe that can help us ensure we're promoting compliance," she said.

The OFCCP is also taking a new approach for conducting on-site evaluations of construction contractors, similar to the process in place for supply and service contractors. Under that process, the agency will first send the contractor a scheduling letter requesting data and policy information before conducting an on-site evaluation.

"We think that will enable us to be more efficient in our compliance evaluations so we can focus our questions and areas of inquiry on those areas of greatest concern," Yang said.

The agency additionally will be launching a mega construction projects program focused on "proactive compliance assistance" before a company is awarded a federal contract, Yang said. The program also includes apprenticeship programs and hiring assistance for underrepresented groups in the construction industry.

Pay Equity

Yang also defended a directive the OFCCP issued in March saying it would more closely scrutinize contractors' pay equity audits. Federal contractors are expected to produce all information about their internal pay analyses when being audited by the office, the agency said.

The directive raised concerns among contractors about violations of attorney-client privilege. The U.S. Chamber of Commerce argued in a letter sent to Yang last week that the move would create a disincentive to do compensation reviews at all.

The directive was a response to contractors saying they've satisfied their requirement to conduct an internal pay audit, but they had no documents to prove it, Yang told Bloomberg Law. Contractors are often not actually meeting that requirement, she said.

The directive makes clear that the OFCCP can request internal pay audits for the purpose of confirming compliance, but contractors are welcome to conduct separate audits for privileged legal advice, Yang said.

"We are not interested in obtaining that analysis as long as they can demonstrate compliance through a non-privileged analysis," she said.

The OFCCP is also closely watching a National Academy of Sciences review of the Equal Employment Opportunity Commission's previous requirement for employers to report pay data in the EEO-1 survey. The OFCCP had considered its own pay data collection survey, but Yang—who previously chaired the EEOC—said contractors would rather submit that information to the EEOC and OFCCP simultaneously.

"I generally think it is better to have more data so that it can help us understand patterns that may warrant further investigation and so we can use our enforcement resources most efficiently," she said.

Information Collection

Finally, Yang stressed the need for the OFCCP to obtain adequate information from contractors.

The agency prefers to resolve compliance issues outside of court, but in order to do so the OFCCP needs "clear communication" from contractors through requests for information, such as pay data and access to witnesses, she said.

In March the OFCCP proposed repealing a contractor-friendly evidentiary standard for bringing enforcement actions, which the agency said limits its ability to investigate and remedy bias allegations.

The November 2020 rule codified how the OFCCP would issue two formal notices after it uncovers potential bias in audits, and required the agency to provide more details on the statistical evidence before it could bring a claim.

If the proposed repeal is finalized, contractors would have a shorter time frame to produce information to the OFCCP, among other things.

"One area that has been a cause of delay in the past is that contractors are not providing us in a timely way the information that's necessary for us to conduct a compliance evaluation," Yang said.

To contact the reporter on this story: J. Edward Moreno in Washington at jmoredelangel@bloombergindustry.com

To contact the editors responsible for this story: Laura D. Francis at lfrancis@bloomberglaw.com; Martha Mueller Neff at mmuellerneff@bloomberglaw.com; Andrew Harris at aharris@bloomberglaw.com



NOTES



TAGS

