

# The Trump-Era Office of Federal Contract Compliance Programs Begins to Come Into Focus

by Bill Parker



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The future direction of the Office of Federal Contract Compliance Programs (OFCCP) was thrown into question after Donald Trump's win in the 2016 presidential election and remained that way for much of the first year of the new administration. While in general terms, it seemed a safe bet that the OFCCP would become less demanding of contractors and affirmative action enforcement less of a priority than it was under the Obama administration, there was no clear signal for much of 2017 as to what practical form those big-picture changes might take. The past several weeks have provided some insight into that question, though a great deal remains to be seen.

As a starting point, it is clear that the Trump administration's and Republican congressional majority's general focus on reducing the size of the federal government will substantially impact the OFCCP. The first, most extreme, possibility was a merger of the OFCCP into the Equal Employment Opportunity Commission. This proposal was floated in the president's proposed fiscal year 2018 budget in May 2017 on the ground that a single entity charged with fighting workplace discrimination could do so more powerfully and efficiently than two could.<sup>1</sup> However, that proposal, which would likely have required congressional approval<sup>2</sup> and was strongly opposed by both business and civil rights groups,<sup>3</sup> was rejected by both the House of Representatives<sup>4</sup> and the Senate<sup>5</sup> (though both also recognized a need for the OFCCP to seriously consider cost-reduction measures). Then-acting OFCCP Director Thomas Dowd also recognized that completing the merger by the end of 2018 would face significant challenges.<sup>6</sup> Accordingly, that extreme measure is now off the table, at least for 2018.

The repeated stress on the need for greater efficiency, though, and the concomitant near-certainty of a substantial budget cut has already substantially impacted the OFCCP's operation. In August 2017, the OFCCP offered buyouts to employees in the form of the Voluntary Separation Incentive Payment Authority

and the Voluntary Early Retirement Authority, which were expected to result in the removal of between 50 and 100 OFCCP employees.<sup>7</sup> When only 28 employees reportedly took the OFCCP up on its offer, however, the agency began a *second* round of buyouts in December 2017 to cut their already historically low headcount even further.<sup>8</sup> While the OFCCP has continued undertaking audits, early returns suggested that they were doing so in the Trump administration at a historically slow pace (under 1,000 per year nationwide)<sup>9</sup>; the reduced headcount will no doubt slow that pace even further.

Additionally, recent changes at the *top* of the OFCCP seem likely to contribute to the same trend. In late November 2017, Florida city attorney Craig E. Leen joined the OFCCP and there were reports that he would become its new director.<sup>10</sup> Just two weeks later, however, on Dec. 12, the agency's website was updated to reflect that Ondray T. Harris had taken over as the new director, replacing acting director Dowd, with Dowd staying on as deputy director and Leen in a senior adviser role.<sup>11</sup>

Harris served as the director of the Department of Justice's Community Relations Service beginning under President George W. Bush, but a later occasion that garnered Harris some public attention arguably suggests something about how he might approach issues around affirmative action. From 2011 until May 2013, Harris served as executive director of the Public Employee Relations Board (PERB), a Washington, D.C., quasi-judicial agency that adjudicates labor cases involving government agencies. In May 2013, Harris was required to resign from the PERB because he resided in Virginia, not Washington, D.C., as required; in a fiery resignation letter, however, Harris claimed that his residency was known to the other board members for over a year and was being used as a pretext for retaliation for Harris' opposition to the PERB's and its other members' discriminatory practices and statements.<sup>12</sup> Harris, who is African-American, asserted that

the board had improperly taken exception to his hiring and continuing to employ a white female because she “had a professional employment record which they perceived as being right of center.”<sup>13</sup> He further alleged that another board member, Don Wasserman (who is white), had “rebuked [Harris] with regard to [his] hiring white male employees” and “demanded that [he] ‘refrain from hiring white men’ in the future.”<sup>14</sup>

Harris’ letter was picked up by a number of right-wing blogs and publications at the time and hailed as evidence of “a government’s targeting of conservatives and pregnant women”<sup>15</sup> and evidence that “whites need not apply” to the PERB,<sup>16</sup> while another stated that “one courageous man”—Harris—had “refuse[d] to participate in racism” and that the letter “provides a disturbing look at alleged discriminatory and partisan conduct by the members of the board tasked with overseeing labor issues and the D.C. government’s relations with public employees.”<sup>17</sup>

There appears to have been no legal or additional media fallout from Harris’ letter or its claims. Arguably, however, that the new OFCCP director took such a strongly worded stance against what he saw as discrimination against white people suggests that his approach to affirmative action (which has traditionally been used to ensure that minority employees and candidates are not disadvantaged vis-à-vis white employees and candidates) can be expected to differ substantially from the OFCCP’s traditional approach. One might plausibly expect that ultimately, under Harris’ direction, the OFCCP could come to look less closely at situations in which minorities employed in a job group falls below placement goals, for instance, or at least to accept explanations for those discrepancies more readily. Conversely, though, the laws and regulations the OFCCP is tasked with enforcing are race-neutral and on their face are as concerned with “underrepresentation” of white employees or applicants in a job group or workforce as they are with underrepresentation among minorities; this technicality has often been ignored, but one can imagine that changing. A Harris-led OFCCP may well take potential indicators of discrimination toward white individuals as seriously as it takes the same toward minorities.

All in all, it seems a safe bet that the Trump OFCCP will continue to reduce the frequency and ferocity with which it conducts oversight of federal contractors. Contractors should, of course, continue to update their affirmative action plans and comply fully with audits when they do occur. In addition, we can expect that as time goes on, some states (in particular, “blue” states) and municipalities will enhance their own affirmative action enforcement further to attempt to pick up any perceived slack left by the more hands-off federal government, and it will be more important than ever for federal contractors who are also state or municipal contractors to be aware of any differences in the state and local government’s affirmative action requirements and to carefully prepare their plans accordingly. ☉

## Endnotes

<sup>1</sup>OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2018 749 (2017).

<sup>2</sup>Jay-Anne B. Casuga & Kevin McGowan, *Trump’s Proposed EEOC-OFCCP Merger May Need Congressional Action*, BLOOMBERG LAW (May 24, 2017), <https://www.bna.com/trumps-proposed-eeocofccp-n73014451444>.

<sup>3</sup>Jay-Anne B. Casuga & Kevin McGowan, *Idea to Merge EEOC, Contracting Watchdog not Well-Received*, BLOOMBERG LAW (May 23,

2017), <https://www.bna.com/idea-merge-eeoc-n73014451372>.

<sup>4</sup>H.R. REP. NO. 115-244, at 13 (2017) (stating, without reference to the proposed merger, that “[t]he committee directs OFCCP to submit a report to the committees on appropriations of the House of Representatives and the Senate within 160 days of enactment of this act on its efforts and the status of implementing each of the GAO recommendations”).

<sup>5</sup>S. REP. NO. 115-150, at 30 (2017) (“The committee rejects the budget’s proposal to begin plans to merge the OFCCP with the Equal Employment Opportunity Commission. The committee strongly urges OFCCP to find efficiencies and cost savings, including the consolidation of offices, within its current budget structure.”).

<sup>6</sup>U.S. DEP’T OF LABOR, OFFICE OF MGMT. & BUDGET, Opinion Letter (Aug. 24, 2017).

<sup>7</sup>Memorandum from Thomas M. Dowd, Deputy Dir., Office of Fed. Contact Compliance Programs, to Office of Fed. Contract Compliance Programs Employees (Aug. 18, 2017).

<sup>8</sup>John C. Fox, *OFCCP Week in Review: December 11, 2017*, DIRECTEMPLOYERS (Dec. 11, 2017), <https://directemployers.org/2017/12/11/ofccp-week-review-december-11-2017>.

<sup>9</sup>*Id.*

<sup>10</sup>*See, e.g.*, Cynthia L. Hackerott, *Florida City Attorney Craig E. Leen Slated for Senior DOL Post—OFCCP Director?*, WOLTERS KLUWER: EMP’T L. DAILY (Nov. 14, 2017), <http://www.employmentlawdaily.com/index.php/2017/11/14/florida-city-attorney-craig-leen-slated-for-senior-dol-post-ofccp-director>.

<sup>11</sup>*Office of Fed. Contract Compliance Programs: OFCCP Key Personnel—National Office*, DEP’T OF LABOR, <https://www.dol.gov/ofccp/contacts/ofccpkey.htm> (last visited Jan 4, 2017); Connie Bertram et al., *OFCCP Appoints New Director (Not Craig Leen)*, POSKAUER: GOV’T CONTRACTOR COMPLIANCE & REGULATORY UPDATE (Dec. 13, 2017), <https://www.governmentcontractorcomplianceupdate.com/2017/12/13/ofccp-appoints-new-director-not-craig-leen>.

<sup>12</sup>Letter from Ondray T. Harris, Executive Director, Pub. Emp. Relations Bd., to Wynter Allen, Chair, Pub. Emp. Relations Bd. (May 24, 2013) [hereinafter Harris Letter].

<sup>13</sup>*Id.* at 1.

<sup>14</sup>*Id.*

<sup>15</sup>J. Christian Adams, *A Government’s Targeting of Conservatives and Pregnant Women*, Rule of Law, PJ MEDIA (June 1, 2013), <https://pjmedia.com/jchristianadams/2013/6/1/a-governments-racist-hiring-and-targeting-of-conservatives-and-pregnant-women>. Harris’ letter mentioned, briefly, that he said he believed the white conservative woman he hired was pregnant, and he claimed that Wasserman said, “Good, maybe we can get rid of her that way.” Harris Letter, *supra* note xii, at 2.

<sup>16</sup>Hans A. von Spakovsky, *Op-Ed: ‘Whites Need Not Apply’ at D.C. Labor Board?*, WASH. EXAM’R (June 3, 2017), <http://www.washingtonexaminer.com/op-ed-whites-need-not-apply-at-dc-labor-board/article/2530997>.

<sup>17</sup>Sundance, *Uncommon Valor—One Courageous Man Refuses To Participate In Racism*, LAST REFUGE (June 3, 2017), <https://theconservativetreehouse.com/2013/06/03/uncommon-valor-one-courageous-man-refuses-to-participate-in-racism-ondray-harris-executive-director-public-employee-relations-board-of-the-district-of-columbia-quits-because-board-demands-no/comment-page-1>.