

April 1, 2020

ARB Said, He Said: Secretary of Labor Announces New Oversight of Administrative Decisions

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On March 6, 2020, U.S. Secretary of Labor Eugene Scalia published [Secretary's Order 01-2020](#), which is among the first of his management decisions since his confirmation back in September. The Order, titled the “Delegation of Authority and Assignment of Responsibility to the Administrative Review Board,” establishes the Secretary’s authority to review, at his discretion, decisions of the Department of Labor (DOL)’s Administrative Review Board (ARB), including decisions arising out of enforcement actions brought by the Office of Federal Contract Compliance Programs (OFCCP). The Order represents a shift in procedure before the Office of Administrative Law Judges (OALJ) and introduces various new process and substantive legal questions to be aware of in connection with contractor pay discrimination enforcement actions.

In some ways, the Order simply represents a return to prior practice. Historically, the Secretary of Labor directly decided many cases with the assistance of an executive office. The Secretary delegated this responsibility to the newly created ARB in 1996 (Secretary’s Order 02-96). Under this delegation, however, the Secretary had not unambiguously retained the authority to review ARB decisions made on his behalf. The Order addresses this issue by providing the Secretary discretionary review of ARB decisions as a means to oversee and direct actions of “exceptional importance” to the DOL. The Order also formalizes certain other ARB operating procedures, including with respect to the composition of the Board and Board members’ appointment terms.

Obtaining Discretionary Review

Pursuant to the Order, an ARB decision can wind its way up to the Secretary through one of two avenues. First, a party may, within 14 days of the decision, file a petition for review. The other party then has 10 days to oppose the petition. Within 21 days of receiving the petition, the ARB will determine if it “presents a question of law that is of exceptional importance and warrants review by the Secretary.” If so, the ARB will submit a recommendation to the Secretary to that effect. The Secretary may, in its sole discretion, accept, deny, or take no action with respect to the petition for review. The ARB’s decision becomes final on the date the Secretary denies a petition or, if the Secretary takes no action, 28 days after the ARB submits the decision for review.

Alternatively, the Secretary may independently direct the ARB to submit a given decision for review.

Scope of Secretary Review

The Secretary’s review is limited to the administrative record, as well as any additional amicus briefing the Secretary may order. The Order does not specify what type of review the Secretary will undertake or the legal standards that the Secretary will apply. The ARB will publish and transmit the Secretary’s final order to the parties, at which point the decision becomes final and appealable.

Key Contractor Takeaways

The procedures are notable for several reasons. Historically, a private party could immediately appeal a final ARB decision to a district court. The Secretary’s procedures under the new Order potentially dramatically extend the appellate timeline, with no clear indication as to when the Secretary will issue a decision in a matter accepted for review. This additional layer of review has important implications regarding the time and costs to contractors in litigating an enforcement action.

Because the Secretary’s discretionary procedures are new, it remains unclear what types of cases the Secretary will consider “exceptional” and accept for review. We anticipate that highly-publicized actions, and actions involving significant monetary damages, are more likely to be selected for review. However, until the procedures are invoked, contractors are left to speculate.

Based on recent enforcement priorities, the Order may have particular significance in the pay discrimination space. [OFCCP has increased its compensation-related enforcement efforts over the last several years](#). OFCCP Directive 2018-05, for example, outlined “standard procedures for reviewing contractor compensation practices during a compliance evaluation and emphasize[ing] OFCCP’s priority of eliminating pay discrimination through enforcement by OFCCP and compliance by contractors through proactive self-auditing.” The Agency also reported some of its largest-ever settlements in pay discrimination actions in late 2019 and early 2020. Although OFCCP enforcement actions before the OALJ remain uncommon, contractors on the receiving end of a compensation-related Predetermination Notice (PDN) should bear in mind the additional administrative procedures they may encounter in the event of an enforcement action.

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