

# Client Alert

September 2013

## OFCCP Publishes New Rules for Veterans/Disabled – Effective March 2014

On September 24, 2013, the Office of Federal Contract Compliance Programs (OFCCP) published two rules that impose new affirmative action obligations toward veterans and individuals with disabilities. These rules, issued under VEVRAA (Vietnam Era Veterans Readjustment Assistance Act) and Section 503 of the Rehabilitation Act, create significant new burdens for covered federal contractors and subcontractors.

### Background

The OFCCP has advertised the new regulations as rules designed to “Improve Job Opportunities for Protected Veterans” and “Improve Job Opportunities for Individuals with Disabilities.” The Department of Labor says the changes are necessary to combat the disproportionately high unemployment rates for disabled persons and veterans from Iraq and Afghanistan. The rules are also intended to increase the diversity of worker pools available to government contractors.

The OFCCP’s regulations under VEVRAA are now completely under 41 C.F.R. Part 60-300, and part 60-250 has been rescinded. Section 503 regulations are still at Part 60-741.

### Overview of Changes

Historically, affirmative action plans (AAPs) have included statistical analyses and placement goals only for women and minorities. AAPs for veterans and the disabled have consisted solely of narrative statements. Now, that is changing. Although the OFCCP backed off some of its original proposals listed in its April 26, 2011 Notice of Proposed Rulemaking, several significant new obligations are imposed by these rules. The full scope of changes is more involved than can be covered in a concise client alert, so please contact our firm for additional guidance or details. Major changes include:

- **An annual hiring “benchmark” for veterans.**
  - This must be based on either the national percentage of veterans in the workforce, presently 8 percent, or the best available data for the establishment.
  - In guidance documents, the OFCCP has said the benchmark can be applied to AAP job groups, EEO-1 categories or the overall workforce, at the contractor’s election.
  - An establishment benchmark must be based on at least five factors:
    1. Bureau of Labor Statistics data on the average percentage of veterans in the civilian labor force for the past three years in that state;
    2. The number of veterans during the previous four quarters who participated in a state employment service delivery system;
    3. The contractor’s applicant and hiring ratios for veterans in the previous year;
    4. The contractor’s assessment of its veterans’ outreach and recruiting efforts; and
    5. “Other factors,” like the nature and location of the job openings.

- The OFCCP has said it will create a “Benchmark Database” where government statistics will be posted. Still, creating a unique benchmark will take more time than defaulting to the national percentage. But, it could yield a significantly lower “benchmark” if the establishment is in a low-veteran area. Locations near military bases, in contrast, may end up with higher “benchmarks.” Because of the difficulty involved with computing a unique benchmark, and the uncertainty as to an improved result, most companies will likely default to the national percentage.
- The OFCCP has been explicit that this “benchmark” is not a “goal,” like those required to be set in certain instances for females and minorities. But, it is not clear how these terms will actually differ in practice.
- Progress toward the benchmark must be measured. However, failure to meet the benchmark will not by itself constitute a violation or carry any penalty. (A violation could result, though, from a failure to establish the benchmark, or to follow data collection, recordkeeping, outreach and recruiting requirements.)
- **A 7 percent aspirational utilization goal for the employment of individuals with disabilities.**
  - This goal should be applied to each individual job group, except for if there are fewer than 100 employees, in which case it can be applied to the entire workforce.
  - An annual utilization analysis should be conducted, including assessment of problem areas and establishment of action-oriented programs (as is currently done for the placement goals for women and minorities). But, as with the veteran “benchmark,” failure to achieve a goal is not by itself a violation or cause for penalty.
- **A pre-offer invitation to applicants to identify as veteran and disabled.**
  - Implementing this will require companies to revise longstanding practices established under the ADA. Companies have specifically steered clear of soliciting disability information at the pre-offer stage to avoid failure-to-hire claims under the ADA. For covered federal contractors and subcontractors, pre-offer collection of this information will be mandatory.
  - Companies have the option of asking disabled applicants about accommodations. Companies should consider doing this, however, to ensure disabled persons are not discouraged from the application process.
  - Responses received from the invitations to self-identify should continue to be stored separately from other application materials. This ensures that hiring decisions are not tainted by an applicant’s race, gender, disability or veteran status.
  - Using prescribed language to be provided by the OFCCP, every five years contractors must also invite employees to self-identify as individuals with disabilities.
- **Performance-driven disability inquiries.**
  - If an employee with a known disability is having a “significant” difficulty performing his job, and it is “reasonable” to conclude the problem may be related to the known difficulty, the contractor shall confidentially notify the employee of the performance problem and ask whether it is related to the disability.
  - If the employee says yes, the employer shall confidentially ask if the employee needs a reasonable accommodation.

- **Changed veteran categories and disability provisions.**
  - The current “other protected veterans” category has been changed to “active duty wartime or campaign badge veterans.”
  - The term “protected veterans” is now used as a summary catchall to encompass all the veterans groups covered by VEVRAA.
  - A category for “pre-JVA veterans” (categories that existed before the 2002 Jobs for Veterans Act, such as Vietnam-era veterans) has been added to the nondiscrimination provisions of the final rules only. This is not in the AAP section.
  - The term “disability” and certain nondiscrimination provisions of the Section 503 regulations have been revised to address the ADA Amendments Act (ADAAA).
- **Additional language for subcontractors.**
  - In addition to, or in lieu of, merely incorporating by reference the EEO clauses in 41 C.F.R. §60-300.5(a) and §60-741.5(a), covered subcontracts must also say **in bold text**: “This contractor and subcontractor shall abide by the requirements of 41 C.F.R. §60-300.5(a) and 41 C.F.R. §60-741.5(a). These regulations prohibit discrimination against (1) qualified protected veterans and (2) qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and qualified individuals with disabilities.”
  - A contractor must also send written notification of the company AA policy to subcontractors and request their cooperation, such as by an annual letter or email.
- **New language for “EEO tag lines” in job ads.**
  - All solicitations and advertisements for employees must state that all qualified applicants will receive consideration for employment without regard to their protected veteran or disabled status and will not be discriminated against. The regulations do not say a generic “EEO employer” reference will suffice.
- **Affirmative action policy rules.**
  - The company’s affirmative action policy must now be included in any employee handbook or policy manual. Written reasonable accommodation procedures are also advised as a “best practice.”
  - The AA policy must now reflect the support of not just a high-ranking company officer, but of the “top United States Executive.”
- **Clarification of job listing methods.**
  - The OFCCP’s Frequently Asked Questions (FAQs) have specified for some time that contractors should list their job openings with the appropriate state or local job service *in a manner and format permitted* by the applicable office. This is now expressed in the regulations. A few offices, for instance, do not process listings conveyed by email.
  - Contractors must now provide the following information to the state employment service, which must be updated annually: name and location of each hiring location, with contact

information for the hiring official; status as a federal contractor; a request for priority referrals; and, if outside job search companies are used, their contact information.

- **Increased data collection and record retention.**
  - Contractors must now collect information to allow quantitative comparisons for the number of veterans and disabled persons who apply and are hired for jobs. This includes information about the number of disabled and protected veteran applicants and hires, the total number of applicants and the total number of applicants hired, and the total number of job openings and jobs filled.
  - Information collected under the regulations shall be maintained for a period of three years. This is longer than the one- or two-year retention period (depending on company size) that applies to other affirmative action obligations.
- **Temporal extension of audit scope.**
  - The OFCCP has codified its position in *Frito-Lay Inc. v. U.S. Dept. of Labor*, 3:12-cv-01747 (N.D. Tex. (still pending)), that the OFCCP may extend the temporal scope of audits after the date of the scheduling letter, to request more information when problems are perceived to exist.

### **Effective Date(s)**

The effective deadline for the new obligations is March 24, 2014. This date applies to nearly all the new requirements in the final rules, with one important exception. Contractors with affirmative action plans (AAPs) already in place on March 24, 2014, can retain them in existing form until the end of their current AAP year, deferring compliance with the new AAP requirements until their next plan year begins.

### **Best Practice Suggestions**

Although compliance deadlines are months away, companies affected by these changes should start preparing now. The following are preliminary actions to take:

- *Ensure critical personnel are aware of these changes and train them on implementation.*
  - Critical personnel include all staff who will be responsible for collecting, maintaining and potentially analyzing (if you do the AAPs in-house) the new data points. Conduct basic training of HR, compliance, legal, IT and senior management personnel — we are happy to assist with this. If you use a third-party vendor for plan preparations, make sure they are on track to update their software and data approaches.
- *Audit and improve outreach and targeted recruiting efforts toward disabled and veteran populations.*
  - Since companies will have hiring targets for veterans and the disabled, the company should ensure its job openings are reaching these populations. This includes not only corporate wide initiatives, but also local outreach activities, for which documentation should be maintained. For instance: form partnerships with military or community groups; transmit job openings to veteran and disabled employment resources; attend and sponsor diversity job fairs; list jobs on diversity websites. See 41 C.F.R. §60-300.44(f)(2) and §60-741.44(f)(s) for further examples.
  - Hiring decisions must still be made without regard to any protected traits. Set-asides, quotas and preferential treatment are prohibited. However, the company can and should try to

increase the number of disabled and veteran candidates who are in its applicant pools, which ideally will result in greater progress toward the new hiring benchmarks/goals.

- Document the company's annual self-assessment of outreach and recruitment efforts (this is now explicitly required by the regulations). If they have not been successful, then identify, implement and document alternative efforts.
- Ensure disabled persons have equal access to any online application process. Consider incurring the cost of assistive technologies, which the OFCCP has codified as a "best practice."
- *Audit job listing activities and job ads.*
  - Ensure the method used to convey job listings to the state and local employment offices actually causes your postings to reach job seekers. Confirm the method you (or your third-party vendor) use is accepted by all relevant offices. Provide the required contact and hiring information. And, ensure your EEO tag line now contains the needed veterans and disabled nondiscrimination language.
- *Prepare revised pre-offer self-ID forms, to be used as of March 24, 2014, which reflect the additional (and revised) veteran and disabled categories.*
  - Contractors should not start soliciting pre-offer disability information until required to do so by law. Collection of this information before it is mandatory could create unnecessary exposure to ADA or Rehabilitation Act discrimination claims.
  - The OFCCP has provided sample language for this revised pre-offer self-identification, in Appendix B to Part 60-300. Or, we would be happy to provide a compliant form.
  - Contractors must continue to also use a post-offer veteran/disabled self-ID form.
- *Add the required language to covered subcontracts (see above).*
  - Or, simply add the required language (**in bold**) to the all subcontracts (i.e., to the contract template), with an "as applicable" qualifier.
- *Evaluate current staffing and resources.*
  - Can the current HR staff handle the additional outreach obligations? Does the company's HRIS system have fields to capture the disabled and veteran identifications? Is the company's AAP and applicant tracking software being updated to facilitate the new undertakings?
- *Consider your budget.*
  - Particularly in the first few years, these new obligations will impose increased costs in both time and money. Plan now for any needed 2014 budget increase, to ensure compliance efforts are not hampered when effective dates are here.
- *Review job descriptions for physical and mental requirements.*
  - If your company has not recently reviewed and updated its job descriptions, now is the time. Outdated mental and physical requirements can create liability not only in an OFCCP audit but in the ADA context as well.

- Ensure that all mental and physical requirements are job-related and consistent with business necessity. Be able to directly answer the question: why does the person need to have this ability to do this particular job? For instance, if a 50-pound lifting restriction is listed, know the exact items that are 50 or more pounds and why they must be manually lifted instead of by machine.

### **Additional Resources**

*We published an article on this topic in our Hunton Employment & Labor Perspectives (HELP) blog. If you do not presently receive alerts of our timely news entries, please subscribe today at <http://www.huntonlaborblog.com/> (the “Subscribe” option is on the right side).*

More detailed information, including links to the text of the Final Rules and the OFCCP’s “Frequently Asked Questions,” are available at <http://www.dol.gov/ofccp/regs/compliance/vevraa.htm> and <http://www.dol.gov/ofccp/regs/compliance/section503.htm>. Or, you can access the Final Rules directly at [www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21227.pdf](http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21227.pdf) and [www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf](http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf).

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