

In Depth Review of Recent OFCCP Developments

By Joshua S. Roffman, Alissa A. Horvitz,
Lance E. Gibbons, and Matt A.D. Nusbaum

Littler Update: In Depth Review of Recent OFCCP Developments

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This update discusses several important recent OFCCP compliance developments:

- OFCCP Issues Proposed Revisions to Federal Contractors' and Subcontractors' Affirmative Action Obligations With Respect to Individuals with Disabilities
- OFCCP Issues Its Corporate Scheduling Announcement Letters (CSAL letters) for 2011 -2012 During the Last Week of 2011
- New Defense Appropriations Bill Eliminates the Provision of Medical Services or Supplies Through TRICARE as a Basis for Subcontractor Status and Federal Affirmative Action Obligations

OFCCP Issues Proposed Regulations Requiring Significantly Broader Individual with Disability Affirmative Action Obligations for Federal Contractors and Subcontractors

The United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued its proposed revisions to the affirmative action regulations for individuals with disabilities on December 9, 2011.¹ These regulations are the companion piece to the proposed revisions to OFCCP's affirmative action regulation for veterans that were issued on April 26, 2011.² Public comments to the proposed individuals with disabilities affirmative action rule are due by February 7, 2012.

Like the proposed revisions to the veterans regulations, the proposed changes to the affirmative action obligations for individuals with disabilities significantly expand the obligations of federal contractors and subcontractors by:

- imposing detailed new data tracking requirements
- establishing a 7% utilization goal for the employment of individuals with disabilities
- requiring that contractors solicit information on disability status of all applicants (pre-offer), not just of applicants offered a job (post-offer)

¹ 76 Fed. Reg. 77,056 (December 9, 2011).

² 76 Fed. Reg. 23,358 (Apr. 26, 2011).

- requiring that contractors annually re-solicit disability self-identification information from its existing employees
- establishing specific mandatory external outreach efforts for contractors, as well as mandatory internal dissemination requirements and specific training obligations
- requiring that contractors engage in an *annual* review of their physical and mental job qualifications
- requiring contractors to document employment decisions affecting individuals with disabilities in much more detail
- requiring the development of written procedures for processing reasonable accommodation requests and establishing mandatory documentation requirements related to accommodations considered and accommodations granted
- expanding the mandated recordkeeping timeframe from two years to as long as five years for certain documents related to the affirmative action plan
- encouraging voluntary priority consideration programs for individuals with disabilities
- seeking to expand the temporal scope of a desk audit from the current two years going back from the date of the scheduling letter to an open-ended time period in the future
- establishing protocols for pre-award compliance reviews that will now cover the affirmative action plan for individuals with disabilities (and not only the women and minorities affirmative action plan, as it had in the past).

Data Tracking Requirements

The most significant proposed change is the requirement that contractors engage in an annual data collection analysis. The regulation would require contractors and subcontractors to track and maintain the following information:

- The number of referrals of individuals with disabilities the contractor received from the applicable employment service delivery systems, including State Vocational Rehabilitation Service Agencies and Employment One-Stop Career Centers.
- The number of referrals of individuals with disabilities the contractor received from entities with which the contractor has established linkage agreements for assistance with recruiting and developing training opportunities for individuals with disabilities.
- The number of applicants who self-identified as individuals with disabilities or are otherwise known as individuals with disabilities.
- The total number of job openings and total number of jobs filled.
- The ratio of jobs filled to job openings.
- The total number of applicants for all jobs.
- The ratio of applicants with disabilities to all applicants (applicant ratio).
- The number of applicants with disabilities hired.

- The total number of applicants hired.
- The ratio of individuals with disabilities hired to all hires (hiring ratio).

As was the case with the proposed revisions to the veterans regulations, the contractor is expected to evaluate this data for its current affirmative action plan year as well as its two most recent previous plan years in assessing the effectiveness of its external outreach and recruitment efforts. This will have the effect of creating a three-year recordkeeping requirement for this information, which is different from the current two-year recordkeeping requirement that applies to companies with more than 150 employees or a contract more than \$150,000, and two years longer than the current requirement for small contractors who have fewer than 150 employees or a contract valued at less than \$150,000.³ OFCCP is not proposing any exception for small businesses or contracts with very low dollar thresholds. To account for the three-year tracking requirement, OFCCP has expanded the recordkeeping requirement for these tallies to five years.

Notably, OFCCP is not requiring that contractors track the number of all referrals and what proportion of referrals were individuals with disabilities, as it proposed requiring in its revisions to the veterans regulations. Instead, OFCCP is requiring only tallies of the number of referrals of individuals with disabilities. The proposed requirement in the veterans regulations to track all referrals and not just veterans referrals seemed inconsistent with OFCCP's Internet Applicant definition. Whether this is a signal that OFCCP intends to remove that specific requirement in its final veterans regulations remains unclear.

Finally, contractors should note that "OFCCP is also considering adding a reporting requirement. . . . Under this proposal, contractors would be required to provide OFCCP with a report containing the [above] measurements and computations . . . for each EEO-1 category. The report would be provided to OFCCP on an annual basis, regardless of whether the contractor has been selected for a compliance evaluation." So in addition to preparing these analyses, OFCCP is considering an annual EEO-1- or VETS-100A-type report for disabled employees. OFCCP seeks public feedback about adding such a requirement.

7% Utilization Goal

The new regulations also require for the first time a utilization goal of 7% for employment of individuals with disabilities for each job group in its affirmative action plan, similar to the placement goals already required for the women and minorities affirmative action plan.

Rather than requiring a contractor to develop placement goals based on various pieces of data, OFCCP proposes establishing an across-the-board goal of 7% for all of the contractor's job groups, using the same job groups as in its women and minorities affirmative action plan.

³ This is the current requirement under 41 C.F.R. section 60-741.80.

This is different from what OFCCP had proposed in its revised veterans regulations in several respects and addresses several problems with that approach, including the lack of specific data about availability of individuals with disabilities or covered veterans as those concepts are defined with regard to affirmative action obligations, the lack of occupation-specific and geographic-specific data for the availability of individuals with disabilities and covered veterans, and the resulting burden-heavy and subjective approach to establishing hiring benchmarks that the Agency proposed in its revised veterans regulations. As such, the approach in the proposed individuals with disabilities regulations is substantially less burdensome. The contractor will not need to do any calculations to establish its goals—they are set at 7%. It also will enable the contractor to establish goals by its job groups within each of its affirmative action plans. By contrast, the approach in the proposed veterans regulations did not really allow for this as it was based on data that was neither location nor job group specific.

While the approach in the proposed individuals with disabilities regulations addresses those issues, it does so only because it establishes an across-the-board goal that is the same regardless of the contractor's location or the specific jobs of its employees. This may be the only realistic way for there to be a utilization goal for individuals with disabilities, but it does show limitations in the usefulness of the data point. OFCCP is seeking comments on whether there are better ways to establish the utilization goal, specifically to account for geographic and occupational differences, perhaps by setting ranges, for example.

New Self-Identification Invitation Requirements for Applicants and for Incumbent Employees

Consistent with the new data tracking and goal-setting obligations, the proposed regulations will require contractors to solicit all applicants to self-identify whether they are an individual with a disability. Given the sensitivity of acquiring this information from someone who has not been offered a job, OFCCP proposes developing a standard form that will be used by all contractors. The pre-offer inquiry will seek no specifics as to the nature of the disability but just whether the individual has a disability. The form includes specific definitional language meant to conform to the ADA Amendments Act (“ADAAA”) as well as information providing assurances about the use of the information. OFCCP provides the specific language of its proposed form⁴ and seeks public comment about the text.

The regulations also require that the invitation to self-identify be provided at the time the applicant applies or is considered for employment, whichever comes first. This is different than the applicant self-identification requirement for gender and race/ethnicity, which allows contractors' discretion on when the invitation is made so long as it is made before an offer of employment is made and is provided to everyone who meets OFCCP's regulatory definition of applicant.

⁴ 76 Fed. Reg. 77063.

The regulations continue to require a post-offer invitation to self-identify as an individual with a disability, but the new regulations will require the use of the standardized form developed by OFCCP.

Finally, the regulations will require that each contractor annually invite its employees to inform the contractor, “in an anonymous manner,” whether the employee believes he or she is an individual with a disability. Contractors will again use a form developed by OFCCP.

It is unclear how OFCCP expects this annual survey to be both anonymous and at the same time enable the contractor to engage in the type of data monitoring and metrics that OFCCP states is the reason that this annual survey is necessary. Without having a way of knowing which specific employees self-identified as an individual with a disability, contractors will have difficulty using that information to measure and assess its employment practices as it relates to individuals with disabilities, in particular, the obligation to evaluate utilization by job group.

Finally, it is unclear what, if anything, OFCCP intends to do to make sure that the standardized forms that it develops will be compatible with various electronic employment forms, including application forms and applicant tracking systems, that employers use.

More Specific Requirements for Contractor Outreach Efforts

Another significant change in the proposed regulations is the fact that OFCCP has now established specific *mandatory* outreach efforts in addition to a number of suggested outreach efforts. Contractors would now be required to list all employment openings (with limited exceptions) with the Employment One-Stop Career Center (One-Stop) nearest the contractor’s establishment.⁵

Contractors also would be required to establish linkage agreements with either the local State Vocational Rehabilitation Service Agency (SVRA) or a local Employment Network (EN) organization listed in the Social Security Administration’s Ticket to Work Employment Network Directory as well as with one of the following:

- entities funded by the Department of Labor that provide recruitment or training services for individuals with disabilities
- the One-Stop Career Center nearest the contractor’s establishment
- the Department of Veterans Affairs Regional Office nearest the contractor’s establishment
- local disability groups, organization, or Centers for Independent Living near the contractor’s establishment

⁵ Contractors are already required to list their employment opportunities under the current veterans affirmative action regulations.

- placement or career offices of educational institutions
- private recruitment sources.

In addition, the proposed regulations require that contractors consult the Employer Resources of the OFCCP's National Resource Directory and establish a linkage agreement with one or more of the organizations for individuals with disabilities listed in the directory that is not one of the types of organizations already enumerated in the OFCCP's regulations.

Lastly, contractors must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.

The *suggested* outreach efforts mirror the outreach efforts in the current regulations, with one notable change. Although listed in the suggested outreach efforts section, OFCCP has changed the language from should to shall on whether contractors must consider known disabled applicants for all available positions for which they may be qualified when the position they applied for is unavailable. As was the case with the proposed revisions to the veterans' regulations, the combination of this mandate along with the obligation to track all position openings and not just positions filled contradicts OFCCP's 2005 Internet Applicant regulations. OFCCP's Frequently Asked Questions under the Internet Applicant topic expressly state that "the contractor does not have to consider for employment individuals who do not specify a particular position, so long as that is the contractor's consistent practice."

Additionally, contractors would be required to review, on an annual basis, the outreach and recruitment efforts they have undertaken over the previous 12 months and evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities. Most importantly, contractors would have to document this review, including the criteria used to evaluate the effectiveness of each effort and their conclusion as to whether each effort was effective.⁶

Finally, contrary to the existing general two year recordkeeping requirement, the proposed regulations would require that contractor's document and retain linkage agreements and all other outreach and positive recruitment activities for five years.

Certain Internal Dissemination Obligations Now Mandatory

Under the current regulations, each specific internal dissemination activity was suggested, as the regulations used only "should" rather than "shall." The proposed regulations now will *mandate* some of the affirmative action policy internal

⁶ Although not in the proposed regulations, the OFCCP makes the comment in the Notice of Proposed Rulemaking that "the primary indicator of effectiveness is whether qualified individuals with disabilities have been hired."

dissemination requirements. The following internal dissemination activities will now become mandatory:

- Including the contractor's individuals with disabilities affirmative action policy in its policy manual.
- Discussing the policy thoroughly in any employee orientation and management training programs.
- Meeting with union officials and/or employee representatives to inform them of the policy and request their cooperation if the contractor is a party of a collective bargaining agreement.

The *suggested* outreach efforts mirror the outreach efforts in the current regulations, including:

- Publicizing the policy in contractor publications.
- Discussing the policy at employee meetings.
- Discussing the policy with executive, management, and supervisory personnel.

A contractor would be required to document the activities it undertook to comply with its internal dissemination requirements and retain these records for two years.

OFCCP also will impose mandatory training topics for the training contractors are required to provide to "individuals who implement the personnel decisions pursuant to its affirmative action program." The required topics will be:

- the benefits of employing individuals with disabilities
- appropriate sensitivity toward applicants and employees with disabilities
- the legal responsibilities of the contractor and its agents regarding individuals with disabilities including the obligation to provide reasonable accommodation for qualified individuals with disabilities.

The proposed regulations would require that the contractor record which of its personnel receive the training, when they receive it, the person(s) who administer the training, along with all written or electronic training materials used in the training.

Required Annual Review of Physical and Mental Job Qualifications

The new regulations would require that *all* physical and mental job qualifications are reviewed on an *annual* schedule, whether or not the qualifications are actually applied. Further, contractors will be affirmatively required to maintain documentation of the methods used to complete the review, the results of the review, and any actions taken in response. This is a significant change as currently contractors are required to conduct a review only periodically, with many contractors typically reviewing such qualifications only when they make changes to any of their underlying jobs.

As currently required, any mental or physical qualifications that tend to screen out individuals with a disability must be related to the job in question and consistent with business necessity. While the contractor has always had the burden of proof, the proposed regulations envision that proof in the documentation of the annual review.

Requirements to Record Rationale for Specific Employment Decisions Affecting Individuals with Disabilities

In reviewing its personnel processes, the proposed regulations would impose requirements that the contractor record and maintain specific information on the contractor's consideration of applicants and employees as follows:

- Each position for which an *applicant* with a disability was considered and each training program for which an *applicant* with a disability was considered.
- Each promotion for which an *employee* with a disability was considered and each training program for which an *employee* with a disability was considered.
- A statement of the reason an applicant or employee with a disability was rejected for employment, promotion, or training.
- A description of any accommodations considered for an individual with a disability who is rejected for employment, promotion, or training.
- A record of any accommodation made and a description of that accommodation for any hire, promotion, or training that was made possible by an accommodation.

The proposed revisions to the veterans' regulations also required contractors to maintain the above information with respect to covered veterans.

Requirement to Develop and Implement Written Procedures for Processing Requests for Reasonable Accommodations

The regulations will require contractors to develop and implement written procedures for processing requests for reasonable accommodations. Contractors will be required to include the procedures in their affirmative action plan and to disseminate the procedures to all of its employees. Contractors also will be required to inform applicants about the reasonable accommodation procedures related to the application process.

The regulations call for several required elements in a contractor's reasonable accommodation procedures:

- The name, title, phone and e-mail of the official designated as responsible for implementing the policy.
- A statement that specifies that requests for reasonable accommodation can be oral or written and that there are no required words to make a valid request.

- Protocols for addressing recurring requests (e.g., the need for a sign language interpreter) without requiring the requester to repeatedly submit or renew such requests.
- Identification of the person to whom requests must be made, which at a minimum will include any supervisor or management official in the employee's chain of command and the person responsible for implementation of the reasonable accommodation procedures.
- Specific reasonable accommodation procedures for applicants.
- Written confirmation of receipt of accommodation requests.
- The timeframe for processing requests, which shall not be longer than 5 to 10 business days if supporting medical documentation is not needed or 30 calendar days in situations where supporting medical documentation is needed or equipment must be ordered.
- A description of the process the contractor takes when processing a request, including any specific information that must be provided to the contractor in order for someone to obtain a reasonable accommodation.
- The circumstances under which medical documentation may be requested and reviewed by the contractor.
- A statement that any denial or refusal to provide a requested reasonable accommodation will be provided in writing and will include reason for denial, a date and signature from the authorized decision maker or his/her designee, a statement of the requester's right to file a discrimination complaint with OFCCP, and information about any internal appeal process that the contractor has.
- A statement that requests for reasonable accommodation and related documentation will be treated as confidential medical records, which will be maintained in a separate medical file.

Contractors also will be required to provide annual training for their supervisors and managers regarding the implementation of the reasonable accommodation procedures.⁷

OFCCP's Access to All Forms of Records

Like the proposed veterans regulations, OFCCP's proposed disability regulations state that OFCCP must be provided records in any available format requested by OFCCP. Included with this obligation is a requirement that the contractor provide, upon request, information about all formats, including specific electronic formats, in which its records and other information are available.

⁷ Training also will be required whenever significant changes are made to the reasonable accommodation procedures.

Expanded Recordkeeping Periods

OFCCP's proposed regulations expand the recordkeeping period beyond the standard two year timeframe to five years in two specific areas—(1)all records related to outreach efforts and positive recruitment for individuals with disabilities and (2)for the specific tallies of jobs open, jobs filled, applicants, hires, applicants with disabilities, and hires with disabilities.

Voluntary Programs to Provide Priority Consideration in Employment to Individuals with Disabilities

The proposed regulations include a new section that “encourages” contractors to voluntarily develop programs providing priority consideration for individuals with disabilities in recruitment and hiring. The section offers suggestions for types of such programs and some basic protocols for establishing a priority consideration program.

Other Issues

In addition to the above requirements, there are additional issues implicated, either directly or indirectly, by OFCCP's proposed regulations.

Internet Applicant

There are at least two aspects of the proposed regulations that seem to be in direct conflict with OFCCP's 2005 Internet Applicant regulations. The first conflict is the requirement that contractors track all positions ever opened and not just those that the contractor actually filled. The second conflict is in the mandate that contractors consider applicants with disabilities for any position for which they may be qualified when the position(s) applied for are unavailable. The proposed veterans' regulations did the same thing.

Temporal Scope of Desk Audits

OFCCP has stated in its proposed regulations that it may extend the temporal scope of a desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations. This regulatory statement is a direct reversal of the Administrative Law Judge's holding in *OFCCP v. Frito-Lay* (2010-OFC-00002; ALJ July 23, 2010). OFCCP comments to the proposed regulations state that this language “merely clarifies OFCCP's longstanding policy” and “does not represent a change in policy or new contractor obligations.” The notion that there was indeed a policy that allowed OFCCP to keep its audits open indefinitely was directly rejected by the ALJ in *Frito-Lay*, who found that “OFCCP's position [was] a marked departure from how OFCCP has interpreted its own regulations and has conducted its compliance reviews in the past.” Moreover, this language is not being added to the women and

minorities regulations, which would mean that the change would exist under the individuals with disabilities (and veterans) regulations, but, so long as *Frito-Lay* remains good law, would not exist in the women and minorities regulations. This is another change that was first seen in the proposed revisions to the veterans regulations.

Potentially Controversial Changes and Opportunity for Public Comment

Comments are due on or before February 7, 2012. We encourage contractors to make their voices heard regarding this sea change in the regulatory landscape. If you don't want to provide comments directly to the OFCCP, please feel free to contact one of the Littler attorneys listed below with your comments and they will be incorporated into the comments that Littler submits.

Alissa A. Horvitz	202.414.6850	ahorvitz@littler.com
Joshua S. Roffman	202.414.6852	jroffman@littler.com
Lance E. Gibbons	202.789.3423	lgibbons@littler.com

OFCCP Releases FY2012 Corporate Scheduling Announcement Letters

During the last week of 2011, federal contractors and subcontractors began to receive their initial FY2012 Corporate Scheduling Announcement Letters (CSAL) from OFCCP. The letters were sent to contractors who have establishments identified for possible compliance evaluations during FY2012. The purpose of the CSAL letter is to put contractors on notice of possible compliance evaluations in an effort to ensure timely submission of the required materials when the actual compliance evaluation is scheduled. OFCCP typically initiates audits of every facility listed on these letters before the September 30 end of its fiscal year.

The list is not all-inclusive; with OFCCP typically issuing a second round of CSAL letters later in the year that identify additional establishments. Moreover, these letters typically do not include audits of corporate headquarters, functional affirmative action plans, and construction affirmative action plans. Therefore, it is possible that additional establishments might be selected for compliance evaluations during FY2012 that are not listed on this wave of CSAL letters.

Lastly, it appears that the CSAL letters are being sent to the individual who certified the contractor's EEO-1 reports and not the company's chief executive officer or president, as has been the case in the past. Therefore, the individual who certified the EEO-1 report for your company should be on the look-out for any letter from the OFCCP so that the contractor can have as much time as possible to prepare for any possible compliance evaluations.

New Defense Appropriations Bill Eliminates the Providing of Medical Services or Supplies through TRICARE as a Basis for Subcontractor Status and Federal Affirmative Action Obligations

In December 2011, President Obama signed the National Defense Authorization Act for Fiscal Year 2012, which included a provision designed to eliminate TRICARE reimbursement contracts and subcontracts as a basis for the OFCCP to assert jurisdiction over hospitals and the providers of medical supplies and services. This provision is a direct outcome of an October 2010 Department of Labor Administrative Law Judge decision, which held that OFCCP had jurisdiction to audit Florida Hospital of Orlando (FHO) because FHO received more than \$50,000 in reimbursement from TRICARE. The Department of Defense's TRICARE Management Activity (TMA)—the agency in charge of administering the military's health benefits program for military members and their families—submitted a sworn declaration in support of FHO asserting that it was never TMA's position that the onerous affirmative action obligations imposed by OFCCP's regulations were intended to apply to the vast network of health care providers who have agreed to participate in the TRICARE program. Moreover, in prior correspondence with OFCCP, TMA had expressed substantial concern that providers might choose not to participate in the future if such obligations applied. The legislative provision inserted into Section 715 of the NDAA of 2012 was designed to overrule the ALJ's opinion insofar as TRICARE reimbursement is concerned.

The elimination of TRICARE reimbursement as a basis for OFCCP to assert jurisdiction does not mean that hospitals and providers of medical supplies and services now are exempt from compliance obligations. Many hospitals and health care systems have direct contracts with federal agencies like the Department of Veterans Affairs, the Federal Prison Bureau, the Department of Defense, and contracts with CMS under Medicare Parts C and D. In addition, OFCCP issued a health care directive in December 2010 that reminds health care providers that there still exist a number of sub-contractual arrangements that could subject hospitals and other providers of medical services and supplies to its jurisdiction. For example, the Office of Personnel Management is responsible for setting up contractual arrangements with various HMOs to provide medical services to employees of the federal government and their families through the Federal Employees Health Benefits Program. If those direct HMO contracts are for the provision of medical services to federal employees, and the HMOs, in turn, enter into contracts with hospitals, pharmacies, medical suppliers, and so forth, in order to be able to provide medical services to federal employees, then the hospital's contract with the HMO may be a covered subcontract.

Hospitals and other providers of medical services and supplies need to assess precisely what types of contracts they have with entities that in turn may be contracting with the federal government to ascertain whether they have covered subcontracts that are "necessary to the performance" of the direct federal contract. The existence of a covered contract or subcontract imposes an obligation to prepare annual affirmative action plans, to engage in targeted outreach for women, minorities, individuals with disabilities and

veterans, and to list all non-executive and non-temporary jobs with employment services delivery systems in the location where the job is being filled, among many other obligations.

Because OFCCP has not yet published the health care directive on its website, interested persons may contact attorneys in Littler's OFCCP Practice Group for a copy of this directive.