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OFCCP's Veterans' and Individuals with Disabilities' Final Regulations Impose New Obligations on Federal Contractors and Subcontractors

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On September 24, 2013, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published in the *Federal Register* the final version of its revised affirmative action regulations for protected veterans and individuals with disabilities. These regulations are the same ones the OFCCP posted on its website on August 27, 2013, prior to formal publication. The effective date of the new regulations will be March 24, 2014, which is 180 days after the September 24, 2013 *Federal Register* publication date of the final regulations.

The final regulations are more streamlined and less burdensome than the original proposed rules that the OFCCP issued for notice and comment in 2011.¹ Some of the most significant concerns raised by federal contractors and subcontractors were addressed by the OFCCP in its final regulations, with some of the most onerous requirements from the proposed versions of the regulations made optional or eliminated in the final versions. Nonetheless, there are new processes that contractors will need to set up under the new regulations, and for the first time there will be specific data tracking and metrics in contractors' affirmative action plans for protected veterans and individuals with disabilities.

Hiring Benchmark for Veterans, Utilization Goal for Individuals with Disabilities

The centerpiece of the new regulations is the requirement of specific data analyses in conjunction with the OFCCP's affirmative action regulations for protected veterans and individuals with disabilities. For the veterans' regulations, this takes the form of a hiring benchmark. For the disability regulations, it will take the form of placement goals. The hiring benchmark will be used to look at the representation of veterans among the employer's hires. By contrast, the utilization goals under the disability regulations will be used as a basis for assessing the representation of individuals with disabilities within the employer's existing workforce, similar to the way placement goals have worked under affirmative action plans for women and minorities.

¹ The Notice of Proposed Rulemaking (NPRM) for the veterans' regulations was published on April 26, 2011. The NPRM for the disability regulations was published on December 9, 2011.

The OFCCP provides two options for how contractors can set their veteran hiring benchmark. The less complicated option is to set the hiring benchmark equal to the national percentage of veterans in the civilian labor force. The OFCCP will publish this information and update it annually. The second option is to follow the approach used in the OFCCP's proposed version of the regulations. Under that approach, the contractor would set its benchmark by taking into account:

1. The average percentage of veterans in the civilian labor force in the state(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP website;
2. The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the state where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP website;
3. The applicant ratio and hiring ratio for the previous year, based on the data collected by the contractor for its affirmative action plan data analyses;
4. The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts; and
5. Any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.

There seems to be no discernible benefit to using the second more complicated approach. It will involve more work, and both methodologies establish a hiring benchmark using primarily data on the availability of all veterans rather than the more limited group of "protected" veterans in the four specific veteran categories under the 2002 Jobs for Veterans Act. Precisely because the benchmarks will be based on data involving a larger group of veterans than those that contractors will be tracking in their affirmative action plans, it should not be surprising if the percentage of protected veteran hires lags behind the availability of all veterans in the civilian labor force.

The OFCCP's regulations call for the contractor to review its protected veteran hiring for the current and prior two plan years to assess its external outreach and recruitment efforts and inform or direct its veteran outreach and positive recruitment efforts. Under the veterans' regulations, the OFCCP will allow a contractor to evaluate its hiring across its entire workforce rather than job group by job group, a distinction that the OFCCP has confirmed in frequently asked questions (FAQs) it has posted regarding the regulations.

For the individuals with disabilities' affirmative action plan, the OFCCP has set a 7% utilization goal for employment, as opposed to hiring, of qualified individuals with disabilities for each of the job groups established in the contractor's women and minorities' affirmative action plans. As with the women and minorities affirmative action plan, the OFCCP allows contractors with 100 or fewer total employees to conduct a single utilization analysis for its entire workforce rather than by multiple job groups.

The individuals with disabilities utilization analysis will function similarly to the utilization analyses that contractors have been conducting in their women and minorities affirmative action plans. However, it does not appear that the OFCCP will allow the use of an 80% rule or standard deviation test in triggering the establishment of disability utilization goal and the corresponding requirement to identify problem areas and engage in action-oriented programs. Instead, a plain reading of the final regulations suggests that if the representation of individuals with disabilities in each job group is below 7%, those obligations will be triggered. Stated differently, it appears that disability utilization goals must be set using the "any difference rule" against the OFCCP's pre-established 7% standard. The regulations call for the OFCCP director to periodically review and update the 7% utilization goal.

Construction companies do not set female and minority goals by job group like supply and service contractors do. They have one goal for females in the construction trades, and a separate goal for minorities. Those goals cross EEO-1 categories. OFCCP has not explained how construction companies are expected to comply with this utilization requirement, given the completely different nature of their goal-setting obligations.

Obligation to Solicit All "Internet Applicants" to Self-Identify Protected Veteran and Disability Status

As expected, the final regulations will require contractors to solicit protected veteran and disability status information at the applicant stage. The scope of the obligation will be the same as the existing applicant solicitation obligations for gender and race/ethnicity information. That

is, contractors will be required to, at a minimum, solicit every candidate that meets the OFCCP's four-prong Internet Applicant definition to voluntarily self-identify as a protected veteran and/or an individual with a disability.

With regard to the veteran self-identification form used at the applicant stage, the OFCCP allows contractors to define the four "protected" veteran categories and then have each applicant self-identify simply as a "protected veteran." The OFCCP, however, gives contractors flexibility in what their form says so long as the form (1) states that the contractor is a federal contractor required to take affirmative action to employ and advance in employment protected veterans, (2) summarizes the relevant portions of the law and the contractor's affirmative action program, and (3) states that the information is being requested on a voluntary basis, will be kept confidential, refusal to provide it will not subject the applicant to any adverse treatment, and will not be used in a manner inconsistent with the law.

The applicant self-identification form for disability status that contractors will need to use will be developed by the OFCCP director and posted on the OFCCP's website, as will the form used at the post-offer stage. The OFCCP has not yet posted this form and contractors will have to refrain from beginning to implement applicant-stage disability status self-identification until the OFCCP has published the form that it will require contractors to use. The proposed self-identification form was three single-spaced pages, and we suspect some employers will be expected to translate the form into additional languages if the OFCCP does not offer to do that proactively.

Solicitation of Self-Identification of Disability Status from Incumbent Employees Within First Year of the New Regulations and at Least Every Five Years Thereafter

In addition to the new requirement for pre-offer self-identification of applicants and the existing requirement to solicit disability self-identification at the post-offer new hire phase, the final regulations also will require contractors to invite all of their current employees to voluntarily self-identify as an individual with a disability within the first year after the new regulations become effective and at least every five years thereafter. Contractors will also need to remind their employees at least once between each five-year resurvey that they may voluntarily update their disability status information. As with the pre-offer applicant-stage and post-offer hire-stage self-identification forms, the OFCCP director will be developing the language and manner for the incumbent employee self-identification resurvey.

Data Collection Analysis

The final regulations will require rudimentary data analyses of the following:

- Number of job openings
- Number of jobs filled
- Number of applicants for all jobs
- Number of applicants who self-identified as or are otherwise known to be individuals with disabilities and protected veterans
- Number of applicants hired
- Number of applicants with disabilities and protected veteran applicants hired

The data analyses must be updated annually. The regulations do not mandate that they be recorded by job group under either the veterans or individuals with disabilities regulations, so presumably one number for the entire workforce is acceptable.

Flexibility on Contractor Outreach Efforts and Action-Oriented Programs

Unlike the initial proposed versions of the OFCCP's regulations, which mandated certain specific outreach efforts including the development of formal "linkage" agreements between contractors and organizations that help place/recruit protected veterans and individuals with disabilities, the final regulations maintain the flexible, open-ended approach on contractors' specific outreach efforts and action-oriented programs, consistent with the current version of the regulations and the approach used in the women and minorities' affirmative action regulations.

Requirement of Specific Equal Opportunity Clause Language in Purchase Orders and Subcontracts

The final regulations will require contractors to use two precise sentences in bold in their subcontracts and purchase orders when passing down by reference the required Equal Opportunity Clauses at 41 CFR 60-300.5(a) and 41 CFR 60-741.5(a). The challenge is that the language being incorporated into all subcontracts and purchase orders does not apply to all suppliers. Only those subcontractors and suppliers who are selling above the dollar threshold (\$100,000 for the veteran EEO clause under 300.5(a) and \$10,000 for the disability EEO clause under 741.5(a)) and who are providing a good or service necessary to the performance of the government contract, are required to comply. It is likely that prime contractors will receive more inquiries from suppliers and vendors who will not always know whether the goods and services they are supplying to the purchaser are necessary for the performance of a government contract, or simply for a commercial contract unrelated to government work.

Three Year Recordkeeping Requirement

Relevant records under the protected veterans and disability affirmative action regulations must be maintained for three years. That is one year longer than the two year recordkeeping requirement under the women and minorities' affirmative action regulations, but shorter than the proposed five year recordkeeping requirement in the OFCCP's original proposed versions of these regulations.

State Job Postings

The final veterans regulations added language specifying that contractors posting with state workforce agencies "must provide information about the job vacancy in any manner and format permitted by the [workforce agency] which will allow [the workforce agency's system] to provide priority referral of veterans protected by [the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA)] for that job vacancy." The regulations also state that "[p]roviding information on employment openings to a privately run job service or exchange will satisfy the contractor's listing obligation if the privately run job service or exchange provides the information to [the state workforce agency] in any manner and format that the [workforce agency] permits which will allow that system to provide priority referral of protected veterans."

This language is designed to reinforce that the burden to prove a contractor's jobs actually were being listed properly with the state workforce agency rests with the government contractor. It will be insufficient to tell the OFCCP that an email was transmitted, or a fax was transmitted, if the state agency is not equipped to receive the postings by email or by fax. Multi-state employers will be required to learn how each state expects to receive those postings and adapt their transmission of the postings as required, or engage a third party to do it for them. Engaging a third party does not relieve the contractor of its burden of proof in an audit if the records are unavailable or missing entirely. It is going to place an increased burden on contractors to obtain periodic proof of compliance instead of waiting until an audit notice is received to do so.

"Other Protected Veterans" Become "Active-Duty Wartime or Campaign Badge Veterans"

The OFCCP's final regulations relabeled the former "Other Protected Veteran" category as "Active-Duty Wartime or Campaign Badge Veteran" to make the definition more descriptive and to avoid the incorrect presumption often made that this category includes every veteran that is not in one of the other three veteran categories. The OFCCP expects contractors to use the term "Active-Duty Wartime or Campaign Badge Veterans" instead of "Other Protected Veterans" in their self-identification forms and other documents developed under the protected veteran affirmative action programs. Contractors should be aware, however, that no corresponding change has been made to the VETS-100A form, where this category continues to be labeled as "Other Protected Veterans."

Elimination of Pre-Jobs for Veteran Act Regulations

The OFCCP final regulations will rescind the regulations previously found at 41 CFR Part 60-250, which included the veteran affirmative action requirements for pre-December 1, 2003, pre-Jobs for Veterans Act contracts, and the older protected veteran categories that existed under those regulations. The OFCCP concluded that contractors are quite unlikely to have any current contracts subject to those regulations

and thus has eliminated this parallel set of regulatory requirements which track the older protected veteran categories. The OFCCP's final regulations provide continued protection against discrimination for any veteran who was a protected veteran under the old categories but is not a protected veteran under the newer Jobs for Veterans Act categories.

Temporal Scope of Compliance Reviews

The OFCCP's final regulations explicitly allow the OFCCP to extend the temporal scope of desk audits beyond the period set forth in the scheduling letter if the OFCCP deems it necessary to carry out its investigation of potential violations under the protected veterans and individuals with disabilities regulations. Notably, the OFCCP has not updated its women and minorities' affirmative action regulations with a similar provision, although the Department of Labor's Administrative Review Board held that it may do so in *OFCCP v. Frito-Lay, Inc.* (ARB, May 8, 2012). That decision is currently on appeal in federal court.

Implementation Timeline

The requirements under the new regulations will take effect on March 24, 2014. Any affirmative action plans developed by a contractor between now and the effective date of the regulations can follow the current, pre-change regulatory requirements. Contractors will not be required to develop their affirmative action plan documents under the new regulations until they first update their annual affirmative action plan after the effective date of the new regulations. This means that companies that have calendar-year affirmative action plans will not be developing their first plan documents under the new regulations until 2015.

This delayed phase-in appears to extend also to the required data analyses and self-identification obligations under the final regulations. That is, contractors can wait to gather the new information until the beginning of their first *new* affirmative action plan cycle after the March 24, 2014 effective date of the new regulations. We nonetheless suspect that most employers will want to conduct the required survey of existing employees prior to preparing their first plans under the new regulations.

More Details to Come

In advance of the formal publication of the regulations in the Federal Register, the OFCCP conducted four web seminars on the new regulations, during which it gathered and began to answer numerous questions regarding these new rules. The OFCCP continues to gather questions from interested parties and it is expected that the OFCCP will provide additional guidance in the form of updated FAQs and other technical assistance in the coming months.

Littler Mendelson's OFCCP Practice Group is monitoring the continuing agency guidance and will share more detailed information about the new requirements as they develop.

Web Seminars

Littler Mendelson's OFCCP Practice Group will be scheduling complimentary web seminars in October 2013. We will be certain to publicize the precise dates and times of these seminars on our website and by email to our clients.

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