

April 10, 2014

OFCCP Publishes Additional Information Related to its New Protected Veterans and Disability Regulations

By Joshua S. Roffman and Deepa S. Menon

As new regulations from the Office of Federal Contract Compliance Programs (OFCCP) go into effect, the OFCCP has released guidance and materials to help covered contractors comply with the new requirements. The new resources include a hiring benchmark database, an updated outreach resources directory, and a Spanish language Section 503 self-identification form.

VEVRAA Benchmark Database

Under the OFCCP's new regulations for protected veterans, which went into effect on March 24, 2014, federal contractors with a covered federal contract or subcontract greater than or equal to \$100,000 are now required to adopt a hiring benchmark for protected veterans as part of the first new annual affirmative action program they develop after the regulations' effective date. To help contractors establish these hiring benchmarks, the OFCCP recently published additional materials and guidance regarding the establishment of these hiring benchmarks. The most notable of the items released by OFCCP was a database that included the various data points that contractors may elect to use in setting their benchmarks.

What is the Hiring Benchmark?

The hiring benchmark is what contractors will use to measure their progress toward achieving equal employment opportunity for protected veterans. With each affirmative action plan, contractors will be expected to measure the percentage of their new hires that self-identify as a protected veteran against the hiring benchmark established for that plan.

Methods for Establishing Hiring Benchmarks

The OFCCP's regulations provide two options for the required hiring benchmarks. The first option is to simply adopt the national percentage benchmark provided annually by the OFCCP. The second option is to establish a more individualized hiring benchmark using the five factors discussed below (under Option 2).

Option 1: Adopting the National Percentage Benchmark

The national percentage benchmark is calculated by the OFCCP based on the percentage of veterans in the civilian workforce, which includes those who are employed and those who are

unemployed but looking for work. Currently, the national percentage benchmark is 7.2%. This is slightly lower than the 8% figure that many in the contractor community had been expecting to see. This option does not require any additional calculation. This 7.2% benchmark is what most contractors will elect to use in their first affirmative action plans prepared under the new regulations.

Option 2: Developing Individualized Hiring Benchmarks

In an effort to afford federal contractors an opportunity to utilize a more individualized method to measure their veteran hiring, the OFCCP also will allow contractors to set their own annual benchmarks. Contractors can set their benchmarks by considering the five factors described below. While Factors 1 and 2 are objective and are provided by information in the Department of Labor's (DOL) new hiring benchmark database, Factors 3 and 4 are dictated by the data in the contractor's own affirmative action plan. Finally, Factor 5 allows contractors to consider other circumstances unique to the specific affirmative action plan.

1. **Factor 1: The average percentage of veterans in the civilian labor force for the state where the establishment is located, for the previous three years.** The DOL provides this data online¹ in two formats. One format provides the annual data for every state by year. The other provides three years of cumulative data for each individual state.²
2. **Factor 2: The number of veterans who participated in the employment service delivery system in the state where the establishment is located, over the previous four quarters.** The DOL tabulates this data, which can be accessed online.³
3. **Factor 3: The applicant ratio and hiring ratio for the establishment for the previous year.** The contractor can calculate the applicant ratio by comparing the number of protected veteran applicants to the total number of applicants per the contractor's Affirmative Action Plan. Similarly, to calculate the hiring ratio, the contractor should compare the number of protected veterans hired to the total number of hires.
4. **Factor 4: The most recent assessment of the effectiveness of the contractor's outreach and recruitment efforts.** For example, if the contractor's outreach efforts attracted (or failed to attract) a large pool of protected veteran applicants, that information could influence the benchmark.
5. **Factor 5: Any other factor, such as the nature of the job openings or the facility's location, that would tend to affect the availability of qualified protected veterans.** This factor provides contractors with the flexibility to consider any other pertinent factors about their establishment or the nature of their business that might affect the availability of qualified protected veterans. For example, if all of the open positions were engineering positions and the facility is not located in an area that has higher education facilities or highly skilled workers, this factor could influence the benchmark that the contractor chooses to set.

The OFCCP recognizes that contractors would not have access to Factor 3 (the applicant ratio and hiring ratio) and Factor 4 (assessment of outreach and recruitment efforts) during the first plan year under the new regulations, as this is a transitional year. Accordingly, contractors electing to set their own benchmark using the five factors will not be required to consider these two factors during their first annual plan cycle under the new regulations.

The contractor's final benchmark does not have to use all factors (although the contractor is required to consider all five factors). According to its guidance, the OFCCP will defer to the contractor on what factor(s) it utilizes to set the benchmark. In the transitional year example provided by the OFCCP, the hypothetical contractor calculated the individualized benchmark using just Factor 1 – *i.e.*, by averaging the three years of availability data for the state. In the second example, the hypothetical contractor calculated the benchmark using its own applicant and hiring ratio data because its recruitment efforts yielded a significant pool of qualified veteran applicants.

Choosing the Benchmark Option: Advantages & Disadvantages

Contractors can choose to set their benchmark using the national percentage or the individualized factors. Contractors with multiple affirmative action plans may choose to use different options for different plans.

1 U.S. Department of Labor, VEVRAA Benchmark Database, available at <http://www.dol-esa.gov/errd/VEVRAA.jsp>.

2 Contractors in Puerto Rico or the U.S. Virgin Islands are expected to use the data applicable to Florida. Contractors in Guam are expected to use the data applicable to Hawaii.

3 Because the data is not available for Guam, contractors in Guam are expected to use the data applicable to Hawaii.

Opting to set the hiring benchmark using the national percentage simplifies the process, saves the contractor the trouble of calculating and/or assessing multiple factors, and is less likely to prompt follow-up questions from the OFCCP. On the other hand, this option deprives the contractor of the flexibility to use factors such as recruitment activities, location, etc., to influence the hiring benchmark.

Given that three of the five factors under the individualized option are localized and subjective, the second option may permit the contractor to better capture the contractor's particular circumstances. Additionally, per the OFCCP's guidance, so long as the contractor reasonably describes and documents the factors it took into account and its methodology for considering them, the contractor will be found to be in compliance with the regulations. The disadvantage of this option, however, is that the burden to gather and evaluate the requisite data rests on the contractor. Additionally, in both examples provided by the OFCCP, the individualized benchmark was set higher than the national percentage. It is unclear how the OFCCP will react if the benchmark is lower than the national percentage. There is reason to believe that the OFCCP would have an unfavorable view if a contractor chose to set its hiring benchmark below the pre-set national percentage. On the other hand, if the benchmark is higher than the national percentage, one wonders whether the contractor will be viewed in a more favorable light. That said, the contractor would just as easily be able to demonstrate its great success if its veterans hiring level well exceeded the national benchmark, which then raises the question of whether there is any advantage in setting the benchmark higher than the national average.

While the OFCCP is not likely to penalize contractors for hiring benchmark data during the first (and maybe even first two) years of implementation, the agency's preferences and potential follow-up queries regarding the setting and evaluation of hiring benchmarks will remain to be seen until the OFCCP begins conducting compliance reviews under the new regulations.

New Outreach Resources Directory

On March 13, 2014, the OFCCP released a new outreach resources directory.⁴ This directory captures a non-exhaustive list of groups and organizations that are available to help contractors recruit, train, and hire qualified veterans and individuals with disabilities. The directory, which supplements the agency's existing Employment Resources Referral Directory (ERRD), allows contractors to search by state. The OFCCP will continue to update available resources, and contractors are encouraged to review the directory periodically.

503 Self-Identification Form

The OFCCP has posted, in PDF and Word formats, both English and Spanish versions of the Voluntary Self-Identification of Disability Form required by the new regulations implementing Section 503 of the Rehabilitation Act (Section 503). Federal contractors and subcontractors must use the forms developed by OFCCP for all solicitations of self-identification of disability status being conducted under the new regulations. Federal contractors and subcontractors must begin using these forms at the start of their next affirmative action plan cycles after March 24, 2014.

The Forms can be accessed online.⁵ Nothing in the OFCCP's regulations or in the sub-regulatory guidance provided by the OFCCP mandates that contractors must use the Spanish language version of the form. Nonetheless, it is advisable for employers that have a significant number of employees or applicants whose primary language is Spanish to offer the form in both languages to all of their applicants, new hires, and employees—allowing the employee/applicant to decide which of the two forms to use.

[Joshua S. Roffman](#) is a Shareholder in Littler's Northern Virginia and Washington, DC offices, and [Deepa S. Menon](#) is an Associate in the Washington, DC office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Roffman at jroffman@littler.com, or Ms. Menon at dmenon@littler.com.

4 U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), Disability and Veterans Community Resources Directory, available at <http://www.dol-esa.gov/errd/resources.html>.

5 U.S. Department of Labor, Office of Federal Contract Compliance Programs (OFCCP), New Regulations: Section 503 of the Rehabilitation Act, available at <http://www.dol.gov/ofccp/regs/compliance/section503.htm>.