

ContractManagement

A Practical Guide to Compliance with OFCCP's New Regulations on Affirmative Action for Veterans and Those with Disabilities

A summary of the new rules, along with practical suggestions for compliance.

February 2014

By David J. Goldstein

On Sept. 24, 2013, the Office of Federal Contract Compliance Programs (OFCCP) published final rules requiring federal contractors to significantly modify their affirmative action programs for veterans and persons with disabilities. This article summarizes the new rules and offers practical suggestions for compliance.

Entities doing business with the federal government must follow certain regulations requiring equal opportunity in employment and mandating affirmative action. These obligations are enforced by OFCCP, an agency within the U.S. Department of Labor. For example, federal contractors must follow Section 503 of the Rehabilitation Act of 1973, which requires affirmative action to employ and advance qualified workers with disabilities. The law applies to contractors with a covered federal contract or subcontract of \$10,000 or more. Covered contractors and subcontractors with 50 or more employees and a government contract or subcontract of \$50,000 or more must also create and apply a written Section 503 affirmative action program.

Another law enforced by OFCCP is the Vietnam Era Veteran's Readjustment Assistance Act of 1974 (VEVRAA). VEVRAA requires contractors to take affirmative action to employ and advance in employment certain categories of veterans and veterans with disabilities. It applies to contractors with covered federal contracts or subcontracts of \$100,000 or more.

Section 503 and VEVRAA apply to both goods and services contractors, as well as construction contractors. While the federal requirements for affirmative action with regard to women and minorities (as established by Executive Order 11246) treat construction contractors very differently from other types of contractors, Section 503 and VEVRAA make no distinctions based on industry.

OFCCP's regulations implementing Section 503 and VEVRAA have always required contractors to engage in outreach. Historically, however, enforcement of these laws has been relatively infrequent, with OFCCP tending to prioritize issues relating to women and minorities. Under President Barack Obama's administration, on the other hand, OFCCP has not only been zealous in auditing compliance with the existing regulations, but it has also recently published new rules imposing additional obligations on federal contractors and enhancing the agency's ability to scrutinize compliance efforts.

The New Rules

Although issued separately, the new regulations regarding veterans and disabled workers are largely parallel in their structure. Accordingly, both rules will be discussed simultaneously.

Federal contractors are already accustomed to the process of assessing their equal employment opportunity/affirmative action efforts by estimating the availability of women and minorities qualified for particular jobs and then comparing that estimated availability to the percentage of women and minorities that the contractor actually employs in those positions. Construction contractors deal with a somewhat different process that requires them to track the hours worked by women and minorities in trade jobs as a percentage of all of the hours worked in such jobs and attempting to meet percentage goals for the utilization of women and minorities as established by OFCCP.

Under the new regulations, similar concepts will now apply to affirmative action programs for veterans and individuals with disabilities. With regard to veterans, contractors will be measuring the representation of veterans among all the individuals hired each year. With regard to individuals with disabilities, contractors will be monitoring overall employee populations (that is, the percentage of individuals with disabilities in the contractor's workforce at particular points in time).

The Hiring Benchmark for Veterans

The new regulations require contractors to:

- Periodically calculate the percentage of all new hires who are considered "veterans" under the regulations,
- Compare that percentage to a particular benchmark,
- Regularly assess the effectiveness of the contractors' efforts to hire veterans, and
- Take appropriate, positive action to effectively attract and hire veterans.

Contractors have two options for establishing the benchmark for veteran hires. They may adopt a hiring benchmark based on the national percentage of veterans in the civilian labor force, as annually determined by OFCCP (currently set at eight percent), or they may calculate their own benchmarks in accordance with OFCCP guidelines. Contractors that wish to set their own benchmarks may take into account the following:

- The average percentage of veterans in the civilian labor force in the state where the contractor is located over the preceding three years, which would be calculated by the Bureau of Labor Statistics and published on the OFCCP website;
- The number of veterans in the previous four quarters who participated in the employment service delivery system in the state where the contractor is headquartered, as tabulated by the veteran's employment and training service and published on the OFCCP website;
- The contractor's applicant ratio and hiring ratio for the previous year based on the data collected by the contractor for its data analyses;
- The contractor's assessment of the effectiveness of its outreach and recruitment efforts; and
- Any other factors that would affect the availability of qualified protected veterans.

The benefit from adopting a customized benchmark is uncertain and the calculation is complex. Accordingly, most contractors will likely use the straightforward benchmark published by OFCCP.

The benchmark must then be used to annually assess protected veteran hiring for the current year and two prior years. This review must then be used to inform or direct the contractor's veteran outreach and positive recruitment efforts going forward. In performing this assessment, contractors will look at each establishment as a whole rather than performing the analysis on a job-group-by-job-group basis.

Utilization Goal for Individuals with Disabilities

The new regulations establish a goal for the utilization of those with disabilities to be used by contractors to assess the sufficiency of contractors' efforts to employ these individuals. This is similar to the use of placement goals in connection with affirmative action plans for women and minorities. The goal established by OFCCP applies nationally and to all job groups.

For now, the goal has been set as a seven percent utilization goal for employment of qualified individuals with disabilities for each of the contractor's job groups as they are established in the contractor's women and minorities affirmative action plans. Goods and services contractors will perform this utilization analysis by establishment on a group-by-group basis. The requirement of an analysis by job group may pose significant difficulties for some construction contractors, however, because they are not required under OFCCP's existing rules to create affirmative action plans or define job groups. Although some of the comments submitted in response to OFCCP's proposed rule requested an exemption of construction contractors from this requirement, OFCCP rejected that request in its final rule without any analysis of this problem. Small contractors (those with 100 or less employees) are permitted to conduct a single analysis for the entire workforce, rather than by job group.

Inviting Applicants to Self-Identify

Another significant change under the new regulations is the creation of expanded obligations to invite applicants to self-identify. The Americans with Disabilities Act and many state laws bar employers from soliciting information from applicants regarding disability. Accordingly, contractors currently should not be inviting applicants to self-identify regarding disability or status as a protected veteran (which includes status as a veteran with a disability) before extending a conditional offer of employment.

Now, under the new rules, contractors will be required to solicit protected veteran and disability status information at the applicant stage. Perhaps not surprisingly, litigation has already been initiated in an effort to invalidate the new rules due to the perceived inconsistency between the regulations and the Americans with Disabilities Act (and other laws).

The scope of this new obligation will be the same as the existing applicant solicitation obligations for gender, race, or ethnicity information. Every "Internet applicant" must be invited to voluntarily self-identify as a protected veteran and/or an individual with a disability. OFCCP's Internet applicant rule determines which individuals must be invited to self-identify and when. Employers are not required to invite every individual who expresses interest in a job to self-identify. Under OFCCP's rule, this obligation only applies to individuals who meet the definition of an "Internet applicant," which is a person who:

- Submits an expression of interest in a job through the Internet or related electronic data technologies;
- Is considered by the employer for a particular position;
- Indicates, as part of the expression of interest, that he or she has the basic qualifications for the position; and
- Does not remove him or herself from consideration before receiving a job offer or otherwise indicate that he or she is no longer interested.

Under OFCCP's existing rules, contractors have the option of inviting self-identification at the beginning of the application process from every applicant. A contractor that does this will likely be soliciting information about race or sex from some individuals who ultimately will not meet the criteria of an Internet applicant. The alternative is to send the invitation to self-identify later in the process, which means that employers may request this information from those who have already been turned down for the position. Such situations are not only awkward, but also unlikely to result in a high rate of response to the invitations.

For these reasons, many contractors invite applicants to self-identify as to race and sex as part of the initial application. When OFCCP's new rules go into effect, such contractors will most likely be inclined to invite applicants to self-identify as a veteran or person with a disability at the same time.

Employers must protect the confidentiality of any disclosed information regarding disability and veteran status. Such information must be kept entirely separate from the individual's other application-related

records and should not be available to anyone involved in making selection decisions. Information obtained at the application stage should only be used for compiling the data required by OFCCP.

Contractors may draft their own forms for inviting applicants to self-identify regarding veteran status, provided the form:

- Defines the four “protected” veteran categories and then invites the applicant to self-identify simply as a “protected veteran”;
- States that the contractor is a federal contractor required to take affirmative action to employ (and advance in employment) protected veterans;
- Summarizes the relevant portions of the law and the contractor’s affirmative action program;
- States that the information is being requested on a voluntary basis, will be kept confidential, and will not be used in a manner inconsistent with the law; and
- States that the refusal to provide the information will not subject the applicant to any adverse treatment.

OFCCP has also published a sample form as an appendix to the VEVRAA rule. However, because OFCCP’s sample form is long and complicated, most employers will probably choose to develop their own versions.

With respect to the identification of veterans, OFCCP is discontinuing the term “other protected veteran” and replacing it with “active-duty wartime or campaign badge veteran.” The agency says this new term is more descriptive and will help to avoid the incorrect presumption that this category includes every veteran not in one of the other categories of veterans. Contractors are required to use this new term on their self-identification forms and other program-related documents. However, the “VETS-100A” form, which is administered by a separate agency, will continue to use the term “other protected veteran.”

With regard to the invitation to identify as to disability, OFCCP is developing a form that contractors will be required to use. This form will be posted later on OFCCP’s website.

Inviting Employees to Self-Identify

Because disabilities may be acquired or overcome during the course of employment, the new rules require contractors to periodically survey their employees to determine the current utilization of individuals with disabilities. Within the first year of becoming subject to the new rule, contractors must invite all of their current employees to voluntarily self-identify if the employee is an individual with a disability.

After the first survey is conducted, employers must then conduct a new survey at least once every five years. At least once between each five-year survey, contractors must remind employees that they may voluntarily update their status. The self-identification form to use will be developed by OFCCP and posted on its website.

Data Collection and Analysis

- The new regulations also require contractors to annually record the following information:
- Number of job openings;
- Number of jobs filled;
- Number of applicants for all jobs;

- Number of applicants who self-identified as, or who 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 regulations do not mandate an analysis of this data by job group under the veterans or individuals with disabilities regulations. It would appear that a single number for each will be accepted with regard to each category.

Outreach and Action-Oriented Programs

The final regulations continue to permit an open-ended approach to outreach and action-oriented programs. The contractor's activities must be documented and they must prepare an annual written assessment of the effectiveness of each activity. Where a contractor's efforts have not been effective, the contractor must identify and implement other ideas.

Employment Advertising

The new regulations also create obligations involving employment advertising. The regulations state:

[T]he contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability. A similar provision in the VEVRAA rule says contractors must state that "all qualified applicants will receive consideration for employment without regard to their protected veteran status."

Using the notation "EEO/AA/M/F/Vets/Disabled" to indicate that the employer takes affirmative action with regard to minorities, women, veterans, and those with disabilities will satisfy the new regulatory requirements.

Notices to Applicants and Employees

The new regulations require contractors to post notices in conspicuous places that are available to employees and applicants and in a form to be prescribed by OFCCP. This obligation is mostly the same as the requirement under the former rules. However, the regulations helpfully provide that notices may be distributed by electronic means.

The regulations further require contractors using electronic or Internet-based application processes to provide an electronic notice of employee rights and contractor obligations, which is to be "conspicuously stored with, or as part of, the electronic application." This seems to mean that the notice must be given as part of the application form. Many Web-based application processes require the completion of an electronic application. Only after that form has been submitted is the applicant directed to a screen that includes the required notice of employee rights and contractor obligations. Under the new rule, this notice must be included as part of the same screen(s) as the application form.

Required Language for Purchase Orders and Subcontracts

The new VEVRAA regulations require contractors to include the following language in subcontracts and purchase orders:

This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

The Section 503 regulations require contractors to include the following language in covered subcontracts and purchase orders:

This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.

Rather than attempt to determine whether particular contracts or purchase orders are “covered” and require the inclusion of these clauses, most contractors will choose to incorporate a conditional version of these provisions into their standard forms. For example, the contractor may include a modified version of the clause that begins, “if applicable, this contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). . . .”

State Job Postings

The new rules do not change the existing requirement that VEVRAA-covered contractors post job openings with state workforce agencies. However, the new regulations emphasize that the burden to post jobs (and to prove that they have been posted) rests entirely with the contractor, explicitly stating that it is the contractor’s responsibility to provide information about job vacancies in a manner and format that will allow the workforce agency system to provide priority referral of veterans protected by VEVRAA for those vacancies.

Contractors must either develop their own expertise in the procedures for posting jobs or outsource this activity to a third party. When engaging a third party to satisfy this obligation, contractors should obtain an agreement that the third party will properly document compliance and make that documentation available (even if the relationship has ended) for the contractor so the contractor may either self-audit or turn the documentation over to OFCCP in the event of a compliance review.

Timetable for Compliance

The new regulations become effective on March 24, 2014. However, contractors are not required to revise affirmative action plans already in place as of March 24, 2014, or to implement some of the other new requirements until the next annual revision of their affirmative action plans following the effective date of the new regulations.

Contractors drafting their annual affirmative action plans between now and March 23, 2014, do not have to use the new language in their existing plans. Plans renewed on or after March 24, 2014, must comply with the new regulations.

Contractors must not invite self-identification as to disability or veteran status prior to the effective date of the regulations. Until the regulations become effective, it is unlawful to solicit this information.

However, there is no reason for employers to hold off on enhanced outreach efforts (especially in light of the Obama administration’s focus on veterans and those with disabilities in OFCCP compliance reviews). With contractors scrambling to comply with the new rules, organizations and agencies that service veterans and those with disabilities are likely to receive numerous requests for assistance from government contractors. These organizations and entities may not have the resources to respond adequately to the new demand. Under these circumstances, effective outreach will require a thoughtfully implemented strategy.

Contractors should not conduct the required initial survey of employees until OFCCP publishes the prescribed self-identification form and probably not before the effective date of the regulations. In general, existing contractors will have until at least March 23, 2015, to conduct their initial survey of the workforce.

Record Retention

The new regulations require that relevant records must be maintained for three years. This is an increase compared to the current two-year requirement under the Executive Order regulations (or the one-year requirement for certain smaller contractors).

The regulations also expand OFCCP's authority to demand the production of documents off site during an audit and allow OFCCP to extend the scope of desk audits beyond the period set forth in the scheduling letter if OFCCP deems it necessary. This provision is intended by OFCCP to address an issue in litigation currently under the Executive Order 11246 regulations.

About the Author

DAVID J. GOLDSTEIN is a shareholder in Littler Mendelson's Minneapolis office. He advises employers on legal and regulatory compliance, including the preparation and approval of affirmative action plans. He represents employers in connection with OFCCP, state, and local compliance reviews and in federal and state court litigation involving employment contracts, restrictive covenants, discrimination, alleged statutory violations, and other matters. He can be reached at dgoldstein@littler.com.

"Originally published in the February 2014 issue of Contract Management Magazine. Copyright 2014, National Contract Management Association."