

New Obligations Imposed on Federal Government Contractors with OFCCP's Issuance of Final Regulations Covering Veterans and Individuals with Disabilities

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The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") issued its much anticipated final regulations regarding the Vietnam Era Veterans Readjustment Assistance Act, as amended, and Section 503 of the Rehabilitation Act of 1973, as amended ("Rehabilitation Act"), published in the *Federal Register* on September 24, 2013. The new regulations will substantially expand the affirmative action obligations imposed on federal government contractors and subcontractors (collectively, "contractors"), effective March 24, 2014, including creating a benchmark for the hiring of protected veterans and establishing a utilization goal for the employment of individuals with disabilities.

Going forward, it is clear that the OFCCP will be focused during compliance reviews not only on rooting out discrimination in hiring and compensation, but also on scrutinizing contractors' documented efforts to increase the employment opportunities for protected veterans and individuals with disabilities. "Protected veterans" include disabled veterans, recently separated veterans, active duty wartime or campaign badge veterans (previously identified as "other protected veterans"), and Armed Forces service medal veterans. The definition of "disability" as applied to individuals with disabilities is consistent with the definition under the American with Disabilities Act, as amended ("ADA").

This *Act Now Advisory* highlights the major changes under the new regulations that will affect contractors. It is therefore incumbent upon contractors to seek advice and counsel regarding all of their nondiscrimination and affirmative action obligations under the new regulations.

Hiring Benchmark and Utilization Goal

Most notably, the new regulations require contractors to create a benchmark for hiring protected veterans and to establish a utilization goal for employing individuals with disabilities. The benchmark and goal are not quotas, nor are they a floor or ceiling for

hiring veterans and employing individuals with disabilities. Rather, they serve as a yardstick against which contractors can measure their success in hiring and employing such individuals.

Protected Veterans

With regard to the employment of protected veterans, by setting a hiring benchmark, the OFCCP has created a quantifiable method by which contractors “can *measure progress* toward achieving equal employment opportunity” by tracking, on an annual basis, the percentage of protected veterans that apply for and are hired into positions (emphasis added). The benchmark is set each year by the contractors, either as the percentage of veterans (not just protected veterans) in the civilian labor force nationally, presently 8 percent, or as a percentage as determined by a contractor, taking into account a number of variables, including the employment activity of veterans in the states in which the contractor is located, the contractor’s applicant and hiring ratios, and the assessment of the contractor’s external outreach and recruitment efforts. With the benchmark options in their infancy, we recommend initially using the percentage of veterans in the civilian labor force nationally (8 percent) as the hiring benchmark.

Armed with the hiring benchmark, on an annual basis, contractors must track the number of applicants who self-identify as protected veterans, the total number of job openings and total number of jobs filled, the total number of applicants for all jobs, the number of protected veteran applicants hired, and the total number of applicants hired. Once collected, contractors must compare the percentage of protected veterans hired to the hiring benchmark, and, in light of the results, assess their outreach and recruitment efforts during the prior three-year period. Make no mistake, the OFCCP will use this data in a compliance review “to measure the effectiveness” of contractors’ outreach and recruitment efforts. Although the need to do so is not spelled out in the new regulations, contractors should consider performing an impact ratio analysis to ensure that there is no adverse impact on the hiring of protected veterans compared to all other hires.

Individuals with Disabilities

With regard to the employment of individuals with disabilities, the OFCCP is concerned not just with the hiring of such individuals, but also with their employment throughout a contractor’s workforce. Specifically, the OFCCP has established a utilization goal of 7 percent for the employment of qualified individuals with disabilities *for each job group* in the contractor’s workforce. As a result, placement goals will need to be set for each job group (or the entire workforce if the contractor employs 100 employees or less) where the percentage of employees with disabilities is less than 7 percent.

Because individuals with disabilities make up 4.83 percent of the workforce nationally, according to the OFCCP, the utilization goal of 7 percent is “an equal employment opportunity objective *that should be attainable*” (emphasis added). To meet the new requirements, a utilization analysis must be performed each year using the contractor’s existing job groups. Where there is underutilization, the contractor is required to take

steps to determine whether and where impediments to equal employment opportunity exist, assessing its personnel processes, the effectiveness of its outreach and recruitment efforts, and any other areas that might affect the success of the program.

Again, on an annual basis, contractors must track the number of applicants who self-identify as individuals with disabilities, the total number of job openings and total number of jobs filled, the total number of applicants for all jobs, the number of protected veteran applicants hired who are individuals with disabilities, and the total number of applicants hired. With this data, contractors need to compare the percentage of individuals with disabilities hired to the utilization goal, and, in light of the results, assess their outreach and recruitment efforts during the prior three-year period. To be sure, the OFCCP will use this data in a compliance review “to measure the effectiveness” of contractors’ outreach and recruitment efforts. Similar to the analysis that they should perform concerning protected veterans, contractors should also consider performing an impact ratio analysis to ensure that there is no adverse impact in the hiring of individuals with disabilities compared to all other hires.

Other Major Changes

The new regulations brought about additional changes, including the following:

- Contractors are required to review, on an annual basis, the outreach and recruitment efforts undertaken to evaluate their effectiveness in identifying and recruiting qualified protected veterans and individuals with disabilities, documenting each evaluation and identifying alternative efforts if the efforts employed were not effective.
- Contractors are required to invite applicants to voluntarily self-identify as an individual with a disability and a protected veteran at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to voluntarily self-identify after receiving a job offer. (Note: Although employers are prohibited under the ADA from making pre-employment inquiries regarding disabilities, contractors are now required to do so under the Rehabilitation Act and its implementing regulations).
- Contractors are required to invite incumbent employees to voluntarily self-identify as an individual with a disability following the effective date of the new regulations and then at five-year intervals. Further, contractors are required at least once during the intervening years to remind their employees that they may voluntarily update their disability status.
- Contractors are required to include specific, mandated language in their subcontracts in order to alert subcontractors to their responsibilities as federal contractors and to indicate in solicitations or advertisements for employees that all qualified applicants will receive consideration for employment without regard to their status as a protected veteran or individual with a disability.

- Contractors are required to notify the state employment service delivery systems in each state in which they are located that they are federal contractors desiring referrals of protected veterans for job openings, providing the contact information of the individuals responsible for hiring.
- Contractors are required to document all activities that they undertake to comply with the affirmative action obligations, retaining such documents for a period of three years.

What Employers Should Do Now

The new regulations are effective March 24, 2014. While contractors must comply with the new requirements as of that date, a contractor's affirmative action program ("AAP") plan documents need not be updated until the commencement of the contractor's next program year. In other words, a contractor with a program year start date of January 1 need not prepare new plan documents compliant with the new rules until January 1, 2015. In the interim, contractors should consider taking the following action steps:

- Review and update existing technologies, including the human resource information system ("HRIS") and applicant tracking systems.
- Review and update processes for communicating with applicants, new hires, and employees regarding invitations to self-identify their status as a protected veteran or individual with a disability.
- Develop processes to provide job postings to state employment service delivery systems and organizations identified for outreach to ensure that postings are provided in the appropriate manner and format.
- Review and update recordkeeping processes regarding documentation of requests for accommodation, outreach, recruitment, and job postings.
- Modify contract and purchase order templates to include newly expanded flow-down language regarding affirmative action obligations of subcontractors.
- Establish an audit and reporting system to measure the effectiveness of the AAPs and determine the need for remedial action, the attainment of objectives, and the compliance with specific affirmative action obligations, including the need to document compliance activity.
- Train human resources personnel to ensure proper implementation of the AAPs and documentation of compliance efforts.

Attorneys at Epstein Becker Green will be conducting webinars on the new regulations in the coming months. For more information now about this *Act Now* Advisory, please contact:

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