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EXPANDING COMPLIANCE OBLIGATIONS: WHAT FEDERAL CONTRACTORS NEED TO KNOW ABOUT OFCCP'S NEW DISABILITY AND VETERANS REGULATIONS

Federal government contractors will soon be subject to expansive new affirmative action regulations under the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") and Section 503 of the Rehabilitation Act ("Section 503"). Published on September 24, these new regulations impose, among other things, new hiring benchmarks and utilization goals for veterans and individuals with disabilities. The new regulations will take effect on March 24, 2014. While many provisions will take effect immediately on that date, contractors will not be required to amend affirmative action plans that are then in place; they will, however, have to ensure that affirmative action plans prepared after the effective date comply with the expanded obligations.

Shortly before issuing these regulations, the OFCCP also issued a new, comprehensive compliance manual to guide agency compliance officers in their compliance evaluations and complaint investigations. And, earlier in the year, the agency rescinded its prior guidance on compensation discrimination and issued a new Compliance Directive 307. Given these various developments, federal government contractors would be well advised to thoroughly review their affirmative action and OFCCP compliance efforts and put into place measures to ensure compliance going forward.

KEY PROVISIONS OF NEW REGULATIONS

The new regulations impose the following key new requirements on contractors:

Prime contractors will be required to include certain specified language in their subcontracts to make subcontractors aware of their affirmative action and compliance obligations. Lengthy equal opportunity clauses applicable to protected veterans and workers with disabilities are set out in both sets of regulations. Although prime contractors will not be required to include the entirety of these clauses verbatim

in their contracts, the clauses must be made part of those subcontracts by referencing VEVRAA by citation to 41 C.F.R. § 60-300.5(a), and Section 503 by citation to 41 C.F.R. § 60-741.5(a). Contracts must also include specific language, set in bold text, stating that these regulations prohibit discrimination against qualified protected veterans and individuals on the basis of disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and individuals with disabilities. For the specific language required, *see* 41 C.F.R. §§ 60-300.5(d), 60-741.5(d).

While this language is now required, the regulations also state that whether or not the language is physically incorporated into a contract, and whether or not there is a written contract between the agency and the contractor, these clauses will, by operation of law, be considered to be a part of every contract. *See* 41 C.F.R. §§ 60-300.5(e), 60-741.5(e). In other words, failure to include these clauses in a contract will not absolve subcontracting parties of their responsibility to abide by their terms.

Contractors will be required to establish annual hiring benchmarks for veterans based either on the national percentage of veterans in the workforce as reported annually by the OFCCP (currently 8 percent) or on their own availability estimates derived using the best available data. The VEVRAA regulations state that this new hiring benchmark "is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups." *See* 78 Fed. Reg. 58613, 58638 (Sept. 24, 2013). Rather, the OFCCP's stated purpose for establishing the benchmark "is simply to provide the contractor a quantifiable means to measure its progress towards achieving equal employment opportunity for protected veterans." *See id.* at 58639. Nevertheless, the OFCCP estimates that, to meet the 8 percent benchmark, federal contractors will need to hire an additional 205,500 protected veterans.

If contractors determine that the national average is not appropriate for their workplace, the regulations allow them to opt to establish their own hiring benchmark for protected veterans. If a contractor chooses to establish its own benchmark based on its own data, the regulations lay out five factors it must take into account in doing so. These factors are: (i) the average percentage of veterans in the labor force in the state where the contractor is located, as calculated by the Bureau of Labor Statistics; (ii) the raw number of veterans who participated in the employment service delivery system in the state where the contractor is located; (iii) the applicant ratio and hiring ratio for the previous year; (iv) the contractor's recent assessment of the effectiveness of its external outreach and recruitment efforts; and (v) any other factors, including the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans. *See* 41 C.F.R. § 60-300.45(b)(2). This last factor in particular allows a contractor flexibility to take into account additional factors it thinks may increase or decrease a reasonable benchmark and to weigh those factors in a reasonable manner. The OFCCP has stated that "[s]o long as the contractor adequately described and documented the factors it took into account, it would comply with the § 60-300.45 requirement." *See* 78 Fed. Reg. at 58638.

Thus, contractors are required to document the hiring benchmark they establish and retain this data for three years. Failure to implement a benchmark will be considered a violation and could lead to an enforcement action. The OFCCP has explained, however, that a contractor will not be subject to an enforcement action or additional affirmative action obligations based "solely" on its failure to meet the hiring benchmark. *See id.* Rather, the agency will "expect that as part of its annual recruitment and outreach assessment, the contractor would assess why it did not meet the benchmark and adjust its recruitment efforts for the following year based on what it has learned." *See id.*

Contractors will be subject to a 7 percent utilization goal for employment of qualified individuals with disabilities for each job group or, for smaller employers, for the entire workforce. OFCCP derived its 7 percent utilization goal by combining estimates of the current representation of individuals with disabilities in the workforce (5.7 percent) with an estimate of what the OFCCP deems to be the discouraged worker effect (estimated at 1.7 percent). Although OFCCP states that the "utilization goal," like VEVRAA's "hiring benchmark," is not an inflexible quota that must be met but, rather, "serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part," OFCCP also

states that it expects that to meet this utilization target, government contractors will have to hire an additional 600,000 people with disabilities. *See* 78 Fed. Reg. 58684, 58708 (Sept. 24, 2013).

The OFCCP denies that the utilization goal will require "disability-based decision making," and insists that it should instead be used as a tool to measure the effectiveness of the contractor's employment practices as they relate to equal employment opportunity for qualified individuals with disabilities. *Id.* The regulations explicitly state, and the OFCCP has reiterated, that a contractor's failure to meet this goal will not result in any violation and does not in and of itself constitute either a finding or admission of discrimination. *See id.*; 41 C.F.R. § 60-741.45(g). However, the regulations make clear that if the utilization goal is not met, the contractor will have to take steps to determine whether and where impediments to equal opportunity exist and must develop and execute action-oriented programs designed to correct any identified problem areas. *See* 41 C.F.R. § 60-741.45(e), (f). Because this is not merely a hiring benchmark but a goal relating to the *utilization* of individuals with disabilities, contractors will need to evaluate not only their recruiting and hiring practices but also their retention of individuals with disabilities. Thus, contractors should be aware that failure to reach the 7 percent utilization goal may implicate their responsibility to take concrete steps to address the discrepancy and may lead to heightened scrutiny by the agency.

Contractors are to invite applicants to self-identify as protected veterans or individuals with disabilities at both the pre-offer and post-offer phases of the application process. The VEVRAA regulations require contractors to invite applicants to self-identify pre-offer as a "protected veteran" and then to invite a successful applicant to inform the employer whether he or she believes that he or she belongs to one or more of the specific categories of protected veterans (e.g., disabled veteran, Armed Forces service medal veteran, recently separated veteran, or active duty wartime or campaign badge veteran). The Section 503 regulations similarly require contractors to invite applicants to self-identify as an individual with a disability at both the pre- and post-offer phases of the application process, using language provided by the agency.

OFCCP has stated that it intends for the data provided through self-identification to enable the contractor and the OFCCP to measure the effectiveness of the contractor's recruitment and affirmative action efforts over time, and thereby identify and promote successful recruitment and affirmative efforts taken by the contractor community. *See,* e.g., 78 Fed. Reg. at 58627.

Many individuals and organizations that commented on these proposed rule changes, however, expressed concern that such invitations to self-identify were not legally permissible under the Americans with Disabilities Act ("ADA") and its respective regulations, which limit the extent to which employers may inquire about disabilities prior to an offer of employment. The OFCCP's position is that the ADA's affirmative action exception clearly allows the type of pre-offer self-identification proposed by the new regulations. Specifically, OFCCP points to the ADA and Section 503 regulations that state that a contractor may conduct a pre-offer inquiry into disability status if it is "made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities," such as Section 503 or VEVRAA. *See* 78 Fed. Reg. at 58627 (citing 29 C.F.R. §§ 1630.13, 1630.14; 41 C.F.R. § 60-741.42). In defending this position, the OFCCP relies in part on a letter obtained from EEOC's Office of Legal Counsel, which affirmed that a requirement to invite pre-offer self-identification of disability is permissible under the ADA and its regulations. *See* 78 Fed. Reg. at 58627 n.19.

With respect to commenters' additional concern that obtaining information about the disability status of an applicant could potentially expose contractors to claims of discrimination by disappointed job seekers, OFCCP stated that although knowledge is a component of an intentional discrimination claim, it must also be *proven* that the contractor treated the person less favorably because of his or her disability. *See* 78 Fed. Reg. at 58623. In addition, OFCCP points out that generally, self-identification information would be obtained by and would reside with human resources offices and will not be provided to interviewing, testing, or hiring officials, as it is confidential information that must be kept separate from regular personnel records, which will help ensure that these officials do not, in fact, have knowledge of which applicants have chosen to self-identify as having a disability. *See id.*

The regulations make clear that all self-identification information must be kept confidential and that disability demographic information must be maintained in a data analysis file, not with an individual's application or in an individual's personnel file. Thus, with regard to veterans, the contractor is required to maintain a separate file on persons who have self-identified as disabled veterans.

Finally, the new Section 503 regulations add the requirement that employers invite employees to voluntarily self-identify every five years and to remind employees between these invitations that they may change their disability status at any time. Contractors will be required to make these invitations by using a new OFCCP form that will be posted on the OFCCP website.

VEVRAA regulations require contractors to list their job openings with appropriate state or local job services and do so in a manner that complies with the mandatory job listing requirements of the Equal Opportunity clause detailed in the regulations. State and local job service agencies, referred to in the new regulations as "employment service delivery systems," are required by statute to refer qualified protected veterans to fill employment openings listed by contractors. *See* 41 C.F.R. § 60-300.2(j). The new VEVRAA regulations require that contractors not only list job openings with those services but that they do so "in any manner and format" that the appropriate employment service permits that will allow it to provide priority referrals to the contractor. *See* 41 C.F.R. § 60-300.5(a)(2). In addition, the Equal Opportunity clause found in the regulations mandates that contractors now provide to the employment service not only the name and location of each of the contractor's hiring locations but also the contact information for the hiring official in each location in the state, its request for priority referral, and its status as a federal contractor.

Both sets of regulations impose new data collection obligations so contractors (and the OFCCP) will know the number of veterans and individuals with disabilities who have applied and been hired each year. For both sets of regulations, contractors must now, on an annual basis, document (i) the number of applicants who self-identify as protected veterans or individuals with disabilities, or who are otherwise known to be protected veterans or individuals with disabilities; (ii) the total number of job openings and total number of jobs filled; (iii) the total number of applicants for all jobs; (iv) the number of protected veteran applicants and applicants with disabilities hired; and (v) the total number of applicants hired. These computations and comparisons must be maintained for a period of three years. *See* 41 C.F.R. §§ 60-300.44(k), 60-741.44(k).

Both sets of regulations clarify that contractors must allow OFCCP access to their records on- or off-site and that the OFCCP may seek data beyond the current plan year. The new regulations require contractors to retain certain records for three years and to provide OFCCP access to any documents or records or to any other material the agency deems relevant to a compliance check or complaint investigation. In addition, contractors must now provide off-site access to materials if OFCCP so requests, and they must inform OFCCP of all formats in which records are maintained and provide those records to the agency in whichever of those formats OFCCP requests. The regulations clarify that contractors' records will be treated as confidential to the extent permitted by the Freedom of Information Act. *See* 41 C.F.R. §§ 60-300.81, 60-741.81.

Both sets of regulations contain "best practices" that contractors should note. Finally, in response to the many comments OFCCP received, the agency "dropped" as requirements some of the more controversial provisions from the final regulations. However, OFCCP included some of these same provisions as "best practices." For example, in the disability regulations, OFCCP dropped its proposed requirement that the contractor enter into linkage agreements with three different entities and list employment opportunities with certain organizations. Instead, the regulation now provides a number of "suggested resources." 41 C.F.R. § 741.44(f)(2). A similar provision appears in the VEVRAA regulations. 41 C.F.R. § 60-300.44(f)(2). OFCCP also dropped from the final disability regulations a provision requiring contractors to develop and implement written procedures for processing requests for reasonable accommodation. OFCCP decided not to incorporate this proposal in the final rule but instead included it as a best practice and added a new Appendix B titled "Developing Reasonable Accommodation Procedures." Contractors would be well-advised to review these sections as compliance officers will

undoubtedly assess their compliance with these provisions in mind even though they are not requirements.

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