

LABOR RELATIONS

Expert Analysis

## Affirmative Action: New Requirements For Veterans and Disabled Individuals

Companies contracting with the federal government or receiving sub-contracts from primary contractors are required to comply with executive orders and other laws calling for affirmative action and workplace accommodation. The Office of Federal Contract Compliance Programs (OFCCP or compliance office), which administers compliance with these requirements, recently issued final regulations implementing provisions of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA or veterans act) and Section 503 of the Rehabilitation Act of 1973 (Section 503) which expand affirmative action obligations covering veterans and individuals with disabilities.

According to the compliance office, the new VEVRAA rules are necessary in light of the increased number of veterans, and in particular those with disabilities, returning from Iraq and Afghanistan. With respect to Section 503, the compliance office maintains that despite technological advancements to assist individuals with disabilities in performing jobs, disparities in hiring and retention persist. Accordingly, the new rules are intended to revise "an outdated framework that does not reflect the realities of today's workplace." U.S. Dept. of Labor OFCCP, Section 503 Frequently Asked Questions, available at [http://www.dol.gov/ofccp/regs/compliance/faqs/503\\_faq.htm](http://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm). While the new rules do not embrace some of the more controversial aspects of the originally proposed rules, they mark a significant shift



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in the law and require attention by employers.

### Numerical Goals

The new rules under VEVRAA and Section 503 were issued separately and promulgated under separate statutory authority, but share many similar requirements. Perhaps most controversial is the setting of numerical goals with respect to the hiring of protected individuals. The veterans act rule establishes a "hiring benchmark" for protected veterans and the Section 503 rule establishes a "utilization goal" for individuals with disabilities. More specifically, under VEVRAA, contractors may either establish a benchmark equal to the national percentage of veterans in the civilian labor force (currently 8 percent) or establish their own benchmarks using certain available data. The Section 503 rule sets a national utilization goal of 7 percent, applied to each job group for contractors with over 100 employees, or to the entire workforce if the contractor has fewer than 100 employees.

Prior to passage of the new rules, contractors were required to make good faith efforts toward employing veterans and individuals with disabilities. However, the OFCCP was of the view that such individuals were underrepresented in the workforce, and the office's director, Patricia Shiu, stated good faith efforts to recruit and hire people

with disabilities were "[c]learly...not working." OFCCP News Release (Dec. 8, 2011). The compliance office considers concrete aspirational goals as more effective than the prior good faith efforts standards. The office emphasizes that benchmark and utilization goals are not quotas. Rather, their purpose is to serve as a tool for contractors to measure and evaluate progress toward affirmative action, and contractors will not be cited simply for failing to meet a benchmark or utilization goal.

From the time the new rules were first proposed by the compliance office, some groups within the contractor community criticized the approach. Critics argue the line between a quota and an aspirational goal is too thin, and thus the new rules have the same practical effect as if the compliance office were enforcing a quota. Further, contractors express concern that even if failure to meet a utilization goal or benchmark is not in itself a violation of law, such failure may trigger a full-blown audit of the contractor or, at minimum, closer scrutiny of its employment practices.

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On the flip side, there is contractor concern that veterans or individuals with disabilities may not always report their status (or need for assistance) to the employer. In such circumstances, an employer may miss an opportunity to provide valuable assistance or, conversely, an employer

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could meet or even exceed a benchmark or utilization goal without knowing it.

### Data Collection

The new rules also call for enhanced data collection and record-keeping with respect to veterans and individuals with disabilities, for the purpose of providing contractors with information to assist in measuring their recruitment efforts. In particular, contractors must document and update annually specific data allowing the contractor to compare the number of veterans and individuals with disabilities who apply for positions with the number hired. Contractors must also document outreach and recruitment activities. Contractors are already required to maintain similar applicant flow and recruitment information relating to the sex, race and ethnicity of applicants and employees under other provisions of law.

Prior to the new rules, government contractors invited employees to voluntarily self-identify as a veteran or an individual with a disability after the individual received an offer of employment. The new rules now require contractors to offer applicants the opportunity to self-identify prior to receiving an employment offer. In addition to such pre- and post-offer invitations to self-identify, contractors must invite employees to self-identify with respect to disabilities every five years.

The employer must also remind employees they have the right to identify as a person with a disability at any time. The OFCCP's thinking is that employees may over the course of their employment feel more comfortable identifying as disabled and therefore need reminding of their right to self-identify. Contractors must communicate that providing the information is voluntary, and must keep the information confidential and separate from regular personnel records.

### ADA Interplay

Contractors express concern that asking applicants about disabilities at the pre-offer stage could constitute a violation of the Americans with Disabilities Act (ADA), prohibiting discrimination against applicants and employees on the basis of a disability. In response, OFCCP points to an opinion letter from the Equal Employment Opportunity Commission (EEOC) stating compliance with the pre-offer requirement is not a violation of the ADA. EEOC Letter to OFCCP (Aug. 8, 2013). OFCCP is of the view that this pre-hire

data will help contractors assess the effectiveness of their recruitment efforts.

Nevertheless, the new rules have implications for ADA compliance. For example, the rules allow contractors to identify individuals as disabled where the disability is obvious to the employer. Under the ADA, employers would generally rely only on self-identification, for fear that the employee may claim he or she is being "regarded as" having a disability in violation of the law. Yet under the new rules, there may be an incentive for employers to identify an individual as having a disability to improve the employer's opportunity to achieve the utilization goal.

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### Other Changes

There are a number of additional changes under the new rules, including a requirement that contractors add language in their covered subcontracts alerting subcontractors to their obligations under VEVRAA and Section 503; a requirement that solicitations and advertisements state the employer is an equal opportunity employer with respect to veterans and individuals with disabilities; and clarification with respect to the compliance office's ability to access documents during an audit. But the new rules do not incorporate some of what were criticized as the more onerous requirements originally proposed. For example, OFCCP did not impose a 2 percent sub-goal for individuals with severe disabilities (the 7 percent utilization goal does not distinguish based on the severity of disability); contractors will not be required to develop written procedures for handling requests for reasonable accommodations (although written procedures are recommended as best practice); and contrac-

tors will not be required to enter into linkage agreements nor list job openings with certain third-party organizations assisting veterans and individuals with disabilities.

### Open Issues

Most requirements of the new rules, which were published in the Federal Register on Sept. 24, 2013, will become effective on March 24, 2014. Contractors who have affirmative action plans (developed under the old regulations) prior to the effective date are permitted to maintain those plans in place until the start of their next affirmative action plan cycle.

As the March deadline for compliance approaches, the OFCCP still has two key tasks to complete. First, the office intends to develop a form for employers to solicit information regarding disabilities, and employers are eager to see what the office prepares. Second, the OFCCP is compiling a database of information so that contractors may develop a benchmark for the hiring of veterans, which should be used by those contractors who do not use the national percentage of veterans in the civilian workforce (currently 8 percent).

Contractors must also consider when they will solicit information at the pre-hire stage. The so-called Internet Applicant Rule provides guidance on when and how contractors should solicit race, ethnicity and gender information from applicants for compliance with affirmative action requirements under Executive Order 11246. While the OFCCP did not formally adopt the Internet Applicant Rule in the new rules, it stated that contractors may solicit veteran and disability information at the same time they solicit information under the Internet Applicant Rule.