

THOUGHT LEADERSHIP

LEGAL UPDATES

PUBLISHED: APRIL 27, 2011

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OFCCP Releases Notice of Proposed Rulemaking Regarding Protected Veterans

On April 26, 2011, the Office of Federal Contract Compliance Programs (OFCCP) formally published its proposed regulations to update contractors' obligations concerning veterans. The proposed regulations impose additional obligations on federal contractors and subcontractors. These obligations require, for the first time, quantitative measurements for the hiring of protected veterans, self-identification invitations pre- and post-offer, and a documented review of specified personnel practices. Comments must be submitted within sixty days, and OFCCP will then move to finalize the regulations.

In 1974, the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) became law. In general, VEVRAA prohibits employment discrimination against certain veterans, and requires basic affirmative action to employ and advance those veterans. The original regulations implementing VEVRAA were published in 1976. Over the past thirty-five years, the regulations have been modified from time to time, creating a confused bundle of obligations. OFCCP's proposed regulations represent the first major overhaul of the regulations since they were initially published.

Applicability

Since December 1, 2003, contractors with contracts of at least \$100,000 have been subject to the nondiscrimination and affirmative action requirements of the veterans' regulations. (NOTE: Prior to this date, the contract amount needed to be only \$25,000; given the way in which government contracting works, OFCCP anticipates there are few, if any, contracts still in existence that were entered into, without any changes, prior to December 1, 2003.) If the contractor has at least 50 employees, the contractor is subject not only to the

basic nondiscrimination and affirmative action requirements, but is also required to prepare and maintain an affirmative action plan.

Substantive Changes

In the proposed regulations, OFCCP makes several substantive changes to the existing regulations. The key proposed changes are highlighted below:

Contracting:

Contractors must include the entire equal opportunity clause verbatim in its subcontracts.

Self-identification:

Contractors must invite all applicants to self-identify as a "protected veteran" prior to the offer of employment, and must maintain self-identification data. The applicant need not indicate he/she is disabled as part of this process. The purpose of this change is to allow an assessment of the effectiveness of the contractor's recruitment and affirmative action efforts over time.

Contractors must invite further self-identification at the post-offer stage, to self-identify as a member of one or more of the four classifications of protected veterans.

Contractors must seek the advice of the applicant regarding accommodations needed.

Personnel practices:

Contractors must review their personnel processes on at least an annual basis, rather than "periodically", to ensure its obligations are being met. The regulations further identify the minimum steps that must be taken to conduct this review, including but not limited to recording specific reasons for personnel actions for protected veterans, and making those reasons available to the protected veteran on request.

Contractors must review and document all physical and mental job qualification standards.

Contractors must document any reasons for a conclusion that an individual constitutes a "direct threat" to the safety or health of the individual or others.

Contractors must engage, at a minimum, in defined outreach and recruitment efforts.

Contractors must, on an annual basis, document its review and evaluation of its outreach and recruitment efforts. In the event the previous efforts are not effective, contractors must identify and implement alternative efforts.

Contractors must hold meetings with employees at least once per year to discuss its affirmative action policies and to explain its employee responsibilities.

Contractors must train those who implement personnel decisions on specified topics, including the benefits of employing protected veterans and the legal responsibilities of contractors regarding protected veterans.

Quantitative measurements:

Contractors must document and annually update data concerning referrals (including the total number of referrals and the referrals of protected veterans), applicants (including the total number of applicants and the protected veteran applicants), and hiring (including the total number of job openings and the number of protected veterans who fill those jobs).

Contractors must establish benchmarks for hiring protected veterans, expressed as a percentage of total hires, using a variety of different sources of information. Contractors must consider and document various factors in determining its benchmarks.

State employment service obligations:

Contractors must inform the state employment service of its status as a federal contractor, certain contact information, and its request for priority referrals of protected veterans.

Contractors must maintain records relating to referrals for five years .

Job solicitations/advertisements:

Contractors must state it is an equal employment opportunity employer of veterans protected under Section 4212.

The proposed regulations also require contractors to specify to OFCCP all formats in which records are available, and to produce records to OFCCP in the format selected by OFCCP.

What This Means to You

The proposed regulations contain significant new obligations for federal contractors and subcontractors relating to protected veterans. Whether you are in favor of the proposed regulations or not, you are encouraged to send comments to OFCCP, in order to ensure your voice is heard.

Comments may be submitted, among other ways, at www.regulations.gov, and search by number 1250-AA00. Once the sixty-day comment period ends, OFCCP will likely deliberate further, and then publish the final regulations. If the final regulations look anything like the proposed regulations, contractors will have significant work to do to be in compliance.

Contact Info

For additional information and assistance, please contact your Husch Blackwell attorney or Molly Kurt at 816.983.8229.

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