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Labor & Employment

OFCCP Compliance

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New Rules for Federal Contractors and Subcontractors Are Game-Changers on Disability Inquiries

Significant changes are on the horizon for employers with construction, supply and service contracts or subcontracts with the federal government. On Aug. 27, 2013, the Office of Federal Contract Compliance Programs (OFCCP) announced the publication of final rules amending the nondiscrimination and affirmative-action provisions of the Vietnam Era Veterans Readjustment and Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act. Although the rules have cleared the Office of Management and Budget (OMB), they would not become effective until 180 after publication in the Federal Register, which is anticipated sometime this month. Thus, the effective date of these rules would be sometime in March 2014.

The new rules represent an aggressive move by OFCCP and will require federal contractors and subcontractors to ask applicants and current employees whether they are individuals with disabilities. Such an inquiry is otherwise prohibited by the Americans with Disabilities Act (ADA). The rules also impose significant new recordkeeping obligations on federal contractors and subcontractors,¹ set high placement goals and hiring benchmarks for veterans and individuals with disabilities, and authorize OFCCP to obtain more contractor information during compliance reviews. As OFCCP Director Patricia Shiu stated during two OFCCP webinars explaining the new rules, “change happens in a movement,” and the new rules embody the agency’s efforts to directly influence the employment of veterans and individuals with disabilities.

The most burdensome sections of the new rules will be phased in for many contractors. For contractors with an affirmative action plan (AAP) year that predates the effective date of the rules (anticipated to be in March 2014), the

AAP-related portions of the new rules will not be required until the following AAP year. This includes the goal setting/benchmarking and self-identification provisions in Subpart C of the new rules. The nondiscrimination, enforcement and recordkeeping provisions of the rules, in Subparts A, B, D and E, apply to all contractors beginning on the effective date. Despite the partial phase-in, contractors should begin now to consider how they will need to modify their existing human resource information and hiring systems to capture new data on disability and veteran status beginning in early 2014. Because of conflicts between the ADA and these new rules, however, we do not recommend early implementation.

Some significant provisions of the new rules are as follows. New obligations are highlighted in boldface type.

VEVRAA	Rehabilitation Act/503
Contract or subcontract must exceed \$100,000 and contractor must have 50 or more employees for most sections of the new rules to apply.	Contract or subcontract must exceed \$50,000 and contractor must have 50 or more employees for most sections of the new rules to apply.
Requires a “benchmark” of 8 percent veteran employment.	Requires a “placement goal” of 7 percent individuals with a disability (IWD).
Alternate benchmark may be calculated using a “five-factor” availability analysis.	No alternate goal-setting methods available.
Benchmark measures <i>entire workforce across all establishments</i>.	Goals measured by <i>job groups</i>, in most cases.
Pre-offer invitation to self-identify as “protected veteran” now required using OFCCP’s form.	Pre-offer invitation to self-identify as IWD now required using OFCCP’s form.
Post-offer invitation to self-identify in	Post-offer invitation to self-identify is still required

specific veteran categories is still required using OFCCP’s form.	using OFCCP’s form.
No self-identification of current employees required.	All employees must be invited to self-identify as IWD every five years. Initial invitation must take place some time during the first year the rules are in place.
Applicant/hire disparity analysis now required for veterans.	Applicant/hire disparity analysis now required for IWD.
Posting of openings with state job service now must follow specific format.	No state job service posting required.
Job advertisement EOE tagline must now specifically include veterans: “EOE/M/F/D/V” satisfies this duty.	Job advertisement EOE tagline must now specifically mention disabled: “EOE/M/F/D/V” satisfies this duty.
Three-year record retention period.	Three-year record retention period.

Several OFCCP compliance-related forms have changed, and many of the model forms will be included as appendices to the new rules. As of the date of this publication, the forms were not yet available, but some of the changes include:

VEVRAA-mandated postings with the state job service must now contain specific language advising that employer is a government contractor.

In the notice to subcontractors, the incorporation by reference of the rules’ EEO clauses is now required to appear in boldface type and to use specific language.

Voluntary invitation to self-identify as a protected veteran for *applicants* now required.

Voluntary invitation to self-identify as an IWD for *applicants* now required.

Voluntary invitation to self-identify as veteran and IWD *post-offer* modified slightly.

Voluntary invitation to self-identify as an IWD for *employees* now required every five years.

Finally, the new rules codify a gloves-off approach to compliance reviews by OFCCP. The rulemaking authorizes OFCCP's ability to obtain documents and other information post-dating the scheduling letter, putting to rest the Frito Lay controversy of recent years. The new rules also permit OFCCP to obtain audit-related records electronically and in the format OFCCP requests rather than in the contractor's preferred format. Furthermore, OFCCP now has broad authority to obtain many records offsite, even during the desk audit stage of a compliance review.

¹The rules apply to supply and service and construction contractors alike. By contrast, the equal employment and affirmative action requirements for minorities and women under Executive Order 11246 are different for the two groups, with construction contractors enjoying a lower compliance burden.

What This Means to You

1. Regularly evaluate the status of any government contracts or subcontracts to determine whether there is a contract/subcontract equal to or greater than the \$50,000/\$100,000 thresholds.
2. If you are a covered federal contractor/subcontractor, use phase-in procedures to determine whether the new AAP rules will apply for the 2014 or 2015 AAP year.
3. Begin to plan for increased human resources information system recordkeeping responsibilities associated with the new rules, including tracking the veteran and disability status of applicants and disability status of current employees. We strongly advise against asking about the disability status of applicants and employees until the new rules are effective.

Contact Information

For more information concerning this or other issues affecting labor and employment, please contact your Husch Blackwell attorney or an attorney in our Labor & Employment practice group.