

LEGAL UPDATES

PUBLISHED: DECEMBER 21, 2011

Services

Government
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OFCCP Wants To Know: Can Employers Attain a Workforce Goal of 7 Percent Disabled Employees?

On December 20, 2011, the Office of Federal Contract Compliance Programs (OFCCP) held a webinar to discuss proposed changes to the disabilities regulations, which it published on December 9, 2011. The proposed changes — which are discussed in 194 pages — are sweeping. As Secretary of Labor Hilda Solis stated, “This proposed rule represents one of the most significant advances in protecting the civil rights of workers with disabilities since the passage of the Americans with Disabilities Act.” For OFCCP Director Patricia Shiu, the proposed regulations represent a “sea change.” In sum, the OFCCP seeks to require a 7 percent hiring goal for individuals with disabilities, along with enhanced obligations for federal contractors in the areas of recruiting, training, record-keeping and disseminating policies. Comments are due by February 7, 2012.

In July 2010, the OFCCP published an advance notice of proposed rulemaking, seeking input on a variety of topics concerning the current disability regulations under Section 503 of the Rehabilitation Act, which are applicable to federal contractors with contracts of at least \$10,000. With a contract of at least \$50,000 and 50 employees, the federal contractor must prepare an affirmative action plan for individuals with disabilities. To date, that affirmative action plan did not contain any numerical goals or analyses, and the regulations generally made suggestions about what an employer should do, rather than impose requirements, to increase the opportunities for the disabled.

The proposed regulations seek to change this long-standing, “hands-off” approach. As Director Shiu stated, “For nearly 40 years, the rules have said that contractors simply need to make a ‘good faith’ effort to recruit and hire

people with disabilities. Clearly, that's not working." Put simply, she said, "What gets measured, gets done."

The proposed regulations contain a number of important changes that, if adopted, will significantly increase the burden on contractors to comply with the law. The key changes and some highlights demonstrating the far-reaching nature of the proposed changes are:

Utilization goal of 7 percent disabled employees for each job group and for the workforce as a whole. The OFCCP is not "set" on the 7 percent, and is considering a goal between 4 percent and 10 percent. There is also a subset goal that 2 percent of the 7 percent be individuals classified as severely disabled. Currently, there is no numerical goal for disabled employees.

Applicant self-identification of disabled status pre-offer and post-offer, as well as annual survey of disabled status for current employees.

At this time, there is no self-identification of disabled status pre-offer, and such self-identification raises potential conflicts with obligations under the Americans with Disabilities Act. Further, there is currently no annual survey requirement.

Job listings, linkage agreements and ongoing relationships with identified agencies and organization. Currently, mandatory job listings and linkage agreements are not required.

Annual review of personnel and technological processes — and of outreach effectiveness — using steps identified by the OFCCP.

Written statement of reasons for rejection of individuals with disabilities for employment, promotion or training, with statement available to the rejected individual on request.

The potential litigation use of such a statement means employers may need to consult counsel before any such rejection.

Written statement of reasons for denial of reasonable accommodations, including notification to individual of right to file a complaint with the OFCCP.

Inclusion of affirmative action policy in policy manual and required training.

Record-keeping for five years.

Currently, the record-keeping obligation is for, at most, two years.

Annual documentation of referral, applicant and hiring data for people with disabilities.

Annual reporting to the OFCCP of numerical data.

Currently, there is no obligation to report annually on disabled employees to the OFCCP.

Although the intent behind the proposed regulations is laudable, there is a significant amount of time and money — and potential legal ramifications — associated with these proposed changes. The public may access the proposed regulations online and may provide comments to the OFCCP on its proposal at www.regulations.gov (RIN # 1250-AA02) or by fax or mail. After February 7, 2012, the OFCCP will consider all comments submitted and then issue final regulations. When the regulations are finalized, we will make available multiple avenues through which we will explain the changes and provide opportunities for you to ask questions.

What This Means to You

Since the 1970s, a federal contractor's affirmative action obligations for individuals with disabilities have taken a back seat to those for women and minorities. The proposed regulations, if enacted, will significantly alter the landscape. We encourage you to carefully review the proposed regulations and provide comments on these critical proposals.

Contact Info

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

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