

Office of Federal Contract Compliance Programs' (OFCCP) Final Regulations for Individuals with Disabilities and Protected Veterans

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Expansive regulations will subject federal contractors and subcontractors to many new requirements, including utilization goals and hiring benchmarks.

On August 27, the Office of Federal Contract Compliance Programs (OFCCP) issued final regulations that significantly revise the affirmative action obligations of federal contractors and subcontractors regarding individuals with disabilities and protected veterans under Section 503 of the Rehabilitation Act of 1973 and the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) of 1974.^[1]

Effective Date

The new regulations become effective on February 25, 2014, but OFCCP has announced an "extended compliance date" for the affirmative action program (AAP) requirements contained in subpart C of 41 C.F.R. parts 60-300 and 60-741—the most complex and burdensome of the new requirements. Except as noted, all of the requirements discussed below are contained in subpart C.

Contractors who have veterans and disability AAPs (developed under the old regulations) in place on February 25, 2014 will not be required to comply with the new AAP requirements until the start of the next AAP cycle. For example, a contractor that implements veterans and disability AAPs based on an AAP year of January 1–December 31 will not have to comply with the new requirements until January 1, 2015.

Overview of Final Regulations

New Requirements

The new OFCCP regulations require contractors to revise their AAPs for individuals with disabilities and "protected veterans"^[2] to accomplish the following:

- Implement new subcontractor flow-down clauses
- Solicit veteran and disability status at the pre-offer stage from applicants and periodically from

employees

- Conduct new analyses of applicant data and hiring benchmarks with regard to protected veterans
- Establish placement goals of 7% in each AAP job group for individuals with disabilities and determine hiring goals for protected veterans
- Implement more robust good faith efforts to meet the placement and hiring goals
- Implement a procedure for periodic review of personnel practices and qualification standards to ensure that (i) individuals with disabilities and protected veterans have opportunities to be considered for employment, promotion, and training and (ii) that qualifications standards do not disproportionately screen out individuals with disabilities and protected veterans
- Train employees involved in recruitment, selection, and discipline on the affirmative action requirements
- Retain records and documents that OFCCP will review during audits to verify compliance with these new requirements

New Definitions

The new regulations also revise the definitions related to qualified individual with a disability and certain non-discrimination and reasonable accommodation requirements to conform to the Americans with Disabilities Act Amendments Act (ADAAA) of 2008.

Summary of Certain Regulatory Changes

Voluntary Self-Identification at Pre-Offer and Post-Offer Applicant Stages

Contractors will now be required, both at the pre-offer^[3] and post-offer stages of the application process, to invite applicants to voluntarily self-identify as individuals with disabilities and protected veterans. The invitation to self-identify as an individual with a disability (there is no similar requirement for protected veterans) must also be extended to current employees at the following three intervals:

1. Within the first year that the contractor is subject to the new regulations
2. Subsequently, at five-year intervals
3. At least once within the five-year interval in (2) to inform all employees of their right to update their disability status

OFCCP will publish a solicitation form that contractors must use for the solicitation of current employees.

New Data Analysis Requirements

The new regulations require contractors to annually analyze data on applicants and hires who self-identified as individuals with disabilities and protected veterans. The data analysis must include the following elements:

- The number of applicants who self-identified as individuals with disabilities or protected veterans or who are otherwise known as individuals with disabilities or protected veterans
- The total number of job openings and the total number of jobs filled
- The total number of applicants for all jobs
- The number of applicants with disabilities hired and the number of protected veteran applicants hired
- The total number of applicants hired

The data analysis must be conducted by the overall AAP workforce, not by AAP job group or job title. The data analysis is to be used by contractors only to evaluate the effectiveness of their external recruiting efforts. OFCCP makes clear that the applicant/hire analysis required under the regulations is not designed to be used as an adverse impact analysis similar to the analysis conducted for women and minorities under Executive Order 11246.^[4]

Utilization Goals for Individuals with Disabilities

Contractors must establish a nationwide^[5] 7% utilization goal for qualified individuals with disabilities. Contractors must apply this 7% goal in each AAP job group contained in all of their AAPs for women and minorities. (Small contractors with 100 or fewer employees can apply the 7% goal on a workforce-wide basis.) Contractors must compare the representation of individuals with disabilities in each AAP job group against the 7% goal and, if the actual representation falls below the goal, must engage in good faith efforts to improve the representation of individuals with disabilities in the job group.

Hiring Benchmarks for Protected Veterans

Contractors must establish hiring benchmarks for protected veterans, which are to be established on a facility-wide basis. Contractors may choose one of two mechanisms to establish those hiring benchmarks: (1) establish a benchmark equaling the national percentage of veterans in the civilian labor force (currently 8%) or (2) develop a tailored benchmark using factors specified in the regulations, such as published availability data from various sources (e.g., the Bureau of Labor Statistics and the Veterans' Employment and Training Service), the contractor's applicant and hire ratios, and other factors unique to the contractor's circumstances. Unlike AAP placement goals, the hiring benchmarks are designed to measure the progress and effectiveness of the contractor's "good faith efforts"; they are not designed to be "objectives or targets reasonably attainable by means of applying every good faith effort."

Expanded "Good Faith Efforts"

The new regulations now mandate that contractors take the following actions that were optional under the previous version of the regulations:

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- Provide written notification regarding the contractor's affirmative action policy to all subcontractors and request appropriate action in support of the policy
 - Include the affirmative action policy in employee handbooks or otherwise make it available to employees
 - If the contractor is party to a collective bargaining agreement, notify union officials of the affirmative action policy and request their cooperation

The regulations also require contractors to evaluate the effectiveness of their external recruiting efforts by considering the number of individuals with disabilities and protected veterans that applied to positions over the prior three years. The contractor must document the evaluation methods used, the conclusions reached, and the steps taken to improve recruiting efforts.

Review of Personnel Practices

The existing regulations require that contractors periodically review personnel processes to ensure that individuals with disabilities and protected veterans are considered for job, promotion, and training opportunities and are not stereotyped in a manner that limits their access to jobs for which they are qualified. In addition, the new regulations now require that contractors provide reasonable accommodations to ensure equal opportunity in the access and operation of personnel processes (e.g., accommodation in the application process for internal job postings).

The discussion accompanying these regulations suggests that OFCCP will request documentation from contractors that demonstrates specific compliance with these requirements.

Recordkeeping

Under the new regulations, contractors must now retain records and documents for three years that can be used by OFCCP to verify compliance with the new requirements during compliance reviews.

Implications

The new OFCCP regulations will impose additional burdens on federal contractors and subcontractors in the areas noted. Given other recent OFCCP developments, namely the issuance of the new Federal Contractor Compliance Manual and abandonment of the 2006 Compensation Standards and replacement by Directive 307, the timing and potential impact of these new regulations could be problematic. Nevertheless, OFCCP's adoption of a significant phase-in period for contractors to ensure compliance with the new regulations is welcome.

It remains unclear whether these regulations are designed to be the first of several incremental steps to bring affirmative action requirements applicable to individuals with disabilities and protected veterans closer to those applicable to minorities and females under Executive Order 11246. In addition, despite OFCCP's stated assurance that the data will not be used to conduct adverse impact analyses, there is potential risk presented by the collection of disability and veteran data from applicants because disparities identified by the data could be the basis for hiring discrimination allegations.

[1]. View the release [here](#).

[2]. The new OFCCP regulations use "protected veterans" as the collective term for the veteran categories protected under the VEVRAA.

[3]. OFCCP has attempted to assuage concerns that the mandatory pre-offer invitation to self-identify for individuals with disabilities may violate the Americans with Disabilities Act by way of an Equal Employment Opportunity Commission opinion letter issued on August 8, 2013. See Letter from Peggy

R. Mastroianni, Legal Counsel, U.S. Equal Emp't Opportunity Comm'n, to Patricia A. Shiu, Dir., OFCCP (Aug. 8, 2013), available [here](#).

[4]. See the order [here](#).

[5]. This goal applies each job group in all AAPs combined.

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