

Major Revisions Proposed to AAPs for Individuals with Disabilities

Expansive new proposals by the Office of Federal Contract Compliance Programs would increase the affirmative action requirements for individuals with disabilities.

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In a Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on December 9, the Office of Federal Contract Compliance Programs (OFCCP) proposed major regulatory changes under Section 503 of the Rehabilitation Act of 1973, as amended, which prohibits discrimination and requires federal contractors to take affirmative action to hire, retain, and promote qualified individuals with disabilities. The proposed changes—if implemented—will substantially increase the compliance burden on government contractors and expose them to new and potentially costly risk.

Contractors have a final opportunity to submit comments to convince the OFCCP to focus regulatory revisions on changes that will increase employment opportunities for individuals with disabilities without imposing unnecessary burdens and risks on contractors. The deadline for submitting comments is February 7, 2012.

The OFCCP proposal would revise the disability regulations in four areas: (1) requiring the establishment of numerical goals for employment of individuals with disabilities, (2) requiring the collection and analysis of data regarding hiring rates for individuals with disabilities, (3) requiring expanded affirmative action efforts, and (4) requiring the establishment of procedures for reasonable accommodation requests. The NPRM is also designed to conform to regulations issued by the Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act Amendments Act of 2008.

Numerical Utilization Goals for Individuals with Disabilities

One of the more significant proposals would require the establishment of a uniform, nationwide “utilization goal” of 7% for the employment of individuals with disabilities. That goal would apply to each contractor Affirmative Action Program (AAP). While contractors would not be required to meet the 7% goal, it is clear that the OFCCP would examine closely a contractor’s “good faith” efforts where the goal is not met.

While the 7% goal would not require quotas or preferences for employing individuals with disabilities, two other OFCCP proposals suggest such an approach. First, the OFCCP proposes a regulatory provision that would encourage contractors to voluntarily afford preferences to individuals with

disabilities. Second, the OFCCP proposes that conciliation agreements used to resolve noncompliance with the Section 503 regulations could include “benchmarks” that will establish “a quantifiable method for measuring the contractor’s progress toward correcting identified violations.”

The OFCCP expressly solicits comments regarding the appropriateness of a 7% goal and appears to be willing to consider a goal in the range of 4%–7%.

Disability Hiring Rate Analyses

Among the most burdensome components of the NPRM is a new requirement that contractors conduct a data analysis of applicants and new hires as part of the annual AAP. The data analysis must include the following 10 elements:

- 1) The number of referrals of individuals with disabilities from governmental employment services.
- 2) The number of referrals of individuals with disabilities from recruiting sources with which the contractor has entered a linkage agreement.
- 3) The number of applicants who self-identified as disabled.
- 4) The number of job openings and total number of jobs filled.
- 5) The ratio of jobs filled to job openings.
- 6) The total number of applicants for all jobs.
- 7) The “applicant ratio” of individuals with disabilities applicants to all applicants.
- 8) The number of individuals with disabilities hires.
- 9) The total number of hires.
- 10) The “hiring ratio” of individuals with disabilities hires to all hires.

Data for these calculations would be obtained in part through a new requirement that contractors solicit—through the mandatory use of an OFCCP self-identification form—voluntary self-identification of disability status from employees and from applicants at the pre-offer stage.

Expanded Affirmative Action Efforts

OFCCP proposes to expand the documentation that contractors must maintain to demonstrate affirmative action to employ individuals with disabilities.

Review of Personnel Processes

Contractors will be required to conduct an annual review of personnel processes to identify barriers to equal employment opportunity for individuals with disabilities. The proposal would include an assessment of each vacancy and training program for which a disabled applicant was considered and each promotion and training program for which a disabled employee was considered, as well as a statement of the reasons that any disabled applicant or employee was not hired, promoted, or selected for a training program, and any reasonable accommodation considered.

The proposal also requires contractors to conduct an annual review of the physical and mental job qualifications standards, document the methods and results of the review, and demonstrate that any job qualification that screens out individuals with disabilities is job related and consistent with business necessity.

External Dissemination Obligations

Several proposed requirements obligate contractors to formalize and document their outreach and targeted recruitment efforts. Contractors would be required to do the following:

- 1) List all job openings with the Employment One-Stop Career Center nearest the facility where the job will be located. The listing must be provided in the manner and format specified by the individual center.
- 2) Establish “linkage agreements” with at least three entities: (a) the local State Vocational Rehabilitation Service Agency nearest the facility or a local organization listed in the Social Security Administration’s Ticket to Work Employment Directory; (b) one of six organizations proficient in recruiting and developing training opportunities for individuals with disabilities listed in the proposed regulations; and (c) one disabled veterans service organization listed in the National Resource Directory, for purposes of technical assistance on proper placement, recruitment, training, and reasonable accommodations. A “linkage agreement” is defined as “an agreement describing the connection between contractors and the appropriate recruitment and/or training sources . . . used by the contractor as a source of potential applicants with disabilities.”
- 3) Evaluate annually the effectiveness of its external dissemination efforts, including review of the data analysis of disabled applicants and hires compared to all applicants and hires (discussed above) for the current year and the two most recent previous years. The contractor must make a record of the evaluation criteria used and the conclusions of the evaluation and must identify and implement alternative efforts if it concludes that “the totality of its efforts were not effective in . . . recruiting qualified individuals with disabilities.”

Internal Dissemination

OFCCP proposes that contractors distribute the Equal Opportunity (EO) policy for individuals with disabilities in their policy manuals, in all employee orientation or management training programs, and, for contractors with collective bargaining agreements, in meetings with union officials. Contractors would be required to document these activities.

Training

Contractors must provide training to all personnel involved in the recruitment, selection, promotion, and disciplinary processes that details (a) the contractor’s affirmative action obligations, (b) the benefits of employing individuals with disabilities, and (c) the legal responsibilities of the contractor, such as providing reasonable accommodations.

Reasonable Accommodation Procedures

Contractors would be required to develop and implement written procedures for requesting accommodations and for responding to such requests. Those procedures must be distributed to all employees and all applicants for employment, and all managers and supervisors must be trained on the procedures on an annual basis or whenever significant changes to the procedures are implemented. The procedures must meet certain regulatory standards, including the following:

- 1) The procedures must mandate an official responsible for implementing the reasonable accommodation procedures.

- 2) The procedures must require that applicants and employees be notified that a request for a reasonable accommodation may be made orally or in writing.
- 3) The procedures must require written confirmation by the contractor of its receipt of a request for an accommodation, which must include the date the request was received and must be signed by the “authorized decision-maker or his or her designee.”
- 4) The procedures must mandate timetables for processing requests for accommodation of 5 to 10 business days if no medical documentation is needed and 30 calendar days if medical documentation is needed. If the timetables cannot be met in a particular case, the contractor must provide written notice to the requester with the reason for the delay and the projected timetable for evaluating the request.
- 5) The procedures must (a) explain the circumstances in which medical documentation will be needed to evaluate an accommodation request and (b) indicate that the requested medical documentation will be limited to documentation concerning the individual’s disability and functional limitations for which a reasonable accommodation is sought.
- 6) The procedures must require written denial of requests for accommodation, including the basis for the denial and notice to the employee/applicant of his or her right to file a complaint with the OFCCP.
- 7) The procedure must indicate that accommodation requests, documentation related to a request and to the processing of the request, and medical/disability information provided to the contractor will be maintained on a confidential basis in a separate medical file.

Conclusion

Morgan Lewis will be submitting comments in opposition to many of these burdensome proposals, and we welcome the participation of contractors and subcontractors that are interested in providing constructive comments that guide OFCCP in adopting requirements that are productive and reject proposals that unnecessarily add to compliance costs.

If you have any questions or would like more information about the topics covered in this LawFlash, please contact any of the following key partners in our Labor and Employment Practice:

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