

Employment

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Nonprofit Organizations

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## Government Contractors Face Expanded Affirmative Action Requirements

*Regulations relate to veterans and individuals with disabilities.*

By Julia E. Judish and Maryelena Zaccardelli (Principal, MEZ Consulting, LLC)

*As its landmark initiative, the Obama Administration's Office of Federal Contract Compliance Programs ("OFCCP") issued expansive new regulations requiring government contractors to undertake greater efforts to employ veterans and individuals with disabilities. The regulations implement the Vietnam Era Veterans' Readjustment and Assistance Act, as amended, ("VEVRAA") and Section 503 of the Rehabilitation Act of 1973 ("Section 503"), which prohibit discrimination against and require affirmative action in employment for certain classes of veterans and for individuals with disabilities. The most controversial of the requirements – hiring benchmarks for veterans and utilization goals for individuals with disabilities – have an effective date that depends on the start date for each contractor's affirmative action plan ("AAP") year. Some provisions, however, go into effect on March 24, 2014, and the OFCCP encourages contractors to begin early implementation of other regulatory provisions.*

Contractors have been accustomed to performing individualized availability analyses in their AAPs for minorities and women under Executive Order 11246; on an annual basis, contractors must compare the actual representation of minorities and women in their workforce to the expected availability of candidates from these groups, based on Census and labor pool data for the contractor's recruiting area for each job group, as well as on data about the contractor's actual applicant pool. The VEVRAA and Section 503 regulations forge new ground in setting a numerical expectation on a nationwide basis for the percentage of protected veterans and individuals with disabilities that government contractors should employ in their workforce. The "hiring benchmark" for the employment of veterans in the civilian workforce is currently set at 8 percent, but it will be updated annually by the OFCCP. Contractors also have the option of

establishing their own annual benchmarks by taking into account prescribed factors, including state-level data on veteran availability and the contractor's own past applicant and hiring ratio for veterans, among other data. The Section 503 national "utilization goal" for employment of qualified individuals with disabilities is fixed at 7 percent for each job group in a contractor's workforce. Smaller contractors, however, with 100 or fewer employees, may measure the 7 percent utilization goal with respect to their entire workforce.

The hiring benchmarks and utilization goals are the centerpiece of the new regulations. The numerous other new regulatory obligations are all designed either to promote contractors' efforts at increasing employment of protected veterans and individuals with disabilities or to enable the OFCCP to monitor more closely contractors' compliance with the regulations. Importantly, the regulations require only that contractors make good faith, documented efforts to increase employment opportunities for individuals with disabilities and protected veterans. The hiring benchmarks and utilization goals serve as yardsticks for measuring the contractor's progress, not mandated employment percentages. "Quotas are expressly forbidden" under the regulations. A contractor that makes good faith efforts to comply with its obligations will not be deemed to violate the regulations simply because its employment data falls short of the applicable hiring benchmark and utilization goal.

For many contractors, achieving these benchmarks and goals may in fact be feasible. The federal government's own efforts to increase employment of individuals with disabilities and of veterans have produced results. According to a report by the Office of Personnel Management ("OPM"), individuals with disabilities comprised 11.89 percent of the federal government workforce in Fiscal Year 2012.<sup>1</sup> OPM also reported that 28.9 percent of its new hires in FY 2012 were veterans, bringing the total percentage of veterans employed in the federal workforce in FY 2012 to 29.7 percent.<sup>2</sup> Not all contractors, of course, should expect to achieve such high percentages. The federal government's sizable civilian workforce at the Department of Defense and in law enforcement, for example, presents a good skills match for many veterans that might not have a counterpart for contractors with a different industry focus. Nonetheless, according to the Preambles to the VEVRAA and Section 503 regulations, the new requirements are designed to counteract the statistical trend outside of federal government employment in which veterans and individuals with disabilities experience unemployment rates that are significantly higher than those of non-veterans and individuals without identified disabilities.

### A Long List of New To-Do Items

Many of the provisions of the VEVRAA and Section 503 regulations (at 41 CFR Part 300 and 41 CFR Part 741, respectively) predated the September 24, 2013 publication of the new regulations. Thus, covered government contractors have already been required to comply with substantial portions of the regulations. Contractors already maintain annual AAPs for veterans and individuals with disabilities (although without significant data-gathering requirements), and they have already been required under VEVRAA to list job openings with local employment service delivery systems or state workforce agency job banks. The regulations now include, however, a panoply of new requirements, some of which become effective on March 24, 2014, and some which go into effect up to one year later.

The regulations are each divided into five subparts. Subpart C governs AAPs and applies only to covered contractors with 50 or more employees. Because the AAP effective date and accompanying twelve-month data period varies from contractor to contractor, the OFCCP is permitting contractors to delay their

<sup>1</sup> See OPM's "[Report on the Employment of Individuals with Disabilities in the Federal Executive Branch for Fiscal Year 2012.](#)"

<sup>2</sup> See OPM's "[Message on Employment of Veterans in the Federal Executive Branch \[for\] Fiscal Year \(FY\) 2012.](#)"

compliance with the AAP requirements of Subpart C until the start of their next AAP cycle after the March 24, 2014 effective date of the other subparts. The OFCCP expressly encourages contractors to begin bringing their employment practices and HR information systems into compliance with Subpart C as soon as possible and has stated that they will insist on strict compliance with all parts of the new regulations immediately upon the new AAP year. As some of the new provisions may entail significant changes to internal and/or vendor-maintained human resources information systems and applicant tracking systems, contractors who wait until the start date of their new AAPs to implement and test their compliance are at risk if they are audited during that AAP year or the one that follows.

### Requirements Effective on March 24, 2014

In addition to continuing in compliance with pre-existing requirements, contractors should implement the following actions as of March 24, 2014:

- Insert mandated language incorporating affirmative action requirements and stating the contractor's status as an affirmative action employer into all covered subcontracts or purchase orders executed or amended after March 24, 2014;
- Post prescribed notices about employees' and applicants' affirmative action and equal employment opportunity rights, displaying them in conspicuous places as well as electronically, and ensuring that the notices are available to applicants and employees upon request in an accessible form;
- Include in all job solicitations or advertisements either the full EEO tagline that "All qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, disability, or protected veterans' status" or an abbreviated EEO tagline that includes the words "Disability" and "Vet" rather than "d/v";
- List jobs with the state or local employment delivery systems in the manner directed by the system, not just by fax or email;
- Notify any recognized unions or worker representatives of the contractor's status as a covered government contractor bound by VEVRAA, and
- For the first job listing after March 24, 2014, notify the state or local employment delivery system of the contractor's status as a covered government contractor, and provide appropriate contact information, including information on the recruiting agencies used by the contractor, with updates when needed.

### Requirements Effective as of the Start of the New AAP Year

The OFCCP has acknowledged that the contractor's first AAP after March 24, 2014 will be a transitional one, because it may include analysis of only a partial year of data. That first AAP should: include evidence of compliance with all pre-existing regulatory requirements; address everything that the contractor has done to come into compliance with the new provisions of Subpart C; and, to the extent that the contractor is not yet in full compliance with the new provisions, discuss the steps that the contractor plans to take to come into compliance. With respect to new regulatory requirements, on or before the start of the contractors' new AAP year, the contractor must:

- Invite applicants to voluntarily self-identify as being a protected veteran at the pre-offer stage and, post-offer, as belonging to one or more of the specific categories of protected veteran the contractor is required to report, using a form that includes the specific content identified in the regulations;
- Invite applicants to voluntarily self-identify as an individual with a disability, at the pre- and post-offer stages, using the OFCCP mandated form without any additions or changes;
- Conduct an initial self-identification survey of employees regarding disability status, and establish a schedule for resurveying employees every five years, with at least one reminder in the intervening years;
- Develop a policy and procedure to store copies of the required self-identification forms, including electronic copies, in a secure, confidential location separate from application materials, personnel files, and ADA medical files;
- Design a procedure for review of the organization's personnel processes, including those implemented using electronic means, that evaluates in light of the new information available to the contractor whether applicants and employees with disabilities have had equal access to the personnel processes and provides evidence of the review should the OFCCP request it during an audit;
- Include an EEO policy statement in the AAP that shows top executive support for the AAPs for protected veterans and individuals with disabilities;
- Assess and document the effectiveness of the contractor's outreach and recruitment efforts for protected veterans and individuals with disabilities on an annual basis;
- Ensure that outreach and recruitment efforts are documented and retained for the specified periods;
- Either develop written procedures for processing reasonable accommodation requests (suggested but not required) or ensure that current procedures include records of accommodations made in a manner easily retrievable in the event of an OFCCP compliance review;
- Train employees engaged in key personnel activities in the contractor's affirmative action obligations;
- Conduct data analysis relating to hiring of protected veterans and individuals with disabilities by using the specific data points related to applicants and internal and external hires enumerated in the regulations, and maintain the data in a separate, confidential file for three years;
- Establish, document and begin applying an annual hiring benchmark for protected veterans for each establishment, using either the national hiring benchmark for veterans or an individually calculated benchmark;
- Conduct an annual workforce assessment and apply the 7 percent goal for employment of individuals with disabilities to each job group or to the workforce as a whole for smaller contractors with 100 or fewer employees; and
- Develop action plans for resolving any problems identified in the contractor's utilization of individuals with disabilities.

In addition, given the OFCCP's statements in the Preambles to the new regulations, contractors should pay particular attention to certain existing AAP requirements which are often stated in the AAP but overlooked in practice. The OFCCP had considered strengthening the existing regulatory language relating to these requirements but declined to do so, in light of contractor concerns. Nonetheless, the OFCCP evidently will give greater scrutiny to contractors' compliance with the following existing requirements:

- Establishing, documenting and adhering to a schedule for the review of all physical and mental job qualifications;

- Developing and implementing procedures to ensure that employees are not harassed because of their protected veteran status or disability;
- If employees with known disabilities have performance problems that might reasonably be expected to be connected with their disability, making confidential inquiry into whether an accommodation is needed, and documenting that inquiry; and
- Designing a compliant audit and reporting system and documenting actions taken to comply the identified system.

### Not Just a Task for Human Resources

The new regulations make clear that compliance cannot merely be delegated to a company's human resources department. The contractor must be able to document top executive support for its affirmative action obligations. In addition, the regulations require contractors to discuss their affirmative action policies "thoroughly" in both employee orientations and management training programs, emphasizing management's individual responsibility for effective implementation. Accordingly, while the human resources department can take the lead in organizing and implementing the new regulatory requirements, this effort demands the attention and cooperation of management and senior executives throughout the company.

If a contractor is selected for an OFCCP compliance review, it can expect that the OFCCP will pay heightened attention to the contractor's efforts to come into compliance with these new regulations. **Given the new data collection and analysis component of the new regulations, no contractor will be able to hastily put together a compliant affirmative action program within the 30 days allotted in the OFCCP's compliance review scheduling program.** Covered government contractors would be well-advised, therefore, to act now in implementing their new obligations. In addition, the Preambles to the new regulations signal the OFCCP's intent to review more closely contractors' compliance with all parts of the AAPs, even those that remained unchanged by the new regulations. As they work to comply with the new regulations, therefore, savvy contractors will include a review of their entire AAPs. Contractors should ensure that all required policies and procedures are in place and that they can demonstrate they have actually undertaken all of the actions described in the AAP documents. Otherwise, contractors may find themselves subject to a long compliance review process and findings by the OFCCP of multiple violations.

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If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Julia E. Judish ([bio](#))  
Washington, DC  
+1.202.663.9266  
julia.judish@pillsburylaw.com

Maryelena Zaccardelli  
Principal, MEZ Consulting, LLC  
+1.703.748.1314  
mezconsulting@verizon.net

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