

PUBLICATION

FEDERAL CONTRACTORS: OFCCP Proposes Significant Changes in Affirmative Action for Protected Veterans

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The regulations implementing the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) of 1974 (38 U.S.C. § 4212) may be seeing their first major revision in 35 years. From 1976, when the regulations were first enacted, to the present, little has changed with regard to affirmative action for veterans. The latest change, which occurred just a few years ago, was to implement some minor revisions brought about by the Jobs for Veterans Act of 2002. Nevertheless, those revisions, codified at 41 C.F.R. § 60-300 and which apply to federal contracts of \$100,000 or more formed on or after December 1, 2003, are not much different in substance from those already in place under 41 C.F.R. § 60-250 (which applies to contracts prior to December 1, 2003). However, federal contractors will want to pay close attention to the proposed significant changes in affirmative action for protected veterans announced April 26, 2011 by the Office of Federal Contract Compliance Programs (OFCCP).

Rescission of 41 C.F.R. § 60-250

OFCCP expresses doubts whether there are any contracts still in existence that would mandate adherence to the 41 C.F.R. § 60-250 regulations that apply to government contracts of \$25,000 or more and entered into prior to December 1, 2003. Consequently, OFCCP proposes to rescind this part. However, as a precautionary measure, OFCCP seeks comments from contractors to let it know whether there are still government contracts out there to which this part applies. Contractors who believe they have such a contract are encouraged to notify OFCCP within 60 days of April 26, 2011 (June 25, 2011). If such contracts are found to exist, OFCCP proposes to revise the part 250 regulations so that they mirror the proposed revisions to the regulations found at 41 C.F.R. § 60-300. Therefore, the discussion of the highlights of the proposed rulemaking below will apply to both sets of regulations if part 250 is not rescinded.

Equal Opportunity Clause

OFCCP's proposed rule would mandate that the Equal Opportunity for Section 4212 Protected Veterans clause, which is nearly five pages long, be set forth in every covered contract and subcontract *verbatim*. Incorporation by reference to the section of the regulations in which the clause can be found will not be permitted. In any event, OFCCP proposes that the clause be incorporated into every covered contract by operation of the Act. Thus, a contractor will be subject to the clause if the contract is covered under the Act regardless of whether it is set forth in the contract. "I didn't know" will be no excuse for non-compliance.

Invitation to Self-Identify

OFCCP seeks to clarify the manner in which contractors invite applicants and employees to self-identify as protected veterans. Many contractors offer individuals the opportunity to self-identify as a protected veteran at the application stage. However, for fear of violating the Americans with Disabilities Act (ADA), these same contractors are often reluctant to ask at the application stage whether the applicant is a "disabled veteran" despite the exception that permits such when the invitation is made "pursuant to a Federal, State, or local law requiring affirmative action for disabled veterans." To alleviate the confusion, OFCCP proposes a "model" invitation to self-identify that not only addresses these concerns, but also will enable contractors to collect the

data on veteran applicants mandated by the proposed regulations. At the application stage, the model form will include the various definitions of "protected veterans" and merely inquire whether the applicant fits into one of the definitions (including status as a disabled veteran) without disclosing which category. If an offer is extended to an applicant, a second "model" form will be offered to the individual, including the same definitions, which will invite the person to identify with one of the four categories of protected veteran status. Contractors need not use the "model" forms, but doing so should aid contractor compliance and eliminate concerns of ADA violations.

Reasonable Accommodations

If an applicant self-identifies at the post-offer stage as a disabled veteran, OFCCP's proposal will require the contractor to ask the individual whether an accommodation is necessary. If so, the contractor *must* engage in the interactive process with the applicant regarding reasonable accommodations consistent with the ADA. For any applicant or employee for whom a contractor makes a reasonable accommodation, a record containing a description of the accommodation must be maintained.

Linkage Agreements

Although covered federal contracts have always required a contractor to post jobs with the state or local employment agency, in addition to continuing that practice, the contractor will also need to establish linkage agreements under OFCCP's proposal. The linkage agreement will enlist the assistance and support of the Local Veterans' Employment Representative in the local employment service office, *and* also enlist the services of one or more persons or organizations provided in the proposed regulations. In addition, the proposal will mandate that contractors consult the Employer Resources section of the National Resource Directory and establish a linkage agreement with one or more of the agencies listed in the directory.

Hiring Benchmarks

Probably the most significant revision proposed by OFCCP is the mandatory use of veteran hiring benchmarks that employers will be required to establish each Affirmative Action Plan year. Similar to a placement goal percentage, the hiring benchmark will be expressed as a percentage of total hires that are protected veterans that a contractor will seek to hire on an annual basis. Unlike placement goals, which are directed at a contractor's "job groups," the benchmark could apparently be achieved by hiring protected veterans into any position. To establish the hiring benchmark, OFCCP will require contractors to take into account at least five sources of data, two of which OFCCP proposes to publish on its web site: (1) the average percentage of veterans in the civilian labor force in the state(s) where the contractor is located over the preceding three years; and (2) the number of veterans, over the previous four quarters, who were participants in the employment service delivery system (state or local employment agency) in the state where the contractor is located. The remaining three sources include "any other factors" which affect the availability of qualified protected veterans, the contractor's assessment of its external outreach and recruitment efforts, and the referral ratio, applicant ratio, and hiring ratio for the previous year. The contractor must document the hiring benchmark each year, detailing the factors considered in establishing the benchmark.

New Data Collection Requirements

Along with the proposed revisions come several new data collection requirements for contractors, including, but not limited to, those listed below. Contractors will have to document:

- The number of veterans referred to it by the applicable employment service delivery system(s) along with the total number of referrals from the same system(s) so that the contractor can arrive at a "referral ratio" of veterans to total referrals.
- The number of applicants who self-identified as protected veterans.
- The number of job openings and total number of jobs filled so that it can arrive at a ratio of jobs filled to job openings.
- The number of total applicants for all jobs, the ratio of protected veteran applicants to all applicants, the number of protected veteran applicants hired, the total number of applicants hired, and the ratio of protected veterans hired to all hires.
- All linkage agreements.
- All hiring benchmarks.

Under OFCCP's proposal, this data must be preserved for five years.

What Can You Do Now?

OFCCP is seeking comments from contractors on all of its proposals. All comments must be received by OFCCP on or before June 25, 2011. Comments must be identified by RIN number 1250-AA00 and submitted by any of the following methods:

- Federal eRulemaking Portal: www.regulations.gov (follow instructions).
- Fax: (202) 693-1304 (only six pages or less).
- Mail: Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

A copy of the proposed rule may be obtained at: <http://www.gpo.gov/fdsys/pkg/FR-2011-04-26/html/2011-8693.htm>.

As always, Baker Donelson's Labor and Employment attorneys stand ready to assist contractors in understanding this Notice of Proposed Rulemaking as well as any issues that may arise in the federal contracting arena. If you have any questions, please feel free to reach out to your Baker Donelson attorney or any of our nearly 70 Labor & Employment attorneys located in Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.