

PUBLICATION

Another Federal Contractor Hiring Quota? Say It Ain't So!!

December 30, 2011

Just several months after the Office of Federal Contract Compliance Programs (OFCCP) issued a notice of proposed rulemaking (NPRM) that sought significant revisions to the regulations implementing the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) of 1974, the OFCCP issued another NPRM. This new NPRM will drastically affect federal contractors' affirmative action obligations to individuals with disabilities. The most significant revisions are discussed briefly below.

Seven Percent Utilization Goal

The NPRM seeks to establish a seven percent utilization goal for each job group of a contractor's workforce. Thus, in addition to the utilization percentages that contractors establish for minorities, females and (if adopted) veterans, contractors will also soon be tasked with meeting a seven percent utilization goal for individuals with disabilities. This seven percent goal will not take into account the specific job(s) at issue such as that which occurs when calculating goals for minorities and females. Naomi Levin, the OFCCP's branch chief for planning and programming development, insists that the utilization goal is not a quota but an "aspirational equal employment opportunity objective." Nonetheless, contractors will fail the utilization goal if they do not hire at least one individual with a disability in each job group containing 15 or more employees. Contractors who do not meet the utilization goal will then have to take specific measures to address this disparity.

Providing Priority Consideration for Individuals with Disabilities

The OFCCP has also proposed to allow contractors to provide priority for individuals with disabilities in hiring. Examples provided by the OFCCP include assigning a weighted value or additional "points" to a job applicant who self-identifies as disabled, and developing a job training program focused on the specific needs of individuals with certain disabilities. The contractor must document annually in its affirmative action program all of the policies governing the program.

Review of Personnel Processes

The new rule would also require contractors on an annual basis to:

- Identify vacancies and training programs for which applicants and employees with disabilities are considered;
- Provide a statement of reasons explaining the circumstances for rejecting individuals for such vacancies or training programs; and
- Describe the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion or training programs.

Contractors would also be required to annually review their physical and mental job qualification standards to determine whether they are job-related and consistent with business necessity, to avoid needlessly screening out individuals with disabilities.

Documentation of the results of the above annual reviews would be mandatory.

Invitation to Self-Identify

As with the proposed revisions to the VEVRAA regulations, the OFCCP also proposes to establish a model Invitation to Self-Identify as Disabled. Many contractors do not offer applicants this opportunity for fear of violating the Americans with Disabilities Act (ADA), even though Section 503 regulations permit such a pre-offer inquiry when the invitation is made "pursuant to a Federal, State, or local law requiring affirmative action for individuals with disabilities." The OFCCP's proposed model pre-offer invitation is narrowly tailored to offer an individual the opportunity to disclose the existence of a disability but not the nature or type. If an offer is extended to an applicant, the OFCCP will require that a second model form be offered to the individual to identify as disabled. OFCCP believes that the use of model forms will encourage more individuals to identify as disabled because it will reassure applicants and post-offer employees that the request is routine and executed pursuant to a contractor's OFCCP obligations. A third requirement will be that contractors must annually survey their workforce (using language prescribed by the Director of the OFCCP) offering yet another opportunity for employees to identify as disabled. This data must be made available to the OFCCP upon request.

Outreach and Recruitment

Job Listing:

- Like its VEVRAA counterpart, contractors would be required to list all employment opportunities, with limited exceptions, with the nearest Employment One-Stop Career Center.

Linkage Agreements:

- Like its proposed VEVRAA counterpart, contractors would be required to establish three linkage agreements under the OFCCP's proposal. The first would be with the relevant State Vocational Rehabilitation Agency office near the contractor's establishment or with a local organization listed in the Social Security Administration's Ticket to Work Employment Network Directory. The second such agreement would be with at least one of a variety of organizations that support the recruitment and advancement of individuals with disabilities. Finally, the proposal mandates that contractors consult the National Resource Directory and establish a linkage agreement with one or more of the agencies listed in the directory.

New Data Collection Requirements

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

- The total number of referrals from the applicable employment service delivery system(s) and from the organizations with which the contractor has linkage agreements;
- The total number of applicants and the number of applicants who are known to be individuals with disabilities, in order to document the "applicant ratio" of known applicants with disabilities to total applicants;
- The number of job openings, the number of jobs filled, and the number of known individuals with disabilities hired, so that they can arrive at a "hiring ratio" of hires with known disabilities to total hires;
- The number of job openings and the number of jobs filled in order to arrive at the "job fill ratio" of job openings to job openings filled; and

- All Linkage Agreements.

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

What Can You Do Now?

The OFCCP is seeking comments from contractors on all of its proposals for 60 days beginning December 9, 2011. Thus all comments must be received by OFCCP on or before February 7, 2012. All comments must be identified by RIN number 1250-AA02 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); or
- 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-2011-12-09/pdf/2011-31371.pdf>.

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. Please feel free to reach out to 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.