

## ALERTS

### Labor & Employment Law Alert - New OFCCP Final Rules Require Federal Contractors To Increase Efforts To Hire Veterans And Disabled Individuals

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The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) recently issued much-anticipated Final Rules that will require federal contractors to engage in specific and measurable recruitment efforts to hire veterans and persons with disabilities.

These Final Rules formally take effect 180 days after being published in the Federal Register. The new regulations make significant changes to the Vietnam Era Veterans' Readjustment and Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act of 1973. For the past two years, federal contractors have anticipated that these rules would take effect. With the Obama Administration's recent appointment of Tom Perez as Secretary of Labor, the enactment of these new regulations signals a renewed focus on increasing the numbers of veterans and disabled individuals in the U.S. workforce.

As applied to VEVRAA, the Final Rule largely formalizes recruitment practices that, up until recently, have been considered "good faith efforts." Here is a summary of significant changes to VEVRAA:

- **Use of Benchmarks:** The OFCCP's Final Rule requires contractors to establish annual benchmarks to measure progress in hiring veterans. Contractors can either use a benchmark equal to the national percentage of veterans in the workforce, or contractors can set their own benchmarks based upon data from the Bureau of Labor Statistics (BLS). Because this data has not yet been posted, it remains unclear which method will be most beneficial to contractors.
- **Data Analysis & Retention:** Contractors are now required to conduct qualitative analysis of hiring data based upon veteran status. Data must be retained for three years (an increase over the existing requirement to retain data for two years).
- **Invitation to Self-Identify:** Contractors must now give applicants the opportunity to self-identify at both pre-offer and post offer stages of the hiring process (previous regulations required only post-offer self-ID of veteran status).

Noticeably absent from the VEVRAA Final Rule is a requirement that contractors engage in "linkage agreements" with recruitment sources. The inclusion of such requirement in previous versions of the revised VEVRAA regulations created a significant amount of confusion among the federal contractor community. Its exclusion suggests that the OFCCP has acknowledged that linkage agreements would not effectively lead to

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increased numbers of veterans entering the workforce.

With regard to Section 503, the Final Rule includes significant requirements for federal contractors, but some uncertainty still exists as to how contractors may legally ask about disability status at the pre-offer hiring stage. The following is a summary of major changes to Section 503:

- **Utilization Goal of 7 percent:** The OFCCP's Final Rule now requires that contractors strive to hire individuals with disabilities ("IWDs") to comprise at least 7 percent employees in each job group. The Final Rule incorporates the definition of disability used by the Americans with Disabilities Amendment Act (ADAAA).
- **Data Analysis & Retention:** The Final Rule now requires contractors to conduct qualitative analyses of disabled applicants and those hired, and to set goals in the Affirmative Action Plans. Data must be retained for three years (an increase over the existing requirement to retain data for two years).
- **Invitation to Self-Identify:** The Final Rule now requires contractors to allow applicants to self-identify as disabled at both the pre-offer and post-offer hiring stages. However, as mentioned, the OFCCP has not yet provided specific language that contractors can use to ask about applicants' disabilities while remaining in compliance with the non-discrimination requirements of the ADAAA. Although the EEOC issued an opinion letter on August 8, 2013 indicating that such practice would not violate the ADAAA, the use of disability as a pre-offer employment inquiry may lead to an increase in EEOC Charges and failure-to-hire complaints. This significant change highlights the importance of clearly communicating valid reasons for non-selection to applicants in efforts to avoid this unintended (but likely) result.

In sum, the OFCCP's Final Rules create an increased number of data retention and recruitment requirements. Federal contractors should contact their legal counsel for advice on how best to proceed with training and preparing recruiters and hiring managers. Legal counsel can also assist federal contractors determine the best means for conducting self-audits, reconfiguring HRIS systems to include the new self-ID categories, and adopting other recruiting practices that will lead to increased numbers of veterans and disabled persons in their companies.

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