



# **Understanding & Implementing OFCCP's "Game-Changing" VEVRAA & Section 503 Regulations**

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# Your Speakers Today



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# Seyfarth Shaw's Perspective

- Informed by experiences of more than 300 employment attorneys representing management
- Handling many of the most significant employment cases today
- Our practice is national in scope: 10 offices in the US
- Nationally recognized leaders in understanding and communicating affirmative action compliance and developing successful affirmative action programs (AAPs)
- Have defended hundreds of OFCCP compliance evaluations across every region in the US
- Consulting with hundreds of employers about employment policies and best practices, including selection and pay equity



# Overview

- It could have been worse
- But....there's a lot to do to comply with new obligations
  - ▶ Self identification & tracking applicants/hires
  - ▶ Goals/benchmarks
  - ▶ Self-assessment & documentation
- Audits will likely be tougher in seeking clear evidence of contractor compliance with all obligations
- Expect immediate uptick in audit enforcement on provisions of current regs that were not changed
  - ▶ Outreach & recruitment
  - ▶ Policy/procedures
  - ▶ Training
  - ▶ Documentation



# Final Disability and Veterans Affirmative Action Regulations

- Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities
  - ▶ Revises 41 CFR Part 60-741
- Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Disabled Veterans, Recently Separated Veterans, Active Duty Wartime Or Campaign Badge Veterans, and Armed Forces Service Medal Veterans
  - ▶ Revises 41 CFR Part 60-300 & rescinds 41 CFR Part 60-250



# When Must I Comply?

- Effective **date estimated March 2014**
  - 180 days from publication in Federal Register (**expected in 1-2 weeks**)
- Except-- phased in approach for Affirmative Action Program section “Subpart C”
  - AAPs in place on the effective date of the final rule remain unchanged until the next regular reporting period
  - *Example, assuming 9/2013 publication:*
    - AAPs dated January, February and March 2014 remain in place under current rules until their termination early 2015
    - April 2014 & thereafter AAPs must comply with new regs, including self-ID, applicant/hire tracking & use of goal/benchmark

# Major Modifications Disability and Veterans Regulations

<b>Themes</b>	<b>Section 503</b>	<b>VEVRAA</b>
<i>Definitional Changes</i>	✓	✓
<i>Benchmarks &amp; Utilization Goals</i>	✓	✓
<i>Self-identification Early &amp; Often</i>	✓	✓
<i>Outreach (but not Linkages)</i>	✓	✓
<i>Reasonable Accommodation</i>	✓	✓
<i>Data Collection, Analysis &amp; Recordkeeping</i>	✓	✓
<i>Transparency and Accountability</i>	✓	✓
<i>Training</i>	✓	✓
<i>Priority Consideration</i>	✓	✓
<i>Jurisdiction, Access and Audits</i>	✓	✓

# Theme 1: Definitional Changes

## Section 503

- Adopts ADAAA definitions
  - ▶ disability (broad coverage)
  - ▶ major life activities
  - ▶ mitigating measures
  - ▶ regarded as having an impairment
  - ▶ substantially limits
- Unlike ADAAA identifies certain impairments that substantially limit major life activities (e.g., deafness, blindness, diabetes, epilepsy, obsessive compulsive disorder)

## VEVRAA

- VEVRAA stays VEVRAA
- Also has definitional changes:
  - ▶ Covered veteran becomes “protected veteran”
  - ▶ Renames “other protected veteran” to “active duty wartime or campaign badge veteran”
  - ▶ Added “Pre-JVA veteran” definition (i.e., those who were covered under 60-250)



# Theme 2: Utilization Goals & Hiring Benchmarks

## Section 503

- Utilization goal (not hiring goal)
  - ▶ 7% qualified IWD in each job group
  - ▶ If total workforce of 100 or less, may apply 7% IWD goal to entire workforce
  - ▶ There is NO sub-goal for severe disabilities
- On its own, failing to meet goal is not a violation
  - ▶ Must assess annually to identify and implement corrective action to address problem areas
  - ▶ Goal is to be used as a “yard stick” to measure the effectiveness of a contractor’s EEO efforts

## VEVRAA

- Hiring benchmarks for veterans:
  - ▶ The percentage of veterans in the civilian labor force (from the Bureau of Labor Statistics) (now 8%)
  - ▶ Or alternative benchmark set by contractor after considering 5 factors
  - ▶ Apply benchmark to entire workforce (not by each job group)
- Like 503’s goal, failing to meet the benchmark is not a violation
  - ▶ Similarly must assess efforts annually (see Theme 4), using benchmark as a yardstick

# Theme 3: Self-Identification (Early and Often)

## Section 503

- Pre-offer
  - ▶ Apply EO11246 internet applicant rule for timing of invitation
  - ▶ Careful not to screen out applicants who could meet basic quals w/ a reasonable accommodation
- Post-offer
- Survey of employees 1<sup>st</sup> year; every 5 years, *plus* an interim reminder of the ability to change status (not anonymous)

## VEVRAA

- Pre-offer
  - ▶ Are you a protected veteran?
- Post offer
  - ▶ Specific category of protected veteran
  - ▶ Consistent with VETS 100A reporting
- No resurvey required

# Theme 3: Self-Identification (cont'd)

## Section 503

- May identify IWD who do not self-identify when disability:
  - ▶ obvious *or*
  - ▶ known
- Mandated self ID invitation language to be provided by OFCCP (not yet released)
- Self ID information must be confidential
  - ▶ Must be in a “data analysis file” – NOT in a personnel or medical file

## VEVRAA

- Suggested Self-Identification provided by OFCCP
  - ▶ Appendix B
- Consider adding “I decline to self-identify”



# Theme 4: Outreach

## Section 503

- Appropriate outreach efforts to be determined by contractor
  - ▶ Linkage agreements are not required
- Written notification of AA efforts must be sent to subcontractors, vendors & suppliers to request appropriate action
- Disseminate outreach policy to employees, union officials
- Scope of outreach efforts depends on size, resources and adequacy of existing practices

## VEVRAA

- Same as Section 503

# Theme 4: Outreach (cont'd)

## Section 503

- Assess outreach efforts annually
- Assessment must be documented
  - ▶ state the criteria used
  - ▶ explicitly state the outcome
  - ▶ include required data analytics for the current year & two most recent years (see Theme 6)
- Identify alternative outreach efforts if “totality” of outreach efforts not effective
- Retain outreach documentation for 3 years

## VEVRAA

- Same as 503
- Also must provide job vacancy information to ESDS “in any manner and format permitted”
  - ▶ Must specifically request priority referrals of protected veterans job openings
  - ▶ Must provide information re: staffing or temp agencies used
  - ▶ Can use 3<sup>rd</sup> party but if not provided in correct format will be contractor violation

# Theme 5: Reasonable Accommodation

## Section 503

- Proposed reasonable accommodation requirements are now considered “best practices” only
- Equal access to electronic or online job application systems required
- Tests based on “uncorrected vision” prohibited unless (1) job-related to specific position and (2) consistent with business necessity
- Compensation may not be reduced to cover cost of reasonable accommodation

## VEVRAA

- Like under Section 503, proposed reasonable accommodation requirements are now considered “best practices” only
- For “direct threat” (only in VEVRAA)
  - ▶ A statement of the reasons supporting the belief of the direct threat must be created
  - ▶ Treated as confidential medical record and retained

# Theme 6: Data Collection, Analysis & Recordkeeping Obligations

## Section 503

- Measurement of applicants and hires:
  - ▶ the number of applicants who self-ID or are otherwise “known” IWD
  - ▶ total applicants for all jobs
  - ▶ the number of applicants with disabilities hired
  - ▶ total number of applicants hired
  - ▶ total job openings and jobs filled
  - ▶ no referral data required
- Required annual measurements but no annual report to OFCCP
- Must retain records for 3 years
- NO Impact Ratio Analyses will be conducted using these measurements

## VEVRAA

- Same as 503, but for protected veterans

# Theme 6: Data Collection, Analysis & Recordkeeping Obligations (cont'd)

## Section 503

- Must self-audit and document self-audit
- Record-keeping requirements:
  - ▶ 2 years if at least 150 employees or contracts at least 150K (no change from current regs)
  - ▶ 1 year if less than 150 ees or contracts of less than 150K (no change from current regs)
  - ▶ All contractors must retain the following records for three years:
    - Outreach 60-741.44(f)(4)
    - Data collection analysis 741.44(k)

## VEVRAA

- Same as 503, but for protected veterans



# Theme 7: Transparency & Accountability

## Section 503

- Incorporate EO clause in contracts by explicitly citing 41 CFR 60-741.5(a) and including in bold text:  
*“This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.”* 60-741.5(d)
- Tagline- Hiring solicitations and ads must explicitly include “disability” in EEO tagline
- Top U.S. Executive must publicly and personally support company’s affirmative action obligations

## VEVRAA

- Incorporate EO Clause- same concept as 503, but language of for protected veteran  
*“This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.”* 41 CFR 300.5(d)
- Like Section 503, hiring solicitations and ads must explicitly include “protected veteran” in EEO tagline and top U.S. Executive must state support for company’s affirmative action obligations

# Theme 7: Transparency & Accountability (cont'd)

## Section 503

- Must ensure that applicants / employees are provided the EO policy statement in a format that is accessible and understandable to the individual
- Electronic notices are allowed in a conspicuous location and format; may be sent by email
- Contractor may electronically post EO clause for employees who work offsite if (1) computers are provided or (2) employer has actual knowledge that employees can access the notice
- Must notify union that you will “not discriminate” against IWDs
- Still need to make AAP available to applicants/employees who request, BUT do not need to include metrics

## VEVRAA

- Same as 503, except for protected veterans



# Theme 8: Training

## Section 503

- Train all employees involved in personnel decisions on affirmative action commitments
  - ▶ But specific elements of training not defined
  - ▶ Do not need to record who attended
  - ▶ Does not need to be annual
- Maintain documentation of training pursuant to record-keeping requirements

## VEVRAA

- Same as 503, but for protected veterans

# Theme 9: Priority Consideration

## Section 503

- Permits contractors to *voluntarily* develop and implement training and employment for individuals with disabilities
  - ▶ Eliminates “priority consideration” language

## VEVRAA

- Contractors are required inform ESDS in each state of federal K status
- And must partner with ESDS to provide priority referrals of protected veterans
  - ▶ Must report changes when occur, not annually

# Theme 10: Jurisdiction, Access and Audits

## Section 503

- OFCCP may extend temporal scope of an audit
- Must provide information to OFCCP in “all formats”, as selected by OFCCP (including electronic)
- Pre-award audits will include compliance with 503
- Remedial benchmarks may be imposed in Conciliation Agreements

## VEVRAA

- Rescinded 60-250 regulations
  - ▶ 60-300 applies ONLY to federal contractors or subcontractors with contracts of \$100,000 or more
  - ▶ But non-discrimination provisions of 60-300.21 and the right to file complaints all apply to “pre-JVA veterans”
- Scope, access to “all formats”, and pre-award audits same as 503
- Remedial benchmarks not included in VEVRAA regs



# What Contractors Should Do Now-Immediately

- Self-audit of current compliance- expect immediate audit attention
  - ▶ Review outreach & recruitment
    - List of current efforts, including organization, types of skills supplied, geography covered, frequency of use, ease of use, usefulness of continued relationship
  - ▶ Review of physical & mental requirements of jobs
    - List by job, document last time reviewed
  - ▶ Review personnel processes, including
    - Recruiting, screening, hiring, promoting, training, compensation
  - ▶ Review policy/practices for making accommodations
    - Determination of reasonableness, documentation of accommodations granted, denied & basis
  - ▶ Review training for HR and managers



# What Contractors Should Do Now- Planning for March 2014 and beyond

- Review self-audit results & supplement where necessary
- Internal Processes:
  - ▶ Revise EEO/affirmative action policy, purchase orders, communication to subcontractors, unions, EEO tagline
  - ▶ Revise record retention requirements- 3 years
  - ▶ Develop forms for internal use by HR/managers to record outreach/accommodations (may implement now)
  - ▶ Ensure basic qualifications screens are job-related & consistent w/ business necessity & include IWD's ability to perform essential functions with accommodations (may implement now)
  - ▶ Draft self-identification format for veterans; plan date and process to implement that & mandated self-id for IWDs
  - ▶ Consider content, format for annual self-assessment
- Research: Consider alternative to 8% veterans benchmark



# What Contractors Should Do Now- Planning for March 2014 and beyond

- Systems:
  - ▶ Human Resources Information Systems (hiring, jobs filled)
  - ▶ Applicant Tracking Systems (self-ID, applicant tracking, jobs opened, record retention)
  - ▶ AAP Development or Vendor (overhaul of AAP narrative, applicant/hire report, goal/ benchmark report, 3 yr trend report)
  - ▶ ESDS Listings (as state requires, VEVRAA Federal Contractor)
- Communication/ Education/ Training:
  - ▶ Training for HR/managers, especially how to document compliance (may implement now)
  - ▶ Recruiter/talent acquisition training re alignment of basic qualifications screen and accommodations, accommodation during employment screening process (may implement now)
  - ▶ Consider employee communication/ education program re self-identifying disability/disabled and veterans/veterans status
  - ▶ Temporary/staffing firm communication re compliance





# Stay Tuned! Coming Your Way...

- More webinars, learning opportunities from Seyfarth Shaw regarding the new regulations and how to implement them
- Webinar regarding the newly revised Federal Contract Compliance Manual and what it means for contractors
- Questions?
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