

Management Alert

OFCCP Publishes Proposed Vets Regulations in Federal Register

On Tuesday, April 26, 2011, the Office of Federal Contract Compliance Programs (OFCCP) published for public comment a Notice of Proposed Rulemaking (NPRM) titled "Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans." The NPRM is intended to revise the current regulations interpreting the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. § 4212, which applies to federal contractors and subcontractors.

The proposed rule is intended to revise the regulations at 41 CFR Part 60-300, which apply to post-December 1, 2003 contracts of \$100,000 or more, and rescind the virtually obsolete regulations at 41 CFR Part 60-250, which apply to pre-December 1, 2003 contracts of \$25,000 or more. Alternatively, OFCCP proposes changes to Part 60-250 paralleling those for Part 60-300.

OFCCP notes that the revisions are intended to strengthen affirmative action obligations, increase data collection obligations, and require federal contractors and subcontractors to establish hiring benchmarks. The most significant proposed changes to the regulations are outlined below.

Redefined Veterans Categories

The current regulations at Part 60-300 define four categories of covered veterans: recently separated veterans, Armed Forces service medal veterans, disabled veterans, and other protected veterans. Section 60-300.2 of the proposed rule will modify these categories to include recently separated veterans, Armed Forces service medal veterans, disabled veterans and "active duty wartime or campaign badge veterans." According to OFCCP, the modification will not alter the veterans who are covered, but it will render the regulations more accurate and compliant with statutory language under the Jobs for Veterans Act, which amended VEVRAA in 2002. After the final rule is published, OFCCP intends to work with the Department of Veterans Employment and Training Service to conform the annual VETS-100A report to the new veterans categories.

Additionally, the proposed rule defines "protected veteran" to encompass the four new categories of veterans. All references to "covered veterans" throughout 41 CFR Part 60-300 will be changed to refer to "protected veterans."

Listing Job Vacancies With State Employment Service Delivery System

The proposed rule makes several changes and additions to the provisions of the Equal Opportunity Clause at 41 CFR § 60-300.5(a). First, contractors will be required to provide job vacancy information to the applicable state employment service delivery systems in the manner required by the service, even if the contractor uses a privately-run job service or exchange to list open positions. This change is in response to feedback OFCCP received from officials in state employment services that job services do not always provide information in a manner the service can use.

Contractors also will be required to notify the state employment service delivery system annually of the employer's status as a federal contractor, provide contact information for the hiring official at each of the contractor's establishments in the state, and make a specific request for priority referrals of protected veterans for job openings at all locations within the state.

Linkage Agreements and Recruitment Efforts

The proposed regulations require contractors to enter into "linkage agreements," which are defined at proposed § 60-300.2(p) as "an agreement describing the connection between contractors and appropriate recruitment and/or training sources. A linkage agreement is to be used by contractors as a source of potential applicants for the covered groups the contractor is interested in, as required by § 60-300.44(f)."

Under proposed § 60-300.44(f)(1), as part of its annual affirmative action program for protected veterans, contractors will be required to engage in a minimum number of outreach and recruitment efforts including entering into linkage agreements with (1) the local veterans' employment representative in the local employment service office; (2) at least one of several other listed organizations and agencies to recruit and develop training opportunities; and (3) at least one veterans' service organization listed on the Employee Resources section of the National Resource Directory, a partnership with an online collaboration among the Departments of Labor, Defense, and Veterans Affairs.

The proposed rule also requires contractors to review their outreach and recruitment activities annually to evaluate their effectiveness in identifying and recruiting qualified protected veterans. The review must be documented and records retained for five years. Other recommended outreach activities are included as well.

Data Collection, Analysis and Recordkeeping

The proposed rule requires contractors to maintain quantitative measurements and comparisons related to veterans who have been referred by state employment services, who have applied for positions with the contractor, and who have been hired by the contractor. The measurements are intended to aid the contractor in evaluating and tailoring recruitment and outreach efforts and in establishing hiring benchmarks. Those measurements and comparisons include the following:

- The total number of referrals the contractor receives from state employment services, the number of priority referrals of protected veterans it receives, and the "referral ratio" of protected veteran referrals to total referrals;
- The total number of applicants for employment, the number of applicants who are known protected veterans, and the "applicant ratio" of known protected veterans applicants to total applicants;

- The total number of job openings, the number of jobs filled, the number of known protected veterans hired, and the “hiring ratio” of known protected veteran hires to total hires; and
- The total number of job openings, the number of jobs that are filled, and the “job fill” ratio of job openings to job openings filled.

These measurements and comparisons must be made annually and records of them retained for five years.

Establish Hiring Benchmarks

One of the most significant changes in the proposed rule is the requirement that contractors establish hiring benchmarks, which are to be expressed as a percentage of total hires who are protected veterans that the contractor seeks to hire in the following year. Contractors will be required to consult different information sources to set benchmarks including: (1) the percentage of veterans in the civilian labor force (available from the Bureau of Labor Statistics); (2) the number of veterans who were participants in the state employment service in the state where the contractors establishment is located (available from the Department of Veterans’ Employment and Training Service); (3) the referral ratio, applicant ratio, and hiring ratios required by proposed 60-300.44(k); (4) the contractor’s recent assessments of the effectiveness of its external outreach and recruitment efforts; and (5) any other factors, including but not limited to the nature of the contractor’s job openings and/or location, which would tend to affect the availability of qualified protected veterans.

Invitations to Self-Identify

In order to gather some of the anticipated mandatory data, contractors will be required to solicit veteran data earlier in the application process. OFCCP proposes a two-step process for soliciting voluntary identification of veteran status. At the pre-offer stage, applicants will be invited to self-identify as a protected veteran, without identifying the specific veteran category that applies. This invitation can be included with the application, similar to the approach taken to solicit race and gender information under Executive Order 11246. At the post-offer stage, applicants will be invited to voluntarily self-identify and provide information about the specific veteran category or categories which apply.

Appendix B of the proposed rule contains two sample invitations to self-identify, one for the pre-offer stage, and one to be used post-offer. The sample also explains that the contractor solicits the information in order to measure its outreach and recruitment efforts under Part 60-300. The contractor must keep all self-identification information confidential.

Other Affirmative Action Program Changes

The proposed regulations strengthen the affirmative action program requirements for protected veterans in ways including the following:

- Review of personnel processes: Under the proposed rule, this review must be undertaken annually, rather than periodically. Additionally, contractors must include the following steps (which are recommendations under existing regulations) in this review: (1) for each protected veteran applicant, identify the vacancies and training programs for which he or she was considered; (2) for each protected veteran employee, identify each promotion and training program

for which he or she was considered; (3) provide a statement of the reasons explaining the circumstances for rejecting proposed veterans for employment, promotions or training and a description of accommodations that were considered for a rejected disabled veteran (which must be provided to the applicant or employee concerned upon request); and (4) describe the nature and type of accommodations for disabled veterans who were selected for hire, promotion or training.

- Physical and mental qualifications: Annual review, rather than periodic review, will be required. Also, contractors will be required to document the results of the annual review to ensure critical analysis and allow OFCCP to audit more effectively.
- Internal dissemination of policy: contractors' internal procedures for communicating affirmative action obligations to employees will have to include the following: (1) include the affirmative action policy in the contractor's policy manual; (2) schedule annual meetings with employees to discuss the policy, explain contractor and individual responsibilities and identify opportunities for advancement; (3) conduct meetings with executive, management and supervisory personnel to explain the intent of policy and individual responsibility for effective implementation; (4) discuss the policy in orientation and management training programs; and (5) if applicable, meet with union officials and representatives to inform them of policy and seek cooperation. Other methods of internal dissemination are suggested as well.
- Training: Contractors will be required to train all personnel involved in recruitment, screening, selection, promotion, disciplinary and related processes to ensure implementation of the commitments in the affirmative action program. The training must include, without limitation, the benefits of employing protected veterans, appropriate sensitivity toward protected veteran applicants and employees, and legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically, such as reasonable accommodation. Records of the personnel who receive training, when it is received, and the persons who administer it must be maintained.

Reasonable Accommodations

The proposed regulations impose additional obligations on federal contractors with respect to providing reasonable accommodations for disabled veterans. Among the notable changes in § 60-300.21 and Appendix A to Part 60-300, "Guidelines on a Contractor's Duty to Provide Reasonable Accommodation" are the following:

- In the event an accommodation would constitute an undue hardship, disabled veterans must be given the option of providing the accommodation themselves or paying the portion of the expense that constitutes an undue hardship to the contractor;
- A disabled veteran who rejects a reasonable accommodation offered by the contractor still may be a qualified disabled veteran if the individual subsequently provides and/or pays for a reasonable accommodation himself or herself; and
- Contractors must seek the advice of disabled veterans who self-identify as such with respect to possible reasonable accommodations.

Applicant and Employee Notifications

The proposed regulations make a number of changes concerning the manner in which certain notices must be provided to applicants and employees.

- Where contractors are required to provide notice in a manner accessible and easy to understand for persons with disabilities, the recommended method of doing so is by using Braille, large print or other versions, instead of reading the notice aloud, which is recommended in the current regulations.
- For employees who do not work at a physical location of the contractor, the posting obligations are satisfied if the contractor posts notices in an electronic format, provided that the contractor provides computers for accessing the electronic posting to such employees, or the contractor has actual knowledge that such employees are otherwise able to access the electronically posted notices. Electronic notices for employees must be posted conspicuously on the company's intranet or sent by electronic mail to employees.
- Contractors may use electronic postings to notify job applicants of their rights if the contractor utilizes an electronic application process. Such notices must be stored with, or as part of, the electronic application.

Compliance Evaluations and Access to Records

The proposed rule addresses the temporal scope of desk audits, largely as a response to the administrative law judge's decision in *Office of Federal Contract Compliance Programs, U.S. Department of Labor v. Frito-Lay, Inc.*, Case No: 2010-OFC-00002, holding the OFCCP is limited to data for the two year period preceding the date of a scheduling letter during a desk audit. Proposed § 60-300.60(a)(1)(i) is modified to clarify "OFCCP's long-standing policy that, in order to fully investigate and understand the scope of potential violations, OFCCP may need to examine information after the date of the scheduling letter in order to determine, for instance, if violations are continuing or have been remedied. The language does not represent a change in policy or new contractor obligations."

The proposed rule also provides that during a compliance evaluation, the contractor must specify to OFCCP all formats (including specific electronic formats) in which its records are available and produce requested records in the format selected by OFCCP. OFCCP proposes this change in light of "many instances" in which the agency conducted extensive review and analysis of records only to find later that they were available in more readily accessible formats.

Other Proposed Changes

The proposed rule contains a number of other proposed changes, including, without limitation, the following: (1) contractors will be required to include the entire EO Clause at §60-300.5(a) *verbatim* in subcontracts and purchase orders; (2) contractors will be required to include, in all solicitations and advertisements for employment, that it is an equal opportunity employer of veterans protected by Section 4212; (3) many of the new records contractors are required to maintain will be subject to a five (5) year retention period; (4) contractors must send written notification of its policy related to affirmative action efforts to subcontractors, including vendors and suppliers, to request appropriate action on their parts; (5) the identity of the officials responsible for affirmative action must appear on all internal and external communications regarding the AAP; and (6) § 60-300.1(a) is modified to expressly prohibit discrimination against veterans in addition to requiring affirmative action.

What Contractors and Subcontractors Should Do Now

Interested contractors and subcontractors should review the proposed rule, which can be accessed [here](#), and assess the possible implications or repercussions from the new, proposed requirements. Comments to the Notice of Proposed Rulemaking are due on or before June 27, 2011.

If you have questions about the proposed regulations or this Management Alert, or if you are interested in submitting comments to the NPRM, please contact the Seyfarth attorney with whom you work or any attorney on our [OFCCP & Affirmative Action Compliance Team](#).



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