

Management Alert



The Clock Starts Ticking Today For OFCCP's "Game-Changing" VEVRAA & Section 503 Regulations - Effective March 24, 2014

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Today's publication in the Federal Register of the OFCCP's final non-discrimination and affirmative action regulations impacting protected veterans and individuals with disabilities marks the countdown that contractors have been long awaiting. The regulatory changes to the Vietnam Era Veterans' Readjustment and Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act (Section 503) take effect on March 24, 2014. Federal contractors should begin now the process to come into compliance by March 24, 2014 with many of the obligations mandated by the new regulations. For contractors with an affirmative action plan (AAP) year that begins before April 2014, the regulations provide for "phased in" compliance with required modifications to the AAPs, self-identification, and other requirements.

Seyfarth attorneys provided an overview of the changes under the new regulations in a September 3, 2013 [webinar](#), titled OFCCP's "Game-Changing" Disability and Veterans Regulations Finalized." As summarized below, the changes update and strengthen federal contractors' affirmative action and nondiscrimination responsibilities for protected veterans and individuals with disabilities (IWDs).

A. Workforce Utilization Goals (IWD) and Hiring Benchmarks (Veterans)

One of the most significant changes in the new regulations is the requirement that contractors implement annual hiring benchmarks and workforce utilization goals. Under Section 503, contractors must strive to meet an OFCCP established seven percent (7%) workforce utilization goal for IWDs—in each and every job group. Put another way, the OFCCP's new Section 503 regulations will require that contractors set a goal of having 7% of each level of the contractors' workforce be comprised of IWDs. Instead of a workforce utilization goal, the VEVRAA Final Rule introduces hiring benchmarks for protected veterans. Unlike Section 503, the VEVRAA hiring benchmark is for the entire contractor workforce and does not apply to each job group. It also is set only for new hires. Contractors must use one of two methods to establish their veteran hiring benchmarks:

- Contractors may choose to establish a benchmark equal to the national percentage of veterans in the civilian labor force (now 8%). This percentage will be published and updated annually by OFCCP.
- Alternatively, contractors may establish their own benchmarks using certain data from the Bureau of Labor Statistics (BLS) and Veterans' Employment and Training Service/Employment and Training Administration (VETS/ETA) that will be also be published by OFCCP, and take into account five factors set forth in the VEVRAA final rule.

A contractor must maintain records relating to the benchmarks for three years, regardless of the method used to establish a benchmark.

According to the OFCCP, both the Section 503 workforce utilization goal and the VEVRAA hiring benchmark are aspirational goals—they are yardsticks by which to measure a contractors' outreach and recruitment efforts for IWDs and protected veterans. Nonetheless, the failure to (1) establish a benchmark; or (2) engage in meaningful outreach and self-analysis with regard to the established goals can result in violation findings.

B. Outreach, Self-Audits, Data Collection and Recordkeeping

Other significant changes in the regulations relate to recordkeeping and to documentation of specific metrics, both of which are intended to measure accountability for the contractor's compliance obligations. First, in the area of outreach and recruitment, the final rules require that contractors document each of their outreach and recruitment efforts for IWDs and protected veterans and perform an annual written assessment of the effectiveness of each of these efforts. The contractor must document the criteria used to evaluate the effectiveness of each effort, including the data analysis described below for the current year and the two previous years. A contractor's conclusions as to whether its outreach and recruitment efforts are effective must be "reasonable" as determined by the OFCCP and will be evaluated based on the totality of the contractor's efforts. If the contractor determines that its efforts were not effective in making progress towards meeting its workforce utilization and hiring benchmarks, it must identify and implement alternative outreach efforts.

The OFCCP provides updated examples of outreach and recruitment activities in both the final VEVRAA and Section 503 rules. For protected veterans, these include enlisting the assistance of organizations supporting veterans, such as the Department of Veterans Affairs Regional Office, and developing on-the-job training opportunities for veterans. Section 503 lists similar examples of outreach and recruitment activities as applied to IWDs.

Contractors are required to maintain all records of outreach and recruitment efforts, including the annual assessment, for three years.

Second, both Section 503 and VEVRAA added a data analysis section under the new regulations. The Final Rules require that contractors document and update annually:

- Number of IWD/protected veteran applicants;
- Total number of applicants for all jobs;
- Total number of job openings and jobs filled;
- Number of total IWDs/protected veterans hired; and
- Total number of applicants hired.

Contractors must also maintain these records for three years.

C. Invitations to Self-Identify

Contractors must invite all applicants to identify as IWDs and/or protected veterans at both the pre-offer and post-offer phases of the application process.

OFCCP has directed that contractors must use the OFCCP's forthcoming language in its invitations to self-identify under Section 503 without modification. The language to be used by contractors will be prescribed and published by the OFCCP at a later date. Although many believed that a pre-offer invitation to self-identify as an IWD conflicted with the Americans with Disabilities Act (ADA), the EEOC issued a letter stating that contractors could engage in such pre-offer invitations pursuant to the ADA's exception for affirmative action obligations.

Under VEVRAA, the OFCCP provided sample invitations to self-identify that contractors may (but are not required to) use. At the pre-offer phase under VEVRAA, contractors are to solicit limited information about protected veteran status followed by a post-offer voluntary self-identification in any of the specific categories of protected veteran for which the contractor is required to report data to VETS.

In addition to pre-offer self-identification, Section 503 also requires that contractors extend the invitation to self-identify as an IWD to its entire workforce. The invitation to employees must be issued to all employees the first year that the contractor is subject to the self-identification requirement under Section 503. Then employees must be invited to self-identify every five years after the initial invitation. A contractor must also provide at least one reminder to employees within each 5 year period that they may self-identify as IWDs.

D. Transparency and Accountability

The Final Rules require that contractors provide written notification of the contractors' affirmative action efforts and policies to subcontractors, vendors, and suppliers. Contractors must also incorporate the EO clause in contracts and subcontracts using text mandated by the OFCCP, which must be printed in bold text. Finally, EEO taglines in solicitations and advertisements must be revised because, in response to specific questions posed to the agency, the OFCCP has taken the position that references to veteran and disability status may not be abbreviated.

E. Reasonable Accommodation

In its proposed rule, the OFCCP required that contractors memorialize any denial or refusal to provide a requested reasonable accommodation in writing, including the reason for the denial. The Final Rule, however, states only that it is a best practice for contractors to issue such a writing. Contractors are nonetheless reminded that it is "unlawful for the contractor to use qualification standards, employment tests, or other selection criteria" that screen out IWDs, on the basis of disability, unless the standard is shown to be job-related for the position and is consistent with business necessity. Accordingly, contractors should carefully review their basic qualifications and hiring criteria to ensure compliance with Section 503.

F. Other Developments—Congressional Oversight of the Final Rules Continues

Just a few days before their publication in the Federal Register, two members of the House of Representatives questioned some of the more controversial aspects of the Final Rules. On September 19, 2013, House of Representatives Education and Workforce Committee Chairman John Kline (R-MN) and Workforce Protections Subcommittee Chairman Tim Wahlberg (R-MI) requested information from Secretary Thomas Perez regarding the U.S. Department of Labor's intention to finalize regulations under Section 503 and VEVRAA. Chairman Wahlberg also invited OFCCP Director Patricia Shiu to testify before the subcommittee on October 2, 2013 about the new regulations.

Representatives Kline and Wahlberg's letter raised several concerns, both substantive and procedural, about the department's rulemaking efforts under Section 503 and VEVRAA. First, the letter provides that despite repeated requests for information from the committee, the department failed to provide information regarding its statutory authority to establish numerical hiring benchmarks for either protected veterans or IWDs. Second, the department failed to respond sufficiently regarding how it provided all interested stakeholders with the opportunity to engage in in-person meetings with administration officials during the rulemaking process. Finally, the letter contends the department did not provide an adequate comment period in which interested stakeholders could study and comment on the proposed regulations. Regarding pre-offer medical inquiries, which are prohibited by the statutory language of the Americans with Disabilities Act unless job-related and consistent with business necessity, the committee requested all communications between the EEOC and OFCCP regarding the legality of such inquiries.

It is theoretically possible that Congress could review and overrule the regulations under the Congressional Review Act (CRA). However, that mechanism has only been invoked successfully once before in 2001, when OSHA's contentious ergonomic

regulations promulgated in the final days of the Clinton Administration were overruled. In today's political environment, it is extremely unlikely that the CRA will be successfully invoked for these regulations.

While these rulemaking deficiencies may call into question the validity of each set of regulations, federal contractors still must prepare to navigate and comply with the complex new regulations, including the hiring goals and other data collection requirements. Absent a private party successfully challenging the procedural and substantive validity of the regulations in court, these regulations are the law of the land and federal contractors will have to take the necessary steps to comply.

If you have questions about the Final Rules or this Management Alert, please contact the Seyfarth attorney with whom you work or any attorney on our OFCCP & Affirmative Action Compliance Team.

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