

Management Alert



Congress Hears Contractor Concerns, Calls on OFCCP to “Clarify Issues” Raised by NPRM Proposing Changes to Disability Regulations

Congress is listening to its constituents in the contractor community and taking very seriously contractors’ well-publicized concerns about the burdensome and expensive proposed changes to Section 503 of the Rehabilitation Act (“Section 503”) disability regulations.

On January 27, 2012, the House of Representatives’ Committee on Education and the Workforce (“Committee”) sent a letter to U.S. Department of Labor Secretary Hilda L. Solis requesting additional information and documentation to clarify issues raised by the Office of Federal Contract Compliance Programs’ (OFCCP) December 9, 2011 Notice of Proposed Rulemaking (NPRM), which proposed extensive, unprecedented changes to the regulations addressing affirmative action for individuals with disabilities. The Committee also requests a 90-day extension of the public comment period to allow for a review of the additional information and documentation and a “thorough review” of the NPRM. The current deadline for submission of public comment is February 7, 2012. Click [here](#) for a copy of the letter.

By OFCCP Director Patricia A. Shiu’s own description, the NPRM represents a “sea change” and one of the “most significant” developments to affect federal contractors’ nondiscrimination and affirmative action obligations under Section 503. Concern over the cost and burden associated with the proposed changes has reverberated through the contractor community, and the Committee’s letter addresses many of the contractor community’s key concerns. Click [here](#) for a detailed discussion of the proposed changes to the disability regulations.

Committee Raises Three Main Concerns

Taking aim at one of the most significant proposed changes -- the requirement that contractors establish a goal of having 7% of their workforce made up of employees with disabilities -- the Committee’s letter questions OFCCP’s legal authority under Section 503 to establish a numerical hiring standard and raises concerns that such a hiring standard would be tantamount to a quota, which has been met with great scrutiny by the Supreme Court.

Echoing another concern of contractors, the Committee also recognizes that a contractor’s ability to meet a numerical hiring standard would be dependent upon accurate self-identification and disclosure during the applicant process, which could “create more problems than solutions.”

Moreover, the Committee raises the potential burdens associated with “the NPRM’s myriad new paperwork and recordkeeping requirements.” Quoting President Obama’s caution from January, 2011 that “[s]ometimes, [rules and regulations] have gotten out of balance, placing unreasonable burdens on business -- burdens that have stifled innovation and have had a chilling effect on growth and jobs,” the Committee opines that a “number of the NPRM’s new paperwork and recordkeeping requirements could create a burden for employers with questionable benefits for individuals with disabilities.” Thus, the Committee urges the OFCCP to weigh closely the related concerns of affected stakeholders [to wit: the contractor community], who are best able to quantify proposed burdens and anticipate unintended consequences.

Finally, the Committee raises questions about the NPRM's requirement that federal contractors ask job applicants to self-identify as having a disability prior to receiving an offer of employment. The Committee suggests this requirement may conflict with statutory language of the Americans with Disabilities Act (ADA) permitting only post-offer self-identification. While it remains to be seen whether the Committee's interpretation will be accepted -- ADA and Section 503 regulations could be interpreted to permit pre-offer inquiry into disability status if made pursuant to a federal, state or local law requiring affirmative action for individuals with disabilities -- the request for pre-offer self-identification is duplicative, burdensome, and unnecessary.

Request for Response to Six Specific Inquiries and All Related Documents and Communications

Requesting a response by February 10, 2012 (assuming an extension of the comment period 90 days beyond February 7, 2012), the Committee seeks response to six (6) comprehensive and detailed "inquiries," as well as "all documents and communications" related to the inquiries, aimed at addressing the three concerns raised by the Committee.

1. Identify and explain OFCCP's statutory authority under Section 503 to establish a numerical hiring standard.
2. Identify and explain the basis for OFCCP's decision that federal contractors' good faith efforts are insufficient affirmative action under Section 503.
3. Identify and explain OFCCP's statutory authority to require contractors to ask job applicants to self-identify as a qualified individual with a disability, given that the ADA prohibits disability-related questions before an offer of employment has been made.
4. Identify and explain the basis for OFCCP's assumption that job applicants and contractors' current employees would understand the legal definition of "disability," as defined in the NPRM's prescribed self-identification notice.
5. Under proposed section 60-741.44(b), OFCCP assumes contractors would spend 30 minutes per year to draft written "statement[s] of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs. Simple math would suggest the amount of time required would far exceed this estimate. Explain how OFCCP determined the 30 minutes per year estimate.
6. Under proposed section 60-741.44(d), OFCCP failed to consider the costs federal contractors would incur to make their "electronic or online job application systems [] compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software." Likewise, under proposed section 60-741.44(g), OFCCP failed to consider the economic burdens associated with discussing the NPRM's new affirmative action requirements with all employees, during, for example, orientation and training events. Explain why OFCCP failed to consider the costs of contractors' compliance with these provisions of proposed sections 60-741.44(d) and (g).

Included with the Committee's letter are instructions and definitions for responding to the Committee's Document Requests.

Congress Gets Involved Again

Notably, this is not the first time in recent history that Congress has jumped in to curtail an ambitious, and possibly overzealous, OFCCP. After an Administrative Law Judge (ALJ) affirmed OFCCP's assertion of jurisdiction over medical institutions, pharmacies, or other health care providers who participated in a health care provider network for TRICARE, the Department of Defense's health care program for active and retired military members and their families, Congress added a provision to the National Defense Authorization Act for Fiscal Year 2012, which was signed by President Obama on December 31, 2011, that effectively removed medical institutions, pharmacies, or other health care providers who participated in a health care provider network for TRICARE from the ambit of the OFCCP's jurisdiction. For a more detailed discussion of this legislation and its impact on federal contractors, click [here](#).

What This Means For Contractors

This is a significant and encouraging development for the federal contractor and subcontractor community, as it indicates that Congress is paying attention to the concerns of the contractor community and understands the vast repercussions that are associated with the massive changes to the disability regulations as proposed by the OFCCP. At the very least, it appears that the period for public comment may be extended beyond February 7, 2012. We continue to encourage contractors to make their voices heard about how the proposed regulations will impact their business. If you would like your comments to be included, with or without attribution, in Seyfarth's comments, please forward them to Christine Hendrickson at chendrickson@seyfarth.com or Regina Grattan at rgrattan@seyfarth.com.

We will be closely monitoring OFCCP's response to the Committee's request for information and documentation and we will continue to keep contractors updated on the latest developments regarding proposed changes to Section 503.

If you have questions about this One Minute Memo, please contact the Seyfarth attorney with whom you work or any attorney on our OFCCP and Affirmative Action Compliance Team.

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