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Management Alert

OFCCP Proposes "Game Chang[ing]" Disability Regulations: Redefined EEO Requirements are Extensive, Expensive and Overly Exacting

On Friday, December 9, 2011, the Office of Federal Contract Compliance Programs (OFCCP) dealt a body blow to federal contractors as it delivered its proposed revisions to the regulations addressing affirmative action for individuals with disabilities. OFCCP Director Patricia Shiu warned the contractor community last summer that these new regulations would be a "game-changer." However, this is no "game" for federal contractors, who are now faced with either abandoning federal contracts or attempting to comply with the extensive, enormously expensive, and overly exacting requirements proposed by the OFCCP. This proposal reflects an Agency that fails to understand the already immense pressures on American employers in the face of a difficult economy.

The OFCCP's proposed disability regulations have been published for public comment in a Notice of Proposed Rulemaking (NPRM) titled "Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors: Evaluation of Recruitment and Placement Results Under Section 503." This proposed revision to the regulations at 41 CFR Part 60-741, et. seq., which implement Section 503 of the Rehabilitation Act of 1973, as amended, requires that contractors do more to recruit, consider, hire, promote, and accommodate individuals with disabilities. These are laudable goals. However, the OFCCP's proposal to implement these goals saddles contractors with unnecessary administrative burdens, obligates contractors to pre-established workforce composition goals, regardless of industry, geography or size of business, and requires contractors to follow set procedures for administering their human resources function rather than permitting the business to implement procedures in their chosen effective manner. The proposed regulations would require contractors to:

- administer multiple solicitations of disability status to applicants and employees;
- measure and analyze referrals, applicants and hires;
- compare workforce composition to the pre-established goal;
- submit an annual report of such results to the OFCCP;
- conduct extensive self-assessments;
- document all activities in a specific manner;
- establish multiple mandatory linkages to disability recruiting resources;
- conform to specific written accommodation procedures and timelines;
- implement extensive data collection and record-keeping systems; and
- implement an extended 5 year record retention period.

Importantly, these proposed regulations emphasize the OFCCP's desire to rely on the contractor's data, documents, and self-assessments to make it easier for the Agency to detect failures of compliance during its audits of contractors. As we have seen in the past few years, it is critical to be aware that a contractor's failure to have accurate and complete data, documents and records of its efforts and other activities can be misinterpreted by the OFCCP to be discrimination and can result in very expensive litigation and/or settlements. These new proposed requirements present a host of opportunities for the OFCCP to find "discrimination," when the issue may simply be a failure to maintain adequate data (such as applicant tracking), documents and other records.

The most significant proposed changes to 41 CFR Part 60-741 are outlined below with an invitation, at the close of this Alert, to our January 5, 2012 webinar which will discuss in more detail the NPRM and challenges for contractors.

Over One Million Additional Individuals with Disabilities Could be Covered

The proposed regulations adopt the ADA Amendments Act's (ADAAA's) very broad definition of who is considered to be a person with a disability. This will greatly increase the number of individuals with disabilities who are covered by the OFCCP's mandate. Even utilizing the EEOC's conservative estimate, over one million more Americans will meet the definition of disability because of the ADAAA.

The proposed regulations also adopt much of the ADAAA's structure, including aligning Section 503 with the ADAAA in the definitions of "major life activities," "physical or mental impairment," "record of such impairment," "regarded as," "substantially limits," "record of such an impairment," "direct threat," and "mitigating measures." Thus, the focus will change from whether someone is disabled enough to be covered by Section 503, to ensuring that benefits under the affirmative action program are provided to individuals who identify a person with a disability.

The expansion of this definition means that potentially a large percentage of the workforce may be defined as a person with a disability. While the new definition could be said to be "old news" in the contractor community since it is already in place under the ADAAA, the significant differences in the nature of Section 503's proscriptive requirements to demonstrate compliance and the OFCCP's aggressive auditing program mark a sharp difference in the impact of the Section 503 regulations as compared with the ADAAA regulations. Indeed, given the vast numbers of those who are now disabled by this definition, it is an enormous burden to implement all of the "affirmative actions" required for these individuals under the Section 503 NPRM.

The Proposed Regulations Establish Workforce Composition Goals

One of the biggest "game-changers" in the proposed rule is the establishment of workforce composition goals. Although the Agency declares that the benchmark goal is "neither a quota nor a hiring ceiling, and a failure to attain the goal does not constitute a violation of Section 503 or OFCCP's regulations," the Agency's commentary on the proposed rule indicate that the "primary indicator of effectiveness is whether qualified individuals with disabilities have been hired." The OFCCP proposes adopting a single, nationwide utilization goal of 7 percent for the employment of individuals with disabilities. This 7 percent utilization goal would apply uniformly to each job group; the calculation cannot be aggregated across job groups. This 7 percent goal is derived primarily from disability data collected as part of the Census Bureau's American Community Survey (ACS), with a surprising expansion of the ACS's calculated availability to add "discouraged" disabled workers to the definition of who is considered a person with a disability. The availability of 5.7% is increased by 1.7% to account for "discouraged" disabled workers whom the Agency supposes are still interested in working even though they did not so indicate so in the census data used to support the availability projections used by OFCCP. The OFCCP specifically invited public comment on the proposed goal, and on the potential use of a utilization range of between 4 percent and 10 percent in lieu of a single national utilization goal.

While it may seem at first blush that a 7 percent composition goal is outrageous and unobtainable, with the ADAAA's disability definition so broadly framed, it is likely most employers will be able to meet this goal if (and this is a big if) employees and applicants with disabilities are willing to self-identify. Constructing such a goal puts pressure on employers to encourage employees or applicants to self-identify as a person with a disability, which may well have other adverse

consequences. The push toward greater self-identification is likely to increase in the number of disability discrimination lawsuits and requests for accommodation, and may put too much pressure on applicants and employees to feel they must disclose a disability, that they would prefer to remain private.

Further, the Agency solicited comment on the adopting a secondary sub-goal for workforce composition of 2 percent individuals with certain, more severe, disabilities. Such a goal would be very burdensome on contractors as the availability of individuals with these more "severe" disabilities is even less known and many of the disabilities listed as being "severe" are hidden disabilities, which as noted above, the employee or the applicant may not wish to disclose.

Moreover, it is uncertain what the workforce goal should properly be. While the ACS data suggests an availability, the ACS definition was much more limited than the ADAAA definition embraced in this NPRM. At this time, there is no verifiable data capturing the availability of persons with disabilities according to the definitions used in the ADAAA and the Section 503 NPRM. As the commentary with the regulations specifically notes, the OFCCP Director will have the authority to modify the goal level. We would anticipate, as new census or other data regarding the availability of people with a disabilities in the workforce according to this definition becomes available, the goal will be increased to put employers under further burden.

Contractors Will Be Required to Solicit Self-Identification of Applicants and Employees with Disabilities Early and Often

The proposed regulations make significant, substantive changes to a contractor's responsibilities and the process through which applicants are invited to voluntarily self-identify as an individual with a disability. The proposed rule requires that contractors ask applicants to voluntarily self-identify their disability status both pre- and post-offer; the current regulations only require contractors to solicit disability status post-offer. The proposed rule also adds a new requirement that contractors annually survey their employees' disability status, permitting employees who are, or subsequently become, an individual with a disability to voluntarily self-identify as such in an anonymous manner.

The self-invitation must use the specific language prescribed by the OFCCP. For applicants, the invitation may be included with the application materials, but must be separable or detachable from the job application.

There has been much discussion about whether, and to what extent, employees and especially applicants will self-identify. Many agree it is naive to expect that the applicants or employees with disabilities will rush forward to declare themselves. Moreover, the frequency of these solicitations, their accurate tracking and follow-up are a substantial burden to employers. The single solicitation of applicants post-offer is certainly more appropriate and will provide an opportunity for interactive discussions about accommodations. The pre-offer solicitation is unnecessary and goes even beyond the applicant tracking requirements under Executive Order 11246, which only require race/ethnicity/gender self-identification once the job seeker becomes an applicant. This NPRM appears to require a solicitation of self-identification even before the job seeker is an applicant, at the time they apply or are considered, but before they are deemed to have the basic qualifications for the job. At the very least, any Section 503 applicant tracking regulations should be consistent with the principal affirmative action regulations under Executive Order 11246.

One of the most significant issues with the proposed regulation's anonymous self-identification process and the proposed 7 percent workforce goal (or 2 percent subgoal) for each job group is that contractors will have no way of accurately counting the number of employees with disabilities in each job group in order to determine if it is meeting these goals. This fundamental disconnect between the self-identification process and the OFCCP's insistence on a workforce goal reflects the failure of the drafters of the regulations to understand the realities and technical aspects of the implementation of their proposed concepts.

More Data Collection, Analysis and Recordkeeping

The proposed rule requires contractors to maintain quantitative measurements and comparisons related to individuals with disabilities 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 from state employment services and other organization with whom the contractor has linkage agreements;
- The total number of applicants for employment, the number of applicants who are known to be individuals with disabilities, and the "applicant ratio" of known applicants with disabilities to total applicants;
- The total number of job openings, the number of jobs filled, the number of known individuals with disabilities hired, and the "hiring ratio" of hires with known disabilities 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.

This data collection is completely new and aligns generally with the Section 4212 NPRM for the proposed revisions to the veterans affirmative action regulations. Like our concerns with those data collection requirements, we observe that employers currently have no systems in place to track referrals. Moreover, this tracking will necessarily be difficult to accurately implement as this information will need to be supplied by the job seeker as he or she applies and is thus subject to inaccuracies caused unintentionally by forgetful or unconcerned job seekers. Referral data possibly may be supplied by referral sources, if they have the resources and the time (which is doubtful). If the data is supplied by referral sources, it would be in various formats, possibly not electronic, and would be mostly useless as it would not marry up to the contractor's applicant tracking system. As to the requirement to track job openings, job fills and compute a job fill ratio, this information is entirely unnecessary as the vast number of job openings are filled, and so has little or no value compared to the burden it represents.

Annual Report Required of All Contractors

Under the proposed regulations, contractors would be required to provide OFCCP with an annual report containing these measurements and computations described above, and also the percentage of applicants, new hires, and total workforce for each EEO-1 category, regardless of whether the contractor has been selected for a compliance evaluation.

This requirement would add yet another annual report (in addition to the EEO-1 and the Vets- 100 or 100A) to the contractor's reporting obligations. The apparent principal purpose of this report seems to be to make the OFCCP's job easier in determining which contractors to audit, i.e., lower percentage of people with disabilities reported compared to workforce would result in greater chance of selection for audit. There are other ways for OFCCP to determine whom to audit that are far less burdensome for the contractor community. We note that the OFCCP seems to be "report happy" as it has also separately proposed the institution of an unprecedented report referred to as the Compensation Data Collection Tool, also intended to support audit selection.

Linkage Agreements & Recruitment Will be an Increasingly Important Portion of Compliance Efforts

As with the proposed veterans' regulations (see *here*), the proposed Section 503 regulations will require contractors to enter into linkage agreements and expand outreach to community groups. The current proposal requires contractors to post most job opportunities with the nearest Employment One-Stop Career Center, enter into signed "linkage agreements" and establish on-going relationships with appropriate recruitment and/or training sources including, at a minimum, each of the following: (1) the local State Vocational Rehabilitation Agency office nearest the contractor's establishment, or a local organization listed in the Social Security Administration's Ticket to Work Employment Network Directory; and (2) at least one of several other listed organizations and agencies for purposes of recruitment and developing training opportunities, which include entities such as the Employer Assistance and Resource Network (EARN), that are funded by the Department of Labor to provide recruitment or training services for individuals with disabilities. Contractors would also be required to "consult"

with the Employer Resources Section of the National Resource Directory, a 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 people with disabilities. The review must be documented and records retained for five years. Other recommended outreach activities are included as well.

As we have discussed in our comments to the Section 4212 NPRM regarding affirmative action for covered veterans, mandatory linkages will likely place an untenable burden on the linkage agencies. These agencies currently do not have the staff or financial resources to enable contractors to fulfill their obligations. And it is unlikely they will be able to staff up and increase their resources in the future to meet the overwhelming demand that will be placed upon them.

Reasonable Accommodation and Direct Threat Procedures Must be Specific and Well-Documented and Accommodations Must be Processed Quickly

Another of the biggest "game-changers" in the proposed regulations is the imposition of significant additional obligations on federal contractors with respect to the procedures for providing reasonable accommodations to applicants and employees with disabilities. Unlike most EEO regulations, these proposed regulations require not only that contractors comply with the equal employment, nondiscrimination, and affirmative action requirements but that they do so in a specific way. Among the notable changes are the following requirements:

- Contractors must develop a written reasonable accommodation procedure and disseminate it to all employees. This written procedure must contain a description of the steps the contractor will take when processing a reasonable accommodation request, including the process by which the contractor renders a final determination on the accommodation request; provide an explanation of the circumstances under which medical documentation may be requested and reviewed before a reasonable accommodation is provided; designate an official for the implementation of the reasonable accommodation process (by name, title/office, and contact information); and detail that medical or disability-related information will be kept confidential and segregated from the rest of the personnel file;
- Contractors must provide the accommodation requesting applicant or employee with a written confirmation of the employer's receipt of an accommodation request;
- The timeframe for processing requests shall not be longer than 5 to 10 business days if no supporting medical documentation is needed. If medical documentation is needed, or if special equipment must be ordered, the timeframe, excepting extenuating circumstances, shall not exceed 30 calendar days;
- Any denial or refusal to provide a reasonable accommodation must be provided by the contractor to the accommodation requester in writing. The written denial must include, inter alia, the basis for the denial, a statement of the requester's right to file a complaint with OFCCP, and detail any internal appeal or reconsideration process;
- Information about the reasonable accommodation procedures must be communicated in orientation, and transmitted to labor unions.
- Contractors must contemporaneously create a written record any time the contractor makes an employment decision based on the employer's belief that an employee poses a "direct threat," which supports its belief that a direct threat exists;
- Contractors must not reduce the amount of compensation that the contractor provides to an individual with a disability because of the "actual or anticipated cost of a reasonable accommodation that the individual needs or requests";
- In the event an accommodation would constitute an undue hardship, employees or applicants 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; and
- If the individual with a disability rejects a reasonable accommodation made by the contractor he or she may still be

considered qualified if the individual subsequently provides and/or pays for a reasonable accommodation himself or herself.

These proposed regulations reflect the OFCCP's apparent intent to control and manage a contractor's human resources decisions. This is out-of-step with EEO law, which respects employers' needs for flexible processes. This will be especially burdensome on small employers with limited human resources staff.

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.

- Throughout the proposed rule, OFCCP clarifies that 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 that can access 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 in a conspicuous location and format 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. Electronic notices for applicants must be conspicuously stored with, or as part of, the electronic application.

Compliance Evaluations and Access to Records

The proposed rule clarifies OFCCP's position concerning 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. OFCCP states that proposed § 60-741.60(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." Contrary to the ALJ's finding in *Frito-Lay*, the OFCCP then goes on to say, "The language does not represent a change in policy or new contractor obligations."

Additionally, the proposed rule modifies several of the investigative procedures available to OFCCP during compliance evaluations, which is consistent with OFCCP's Active Case Enforcement Directive (ACE). For more information about ACE, click *here*. The proposed regulations provide that during a compliance check, used to monitor contractor recordkeeping, OFCCP may request that documents be provided on-site or off-site. The current regulation provides that contractors may provide requested records on-site or off-site at the contractor's option. The proposed rule also provides that focused reviews may be conducted off-site as well as on-site. And the rule includes a new procedure for pre-award compliance evaluations, which is based on the procedure in the Executive Order 11246 regulations.

Finally, the proposed rule attempts to put a stop to some contractors' practices of submitting the least user-friendly form of information, e.g. a roomful of documents rather than a spreadsheet with the relevant data. The proposed regulation 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. According to its comments, 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.

Self-Assessment Requirements

The proposed regulations also expand the self-audit requirements for contractors' data, processes and programs regarding non-discrimination and affirmative action for individuals with disabilities, including assessing the results of the data collection, linkage agreements and specific outreach obligations discussed above. Those requirements include the following:

- Requiring contractors to engage in an annual review of "personnel processes" and technology. In the personnel process review, the contractor must identify the vacancies and training programs for which applicants and employees with disabilities are considered; provide a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and describe the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs.
- Requiring contractors to annually review and revise all physical and mental job qualification standards.
- Requiring annual (rather than periodic) review of personnel and technological processes;

Not only do the proposed regulations require contractors to conduct such self-assessments, but they also make it clear that OFCCP will be critically reviewing them during their compliance evaluations in order to find non-compliance and demand whatever remedy OFCCP believes appropriate. This is a significant change from the OFCCP's practices under Executive Order 11246 and its review of contractor compliance because with these proposed regulations, unlike the EO 11246 regulations, the OFCCP demands to see and evaluate for themselves the contractor's self-assessments. Consequently contractors will need to be much more circumspect about the information and discussion contained in these documents and it will be wise to develop drafts under attorney-client privilege, especially if issues are anticipated. Under privilege, observations could be made in a draft document regarding potential compliance problems, the problems could be addressed and a final assessment document could be issued once the problems are resolved.

Record Retention Expansion

The proposed regulations would require contractors to retain specified data and documents for five years. As with its NPRM for Section 4212 Veterans Affirmative Action, the OFCCP is attempting to expand the retention period longer than the current statute of limitations. While asserting that this longer period is important for contractors to see their own trends and history, we note that this retention period sets the stage for even more burdensome document requests from OFCCP.

Preference Programs

The regulations encourages contractors to voluntarily develop and implement programs that provide priority consideration to individuals with disabilities in recruitment and/or hiring. It is unclear whether such preference programs would be lawful. OFCCP cites no legal authority upon which contractors may rely in considering risks associated with such programs.

Transparency, Accountability and Specific Communication Requirements

The Agency seeks to require that federal contractors to include the EO clause verbatim in all federal subcontracts. Further, the identity of the official responsible for a contractor's affirmative action activities must appear on all internal and external communications regarding the contractor's affirmative action program and the CEO for each federal contractor must express her or his support of the company's affirmative action obligations publicly and in writing.

The proposed verbatim EO clause provision is apparently designed by OFCCP to send a message to subcontractors that they can no longer claim they did not know or understand their compliance obligations. The verbatim EO clause would require contractors to redraft their contracts and purchase orders and create longer documents. A great many contractors already name and involve the CEO, and name those responsible for compliance in their communications.

What Contractors and Subcontractors Should Do Now

Complying with the regulations, as proposed, would require contractors to engage in a major alteration of their outreach and recruiting activities; human resources policies, procedures and systems; referral and applicant tracking processes and systems; promotion and training practices and recordkeeping; self-audit processes; documentation practices; record retention policies and practices; and substantial revision of their Section 503 affirmative action plans. To learn more about these proposed regulations, the associated challenges for contractors and how to prepare for the likely changes to come, we invite you to join our webinar on January 5, 2012. To enroll in the webinar, please register *here*.

We also encourage contractors to make their voices heard about how these proposed regulations will impact your businesses, especially given the OFCCP's statements that these additional obligations will not be onerous to federal contractors. Please note that the OFCCP's estimate of the burden on contractors is a one-time cost of $172 per contractor establishment and a recurring annual cost of $301 per contractor establishment.. Clearly, this is a gross understatement of the actual burden that will be experienced. Comments to the Notice of Proposed Rulemaking are due on or before February 7, 2012. If you would like your comments to be included, with or without attribution, in Seyfarth's comments, please forward them to Valerie Hoffman at *vhoffman@seyfarth.com* or Christine Hendrickson at *chendrickson@seyfarth.com*.

If you have questions about the proposed regulations 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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