

Management Alert



OFCCP Issues Additional FAQs: Clarifies Data Collection Analysis, Self-Identification, Utilization Goals and Hiring Benchmarks

By Annette Tyman, Christine Hendrickson and Kevin A. Fritz

On June 18, 2014, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published additional FAQs to answer questions that have been puzzling contractors seeking to implement the new Section 503 of the Rehabilitation Act (Section 503) and Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) regulations. The FAQs are available [here](#) and [here](#); the new guidance is highlighted with yellow flags.

Good News for Employers: Accepted Employee Survey Methods Revealed

The Section 503 regulations require that federal contractors survey their entire workforce to seek voluntary self-identification of disability status. In prior guidance, the OFCCP has been downright exacting, mandating the precise language used to solicit this information, outlining the exact font type and even the font size that can be used to electronically collect the information, and even naming the folder in which this information can be stored. As a result, many believed that the OFCCP would be similarly particular about the way in which contractors were required to survey their own employees.

The good news for contractors is that the OFCCP seems to be giving contractors significant leeway in selecting the method for conducting the survey so long as the chosen approach is "reasonable and likely to be effective" given the contractor's particular circumstances. For instance, the OFCCP approvingly recognized the following as acceptable methods for engaging its workforce in an employee survey:

- Emailing the self-identification form to employees along with a notice of the survey;
- Emailing employees an intranet link to the form;
- Prominently posting a notice with a link to the self-identification form on the company intranet;
- Prominently posting a notice and copies of the form in employee lounges; and
- Distributing a notice and copies of the form where employees go to sign in or pick up their paycheck.

While this may be welcome relief for contractors, the ease of implementing the survey should be weighed against its effectiveness given that the response rate will matter as noted below.

It's a Mixed Bag: 7% Disability Utilization Goal Harder to Meet but 7.2% Veteran Hiring Benchmark is Easier

The OFCCP's FAQs also answered the outstanding question concerning whether the calculation of the 7% goal will include those individuals who decline to complete the disability self identification form. This is a concern for many contractors who have legitimate concerns over low employee response rates. For example, consider the contractor who surveys 100 employees in a job group, but only 20 employees complete the self-identification form. Of those 20 who completed the form, only 2 identified as an individual with a disability. In this case, the contractor would not meet the 7% utilization goal for that job group, as only 2% (2/100) of individuals identified as an individual with a disability. In contrast, if contractors were rightly able to limit the analysis to those who complete the self-identification form with a "yes" or "no" response, then the contractor would meet the 7% utilization goal, as 10% (2/20) of individuals in the job group identified as an individual with a disability.

Notwithstanding these legitimate concerns, the OFCCP's FAQ provide that contractors must include even those who decline to complete the survey in their calculation.

Additionally, while the FAQ claims that the Section 503 methodology is the "same methodology" used to calculate availability goals for women and minorities, the OFCCP misses the mark. Contractors have a regulatory obligation to identify the sex and race/ethnicity of all employees, and routinely engage in visual identification to meet their obligation. In contrast, although the OFCCP *permits* the inclusion of those individuals with "known or obvious" disabilities, visual identification of disability status is not possible (or advisable) given the myriad hidden disabilities. Contractors should take special note of this guidance as it is clear that the response rate to the employee survey will matter.

With respect to veteran self-identification, the FAQs make it easier to meet the hiring benchmark. Specifically, the OFCCP's latest FAQs provide that contractors may identify a new hire as a "protected veteran" for purposes of compliance with the new VEVRAA regulations an applicant if the hire self-identifies as a "protected veteran" at the pre-offer stage or post-offer stage. This clarification should be good news to contractors concerned about veteran hiring benchmark.

Proceed with Caution: OFCCP Gives Nod to Hiring Preferences for Individuals with Disabilities

The FAQs state the obvious: contractors are not required to hire an individual with a disability who is not the best qualified person for the position. The OFCCP went one step further and stated that it would not violate Section 503 for a contractor to select a person with a disability over a candidate without a disability who was equally or better qualified for the position, so long as the selection decision was not based on a prohibited factor such as race, gender or ethnicity. The OFCCP's position is based on the premise that there is no recognized cause of action for reverse discrimination under Section 503.

Despite the OFCCP's stated position, contractors should be mindful of the potential business, and perhaps legal risks, associated with engaging in hiring practices that are not based on the job qualifications of applicants. We strongly encourage you to discuss this with counsel before making any policy changes based on this FAQ.

OFCCP's New Dictionary: Competitive or Non-Competitive Movements Mean "Jobs Filled"; Competitive Promotions Mean "Hires"

In an earlier FAQ, the OFCCP explained that the definition of a "hire" includes both external hires and internal competitive promotions. The latest FAQs provide further guidance on the "jobs filled" analysis by clarifying that both competitive and non-competitive in-step or ladder movements qualify as a "job filled" as long as the movement is one into a different position. The OFCCP provides the following example:

A time-driven salary increase from one “step” to the next within the same position would not be a “job filled,” since there was not any movement into a new position. By contrast, if an apprentice completes a certification program and moves into a journeyman position, then such movement would be a “job filled,” since it is a movement from one position to another.

In addition, in the VEVRAA FAQs, the OFCCP said that when applying hiring benchmarks, contractors should use the same definition of “hires” that is used for purposes of the data collection analysis required by 60-300.44(k). That means the hiring benchmark will be calculated based on the number of competitive hires into the organization, including internal competitive promotions.

Effective Implementation

While the FAQs provide some guidance for federal contractors, many questions remain as contractors continue implementing the far-reaching regulations. Seyfarth Shaw’s OFCCP, Affirmative Action & Diversity Consulting Team has a deep understanding of what needs to be done to implement the new regulations and experience advising clients on effective implementation strategies and best practices. We have created templates (e.g., self-identification forms), logs (e.g., reasonable accommodation logs, outreach logs), and other “user-ready” documents to streamline the process. We now offer *three levels* of implementation assistance on a fixed fee basis, in addition to our traditional hourly advice and counseling.

Annette Tyman is a partner in Seyfarth’s Chicago office, *Christine Hendrickson* is senior counsel in the firm’s Chicago office and *Kevin A. Fritz* is a senior fellow in the firm’s Chicago office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Annette Tyman at atyman@seyfarth.com, Christine Hendrickson at chendrickson@seyfarth.com or Kevin A. Fritz at kfritz@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | June 23, 2014

©2014 Seyfarth Shaw LLP. All rights reserved. “Seyfarth Shaw” refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.