

OFCCP's New Affirmative Action Compliance Requirements for Protected Veterans and Persons with Disabilities

Greater Houston Industry Liaison Group
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Background

- Major changes to veteran and disability AAP regulations published on September 24, 2013
 - Both programs deemphasized in favor of EO 11246, over multiple administrations, both democrat and republican
 - Aggressive enforcement began January 2010, resulting in more vigorous good-faith efforts by contractors since
 - Current administration believes good-faith efforts no longer enough, or even adequate measure
 - Results-oriented regulations needed to improve employment situation for veterans and persons with disabilities
 - Primary measure of success is whether members of targeted group are hired

Regulatory Intent

- Why OFCCP revised its rules
 - Stated goals of agency’s “game changing” revisions
 - Help connect job-seeking veterans and individuals with disabilities with contractors looking to hire
 - Ensure the contractor effectively communicates AAP obligations internally and externally
 - Provide mechanisms to assess outreach efforts
 - Change the manner in which compliance reviews are conducted for the benefit of contractors, protected veterans, and individuals with disabilities

Overview

- What the rules will require
 - Uniform 8% veteran hiring benchmark per AAP
 - Alternative option for contractors to calculate their own benchmarks
 - Uniform 7% disability utilization goal per AAP job group
 - Pre-offer invitations to self-id as protected veteran and/or person with a disability
 - Employee survey to self-id as person with a disability
 - Data collection and analysis
 - Annual assessment of outreach efforts
 - New Equal Opportunity (EO) clause requirements

Overview

- What did not make it into the final rules
 - Written linkage agreements
 - “Build a file” requirements
 - Annual review of physical and mental job qualifications for each job every year
 - Mandatory all-employee orientation and training sessions
 - All of the proposed data collection requirements
 - Mandatory job listing requirements under Section 503
 - Prescriptive reasonable accommodation procedures

Goals and Benchmarks

- AAPs for protected veterans and persons with disabilities will now entail quantitative analysis
 - Each rule will require numerical components
 - VEVRAA rule requires veterans hiring benchmark for each AAP
 - ▶ Benchmark to equal
 - » National percentage of all veterans in the civilian labor force (updated annually but currently 8%); or
 - » A contractor-determined percentage based on a “five-factor” veterans availability analysis (quantitative and qualitative)
 - Section 503 rule requires uniform disability utilization goal of 7% for each AAP job group
 - ▶ Job groups must be same as EO 11246 AAP job groups

Goals and Benchmarks

- Veterans hiring benchmark established using veteran data broader than “protected veterans”
 - Categories of *protected* veterans
 - Disabled veterans
 - Recently separated veteran
 - Active duty wartime or campaign badge veteran
 - Armed Forces service medal veteran

Goals and Benchmarks

- Veterans hiring benchmark
 - Nothing in rule explicitly requires a “veterans hiring benchmark analysis”
 - But some annual analysis of performance against benchmark clearly implied
 - How?
 - ▶ Straightforward calculation of number of (protected?) veterans hired divided by total number of hires?
 - » By definition, the percentage of “protected veterans” will always be less than the “national percentage of veterans in the civilian labor force”
 - ▶ Consideration of internal placements?
 - ▶ What analytical units should be used?

Goals and Benchmarks

- Disability utilization goal
 - New “disability utilization analysis” analogous to female/minority utilization analysis
 - For each job group, compare representation of persons with disabilities to 7% national utilization goal
 - Where representation percentage is (any?) less than 7%
 - ▶ Contractor must take steps to determine whether and where impediments to nondiscrimination exist
 - » Examine personnel processes, effectiveness of outreach and recruitment efforts, and results of internal AAP audit
 - ▶ If problem areas identified, contractor must develop and execute action-oriented programs

New Self-Identification Requirements

- Invitations to self-identify disability status required at three different stages
 - Pre-offer, whenever applicant “applies for or is considered for employment”
 - Post-offer, pre-employment
 - Periodically of all employees
 - Must be extended to employees during the first year the contractor is covered by the regulations, and thereafter at five year intervals
 - At least once in intervening years, employers must remind employees that they may voluntarily update their disability status

New Self-Identification Requirements

- Invitations to self-identify protected veteran status required at two different stages
 - Pre-offer, but only as a protected veteran (not specific veteran category)
 - Post-offer, pre-employment in one or more specific protected veterans categories

New Self-Identification Requirements

- Practical considerations of self-id requirements
 - Disability invitations must use “language” and “manner” prescribed by OFCCP
 - Proposed “universal” disability now under review
 - Legality of pre-offer and current employee “invitations” under ADA remains a question
 - Confidentiality of disability information
 - Separate “data analysis files” now required
 - OFCCP says OK to identify person as disabled when
 - Disability is obvious (e.g., someone is blind or missing a limb)
 - Disability is known

New Data Collection Requirements

- New data collection requirements should be manageable once systems and forms in place
 - Total number of job openings
 - Total number of jobs filled
 - Total number of applicants for all jobs
 - Total number of applicants hired
 - Total number of applicants who self-identify (or otherwise knows as) persons with disabilities or protected veterans
 - Total number of applicants with disabilities and protected veterans hired

New Outreach Assessments

- Contractors must annually assess the effectiveness of their outreach and recruitment efforts
 - Assessment must be documented, and include at a minimum
 - Criteria used to evaluate effectiveness of each effort
 - Conclusion as to whether each effort was effective
 - Analysis of the data collected under new data collection provisions

New EO Clause Provisions

- Equal opportunity clause changes
 - Format of employment service delivery system listings
 - Content of information provided to ESDS
 - Status as a federal contractor
 - Desire for priority referrals of veterans for job openings
 - Name and location of each hiring location within the state
 - Contact information for official at each location within state
 - Format of EEO notice to employees & applicants
 - Method of inclusion of EO clause
 - Changes to EO tagline in solicitations or advertisements for employees

Listening Session Debrief

- EEAC hosted listening session with OFCCP Director Shiu on Monday, January 13, 2014
 - EEAC board and member delegation represented companies that:
 - Employ 929,265 U.S. employees
 - Operate 22,236 U.S. locations
 - Prepared 2,335 AAPs in 2013
 - Have been audited 112 times since January 2013

Listening Session Debrief

- Topics discussed
 - Consolidation of EO Clauses
 - Subcontractor, vendor, and supplier notifications
 - Applicability of alternative poster format requirement
 - Administration of disability self-id forms
 - Definition of “data analysis file”
 - Assessments of outreach and recruitment efforts
 - Implementation of new veterans hiring benchmark
 - Employment service office notifications

Discussion

Q&A