

ALERTS AND UPDATES

OFCCP Proposes Revisions to Veterans' Affirmative Action Regulations

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The U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published on April 26, 2011, in the *Federal Register*, a [Notice of Proposed Rulemaking](#) to strengthen existing regulations requiring federal contractors and subcontractors covered by the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) to take affirmative action in hiring certain protected veterans, and to impose additional responsibilities on the contractors and subcontractors subject to those regulations. Among the more significant changes discussed below, these revisions would expand contractors' job listing, outreach and recruitment obligations; impose stiffer data collection and record retention obligations; and require contractors to establish annual hiring benchmarks for protected veterans.

The changes are not final. The OFCCP has asked for public comments on the proposed rule before June 27, 2011. After considering those comments, OFCCP will issue a final rule. However, the proposed revisions are consistent with the Obama administration's increased focus on affirmative action for veterans in light of the increasing numbers of veterans returning from tours of duty abroad.

There currently are two sets of regulations promulgated under the VEVRAA. One set of regulations—at [41 C.F.R. Part 60-250](#)—applies to contractors with government contracts of \$25,000 or more entered into before December 1, 2003. The second set of regulations—at [41 C.F.R. Part 60-300](#)—applies to contractors with government contracts of \$100,000 or more entered into or modified on or after December 1, 2003. The OFCCP has proposed to rescind Part 60-250 in its entirety because it assumes that few, if any, unmodified contracts entered into before December 1, 2003, for \$25,000 or more currently exist. If it does not rescind Part 60-250, the OFCCP would implement revisions that mirror the proposed revisions to Part 60-300, the most significant of which are discussed below.

What Are the Key Proposed Changes?

Expanded Job-Listing Obligations

Currently, covered contractors are required to list all job openings (with very limited exceptions) with the "appropriate employment service delivery system." The proposed revised regulations specify that job-opening information must be provided "*in the manner that the employment service requires* in order to include the job in their database so that they may provide priority referral of veterans."

Covered contractors currently also are required to list job openings with the state employment service in each state where the contractor has establishments. The revised regulations would mandate that contractors also provide the state employment service with the following information, updated annually:

1. The contractor's status as a federal contractor;
2. The contact information for the contractor hiring official at each location in the state; and
3. The contractor's request for priority referrals of protected veterans for job openings at all its locations within the state.

Stiffer Record Retention Requirements

The proposed revisions to the regulations would require covered contractors to retain records of the following for five years:

1. The total number of referrals the contractor receives from state employment services;
2. The number of priority referrals of protected veterans the contractor receives; and
3. The ratio of protected veteran referrals to total referrals.

Requires Contractors to Establish Annual Hiring Benchmarks for Protected Veterans

At this time, covered contractors are not required to establish annual hiring benchmarks for protected veterans, but they are required to engage only in good-faith recruitment efforts in the absence of any such benchmarks. For the first time, the revised regulations would require contractors to establish benchmarks "expressed as the percentage of total hires who are protected veterans that the contractor seeks to hire in the following year." This requirement appears to impose a significant responsibility, particularly because, unlike data for women and minorities, the federal government does not maintain centralized data specific to the various categories of protected veterans. Accordingly, in order to set appropriate benchmarks, contractors would be required to "consult a number of different sources of information" to determine the availability of protected veterans in applicable geographic areas.

Changes to the Pre-employment Voluntary "Self-identification" Process

Currently, contractors are required to invite individuals voluntarily to "self-identify" as a protected veteran prior to employment, but only after receiving a job offer. Under the proposed revised regulations, covered contractors would be required to invite all applicants to self-identify prior to extending an offer of employment.

This is likely to raise concerns that such self-identification would violate the Americans with Disabilities Act's (ADA) general prohibition against pre-offer disability-related inquiries because some protected veterans will be "special disabled veterans." However, the Notice of Proposed Rulemaking states that such concerns are "misplaced, as the ADA . . . regulations permit the contractor to conduct a pre-offer inquiry into disability status if it is 'made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities.'" In addition, the OFCCP states that it does not propose pre-offer self-identification to include the specific category in which a protected veteran claims coverage. Such specific information, which might reveal a disability status, would be requested only after a job offer had been made.

Expanded Review of Personnel Processes

Current regulations state that covered contractors must only review their personnel processes "periodically" to ensure they are meeting their obligations for protected veterans. The OFCCP proposes to impose an annual review requirement, and the revised regulations would require that contractors take certain specific steps as part of that review, including:

1. Identifying vacancies for which protected veteran applicants and employees were considered;
2. Providing a statement of reasons explaining the circumstances for rejecting protected veterans for vacancies and a description of the accommodations considered; and
3. Describing the nature and type of accommodations for special disabled veterans who were selected.

Expanded Outreach and Recruitment Efforts

The proposed regulations outline specific outreach and recruitment efforts that covered contractors would be required to undertake. These efforts include:

1. Entering into "linkage agreements" and establishing ongoing relationships with several veterans employment sources for purposes of recruitment and developing training opportunities;
2. Consulting the Employer Resources section of the National Resource Directory, an online employment resource database; and
3. Annually reviewing the outreach and recruitment efforts the contractor has undertaken over the preceding year and evaluating their effectiveness in identifying and recruiting protected veterans, and documenting that review.

Internal Communication of Affirmative Action

The revised regulations would require a contractor to take specific steps to communicate its affirmative action obligations to the contractor's management and workforce, including:

1. Holding annual meetings with employees to discuss its affirmative action plan (AAP), contractor and individual responsibilities, and individual employee opportunities for advancement;
2. Regularly discussing implementation of the AAP with executive, management and supervisory personnel; and
3. Discussing the contractor's affirmative action policy at employee orientation and training.

What Does This Means for Employers?

The OFCCP's Notice of Proposed Rulemaking signals the OFCCP's first official step toward its stated goal of enhancing affirmative action efforts for protected veterans. While the proposed changes are not yet in effect and are subject to change following a public comment period, federal contractors and subcontractors who are covered by these regulations can anticipate increased OFCCP scrutiny of affirmative action efforts for protected veterans during compliance evaluations. In addition, these contractors may want to assess the steps and associated costs necessary for the changes that would be mandated in the proposed rule in order to potentially avert being unprepared when a final rule is issued in the coming months. Where questions arise about affirmative action obligations for veterans, these companies may also wish to consult with legal counsel to determine what those obligations are and how best to meet them.

For Further Information

If you have any questions about this *Alert*, please contact any of the [attorneys](#) in our [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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