



Legal Alert: OFCCP Issues Advance Notice of Proposed Rulemaking Regarding Employment of People with Disabilities

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We previously outlined how the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) was ramping up enforcement for covered federal contractors and giving heightened scrutiny to issues involving disabled individuals. See our Legal Alert dated March 25, 2010, "[OFCCP Update](#)," available on our web site at:

<http://www.fordharrison.com/shownews.aspx?show=5950>. On July 23, 2010, consistent with this renewed emphasis on the disabled, the OFCCP issued an [Advanced Notice of Proposed Rulemaking](#), (ANPRM) available at: <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480b1fd5a>, soliciting public input on how to ensure equal employment opportunity for people with disabilities by strengthening the affirmative action requirements of the regulations implementing Section 503 of the Rehabilitation Act of 1973 (Section 503).

Companies with federal contracts or subcontracts exceeding \$10,000 are subject to Section 503's obligations to ensure equal employment for the disabled and take affirmative action to employ and promote individuals with disabilities. However, the OFCCP cited statistics showing the underemployment of people with disabilities as evidence that the regulations implementing Section 503 need to be comprehensively reviewed and revised for the first time since May 1, 1996. The OFCCP's stated goal is to "reexamine its affirmative action provisions under Section 503 to make them more effective and to help ensure that more people with disabilities are employed and given the opportunity to advance in employment in the Federal contracting labor force."

Specifically, the OFCCP is considering adopting measures regarding the employment of people with disabilities that are similar to those required for women and minorities under Executive Order 11246. Under that program, "covered contractors are required, among other things, to compare the percentage of women and minorities in each job group at an establishment with the availability of women and minorities to work in the job group." This "availability" is usually based on Census Bureau data, state employment service data, and college graduation data and estimates what percentage of the workforce in the relevant recruitment area for each job group is female or minority.

In order to strengthen the EEO and affirmative action requirements of

Section 503, OFCCP is seeking comments from the public on eighteen issues including:

- Possible changes to the required contents of affirmative action programs regarding the disabled;
- What data could the disabled "availability" be based on, if (as addressed above) federal contractors were required to run the sort of availability and utilization analyses for the employment of the disabled that they do for females and minorities?;
- Possibly establishing placement goals for the disabled;
- Impact of workplace flexibility, flexible work schedules, and job-protected leave on recruitment and retention of the disabled;
- Possibly requiring federal contractors/subcontractors to invite all applicants to voluntarily self-identify whether they have a disability prior to offering employment (as is done with race and gender) as opposed to post-offer (as is currently done with the disabled);
- Possibly requiring that federal contractors and subcontractors make information and communication technology used by job applicants in the application process, and by employees in connection with their employment, fully accessible and usable by individuals with disabilities. The OFCCP cited, as examples, requiring that contractors ensure that application and testing kiosks are fully accessible and usable by the disabled, and that the contractors strive to ensure that their Internet and Intranet web sites satisfy the same accessibility standards for technology that the federal government must meet.

Bottom Line for Federal Contractors and Subcontractors:

The comment period ending September 21, 2010, offers federal contractors and subcontractors an opportunity to furnish input to the OFFCP about the feasibility of the agency's suggestions and what impact new requirements may have on them. However, even if a contractor does not want to participate in the comment period, the advance notice of proposed rulemaking provides an idea of what changes may be expected. Under the Obama administration, the OFCCP has augmented its staff and has been more aggressive in conducting its compliance reviews. Our previous [Legal Alert](#) addressed how the OFCCP had expanded its focus during audits to include detailed review of contractors' compliance with requirements regarding veterans and the disabled. This ANPRM is another example of the OFCCP's heightened emphasis on enforcement and rulemaking.

For further information, please contact the Ford & Harrison attorney with whom you usually work or the attorneys in Ford & Harrison's [Affirmative Action Compliance Group](#), including [Bennet Alsher](mailto:balsher@fordharrison.com), balsher@fordharrison.com, 404-888-3852; [Linda Cavanna-Wilk](mailto:lcavanna-wilk@fordharrison.com), lcavanna-wilk@fordharrison.com, 212-453-5923; and [Karen Tyner](mailto:kytner@fordharrison.com), kytner@fordharrison.com, 864-699-1134. David P. Maram is the author of this Alert.