

Labor and Employment Law Update

09/13/2013

Federal Contractors Beware: New OFCCP Rules Heighten Your Affirmative Action Obligations

On August 27, the U.S. Department of Labor's ("DOL") Office of Federal Contract Compliance Programs ("OFCCP") announced new rules intended to improve job opportunities for protected veterans and people with disabilities. Under new rules added to the Vietnam Era Veteran's Readjustment Assistance Act of 1974 ("VEVRAA") and Section 503 of the Rehabilitation Act of 1973 ("Section 503"), federal contractors and subcontractors must adopt quantifiable hiring benchmarks for protected veterans and hiring goals for qualified individuals with disabilities. Federal contractors should begin preparing now to implement these new rules.

Changes to VEVRAA

The new VEVRAA rule requires federal contractors to adopt annually a recruiting benchmark based on the best available data or the current national percentage of veterans in the workforce (currently 8 percent). The DOL believes that this update will improve accountability and better enable contractors to assess the effectiveness of their recruitment efforts, in part through heightened record-keeping requirements. The new rule also clarifies job-posting and sub-contract requirements.

For purposes of VEVRAA, "veterans" include veterans of the Vietnam War, any disabled veterans, veterans who separated from the military within the past three years, veterans who received an Armed Forces service medal while on active duty, and veterans who served on active duty during a war or campaign where a campaign badge was authorized.

Rules Regarding Individuals with Disabilities

New Hiring Goal. The new Section 503 rule establishes an aspirational 7 percent hiring goal of qualified individuals with disabilities in each job group for federal contractors with more than 100 employees. Those with 100 or fewer employees may apply the 7 percent goal to their entire workforce. In a controversial move, the OFCCP rejected the notion that industries with physically demanding and/or safety-sensitive positions should be exempted from the goal. In rejecting the exemption, the agency disagreed with what it saw as the proponents' view that individuals with disabilities as a group are incapable of working in these jobs.

Not a Quota. The OFCCP acknowledged “that for some jobs in some locations availability of qualified individuals may be less than 7 percent.” The agency insisted that “the goal is not a rigid and inflexible quota which must be met,” but rather “a yardstick against which contractors will be able to measure the effectiveness of their equal employment opportunity efforts.” The OFCCP stated that “because the goal is intended solely as a tool ... a failure to meet the goal will not, in and of itself, result in a violation of Section 503 or a finding of discrimination.” Instead, failure to meet the goal will trigger an assessment to identify any barrier to equal employment. During an assessment, the OFCCP and the contractor will review all of the contractor’s personnel practices and affirmative action efforts.

Both rules retain obligations for contractors to invite job applicants to self-identify, either as protected veterans and/or as individuals with disabilities at the pre-offer and post-offer phases of the employment process. The new Section 503 rule also requires contractors to invite current employees to self-identify as an individual with a disability every five years. Employers can find sample language for these invitations in both rules.

These rules become effective 180 days after their publication in the Federal Register. More information is available at www.dol.gov/ofccp/VEVRAARule and www.dol.gov/ofccp/503Rule.

What Does This Mean for Federal Contractors?

Federal contractors should begin preparing for the implementation of the new rules now and not wait until their effective date. Specifically, contractors should:

- Adopt quantifiable hiring benchmarks for protected veterans;
- Adopt quantifiable hiring goals for qualified individuals with disabilities;
- Invite job applicants to self-identify as protected veterans and/or individuals with disabilities;
- Invite current employees to self-identify as an individual with a disability every 5 years; and
- Adopt comprehensive policies to ensure proper record-keeping of your organization’s personnel practices and affirmative action efforts. At a minimum, contractors must collect the following information:
 - The total number of job openings and jobs filled;
 - The total number of job applicants for all jobs and the number of applicants known to be veterans or to have disabilities; and
 - The total number of applicants hired and the total number of individuals hired who are veterans and/or have disabilities.

Contractors also should consider how their electronic tracking systems or software might need to be adjusted or replaced to be able to collect all of the necessary data.

Not sure if you are a federal contractor? Contact counsel to review whether contracts or subcontracts, including purchase orders with federal procurers or the provision of nursing home services to veterans through the Veterans Administration, qualify you as a federal contractor and subject your business to new and existing OFCCP requirements.

For more information, please contact the Labor and Employment Practice Group at Lane Powell: employlaw@lanepowell.com

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