

February 2014

Federal Contractors: Overhauled OFCCP Regulations on Employment Obligations to Veterans and Individuals with Disabilities

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Starting March 24, 2014, the Office of Federal Contract Compliance Programs (OFCCP) will begin enforcing two regulations that amend the obligations of federal contractors to employees and applicants who are protected veterans or individuals with disabilities. The regulations cover Section 503 of the Rehabilitation Act of 1973 (Section 503) and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 as amended by the Jobs for Veterans Act of 2002 (VEVRAA).

What Changed?

The most significant change is the implementation of aspirational goals or benchmarks in the hiring and employment of disabled persons and protected veterans. How the rules will define "disability" and related terms is another notable change. Finally, the regulations have modified or created certain contractor obligations including electronic posting requirements, invitation to self-identify and data collection. The following provides a general overview of both regulations and the new developments.

Who Must Observe These Regulations?

Federal contractors who meet a minimum threshold are required to comply with Section 503 and VERRA. The threshold is determined by the amount of the awarded federal contract and/or the size of the contractor's workforce.

There are two distinct obligations under the regulations with two independent thresholds:

1. Contractors are required to adhere to an equal opportunity clause and post a notice; and
2. For a specific subset of federal contractors, the regulations require them to create and implement an affirmative action program (AAP).

Current federal contractors covered under Executive Order 11246 (EO11246), which prohibits employment discrimination based on race, color, religion, sex or national origin, will notice the Section 503 thresholds are substantially the same as EO11246. Contractors who fall below these thresholds are not subject to these regulations.

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Exactly when a contractor will become subject to the new regulations will depend on several factors, including the start date of the contractor's federal contract as well as the date of the contractor's AAP. The following is a general guideline on who must observe the new regulations and when; however, specific questions should be directed to legal counsel.

Act	Coverage Threshold	Effective Date
Section 503		
Equal Opportunity clause and notice	Contractors with contracts of or in excess of \$10,000	March 24, 2014
Affirmative Action Program	Contractors with 50+ employees and contracts of or in excess of \$50,000	<p>New contract and new AAP dated after March 24, 2014: within 120 days of the start of a new contract</p> <p>Old contract but new AAP dated after March 24, 2014: AAP must comply from start</p> <p>Old contract with old AAP dated before March 24, 2014: end of the current AAP review and update cycle</p>
VEVRAA		
Equal Opportunity clause and notice	Contractors with contracts of or in excess of \$100,000	March 24, 2014
Affirmative Action Program	Contractors with 50+ employees and contracts of or excess of \$100,000	<p>New contract and new AAP dated after March 24, 2014: within 120 days of the start of a new contract</p> <p>Old contract but new AAP dated after March 24, 2014: AAP must comply from start</p> <p>Old contract with old AAP dated before March 24, 2014: end of the current AAP review and update cycle</p>

How Has “Disability” Been Modified in the New Regulations?

The new regulations adopt the definition of disability as defined by the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). This means federal contractor and private employer employment laws will now define disability (and other relevant terms) in the same manner. Indeed, Section 503 and VEVRAA specifically refer to the ADAAA regulations for guidance.

What Is An Equal Opportunity Clause?

The clause affirms contractors will not discriminate and will take affirmative steps to employ and advance individuals with physical or mental disabilities and/or protected veterans (a category of 4 distinct groups of veterans) under Section 503 and VEVRAA.

Contracts and Subcontracts

The equal opportunity clause is still required in every *government contract* and *subcontract*. For subcontracts, a contractor can continue to insert the equal opportunity clause (41 CFR 60-741.5(a) for Section 503 or 41 CFR 60-300.5(a) for VEVRAA), or incorporate the equal opportunity clause by reference.

To incorporate by reference, the subcontract must cite to the specific regulations and in **bold** insert the following text. The contract should use the red text to incorporate VEVRAA’s equal opportunity clause or the blue text for Section 503:

This contractor and subcontractor shall abide by the requirements of [**41 CFR 60-741.5(a)**] [**41 CFR 60-300.5(a)**]. This regulation prohibits discrimination against qualified [**individuals on the basis of disability**] [**protected veterans**], and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified [**individuals with disabilities**] [**protected veterans**].

If a contractor is obligated under multiple equal opportunity clauses, the agency allows for a combined clause by reference. An example of how to create a combined clause can be found on the [agency’s website](#).

The clause provides notice that the contractor agrees not to discriminate in its employment practices including:

- Recruitment, advertising, or job application
- Promotion, hiring, upgrading, tenure, demotion, transfer, layoff, termination, right of return or rehire
- Rate of pay or compensation

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- Job assignment, classification, organization structure, job description, progression or seniority list
- Leaves of absence, sick leave or other leave
- Fringe benefits
- Selection and financial support for training, apprenticeships, conferences or professional meetings
- Activities sponsored by the contractor including social or recreational programs
- Any other term, condition or privilege of employment

The contractor agrees not to engage in:

- Disparate treatment
- Segregation or classification of employees by protected characteristics
- Use of non-job related standards which have a discriminatory effect
- Discrimination because of a known relationship with an individual with a disability or a veteran
- Denial of an application from a qualified individual because of a need for a reasonable accommodation
- Certain medical examinations

What Is An Equal Employment Opportunity Notice?

Federal contractors (and subcontractors) who have a covered contract are required to post an EEO notice, the [“Equal Employment Opportunity is the Law” poster](#), to notify employees and applicants of their employment rights. Notably, the new regulations now allow for electronic notices of the contractor’s obligations to employees and applicants.

Notice to Employees

The notice must be posted in a conspicuous manner and accessible to all employees, and should accommodate any disabilities. The OFCCP suggests modifications such as notices in Braille, lowered poster height for individuals in wheelchairs or larger print. The OFCCP will prescribe a notice which will be available through its [website](#).

The employer may post the notice in an electronic format when its employees do not work at a physical location or in circumstances where some employees may require electronic posting as an accommodation of a disability. The notice must be posted in a conspicuous place such as on the contractor’s intranet, if any, or it may be sent by email. However, the contractor must then (1) provide its employees with computers that can access these postings or (2) have actual knowledge that the electronic postings are accessible by the employees.

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Notice to Job Applicants

Any solicitation or advertisement for employment should state that all qualified applicants will receive consideration for employment and will not be discriminated against due to disability or veteran status. If the contractor has a collective bargaining agreement, the union or representative should also be notified about the contractor's equal opportunity obligations.

If the contractor uses an *electronic application process*, it must post the electronic notice in such a way that every applicant has an opportunity to view the clause during the application process. For example, acceptable means of giving notice in an application include inserting a copy of the clause within the application itself or having a prominent link (with a description of the link) to the clause.

For Contractors Subject to the VEVRAA: A new mandatory job listing requirement will require most job openings (including full time, part time lasting more than three days, and temporary positions) to be written in a manner and format permitted by the state and local employment service delivery systems (ESDS) so the systems can allocate *priority referral* to a protected veteran for that job vacancy. **Executive and management positions and positions that are not posted externally but filled from within an organization are excluded from the posting requirement.** The ESDS notice will run concurrently with other recruitment solicitations, sources and efforts.

What Is Self-Identification?

Employees and applicants self-identify as to their protected status (disability, protected veteran) usually through a report or form. Contractors must invite an applicant to *voluntarily* self-identify as an individual with a disability or as a protected veteran. The new regulations increase the number of times when individuals are asked to self-identify. Previously, self-identification was only required at the post-offer stage. Now, applicants must also be invited to self-identify during recruitment or pre-offer stage. The OFCCP has developed a [self-identification form](#) for Section 503, and the [VEVRAA final regulations](#) include sample invitations to self-identify in its Appendix.

For Contractors Subject to Section 503: Once employed, all **employees** will also be invited to self-identify in the first year of the federal contract and every five years thereafter. Moreover, contractors must remind employees of their option to self-identify as a disabled person at least once during that five-year interval. Employees can self-identify whenever they want during their employment.

What Is An Affirmative Action Program?

The Affirmative Action Program (AAP) is a contractor created “tool” to foster employment under the contractor’s equal opportunity obligations. The AAP should be reviewed annually by an official of the contractor, and must be available for review upon request by any employee, applicant, or the OFCCP. Further, the contractor must notify subcontractors of its AAP obligations and ask for their compliance and cooperation.

What Are The General Requirements Under The AAP?

- 1. Post a Policy Statement:** The contractor must issue and post an affirmative action policy statement on company bulletin boards, handbooks, electronic boards or handbooks which are accessible and understandable to individuals with disabilities. The statement now must be supported by a top executive (*e.g.*, CEO or President) and reiterate the contractor’s commitment to recruit, hire, train, and promote persons in all job titles regardless of disability or veteran status. The statement must also reiterate the contractor’s commitment to prohibit harassment, threats, coercion or discrimination against disabled individuals or protected veterans. Labor unions and employee representatives should also be notified of the contractor’s AAP obligations.
- 2. Review HR and personnel processes:** Contractors should continue to engage in a thorough, careful and systematic review of training opportunities and other employment actions to ensure equal opportunity. Thus, processes should still include offering reasonable accommodations, where appropriate, to qualified disabled individuals and the development of anti-harassment policies. Any review of processes and modifications must be included in the AAP.
- 3. Review job qualifications:** Job qualifications, including physical and mental requirements, must continue to be periodically reviewed to ensure the qualifications do not screen out qualified individuals, are job-related and are consistent with business necessity.
- 4. Participate in and assess the impact of outreach and recruitment efforts:** The OFCCP provides a list of outreach organizations that contractors can utilize to recruit qualified veterans and disabled individuals. Some of the organizations include: the Department of Veterans’ Affairs regional offices, local disability groups, veteran counselors and coordinators, and state vocational rehabilitation service agencies. While the contractor is not required to use the job listing, it should engage in appropriate outreach and recruitment activities. Further, the contractor remains obligated to annually review and assess its efforts, document the criteria used during the outreach, and review the effectiveness of those efforts. Under the new rule, records of outreach and recruitment efforts must be retained for three years.

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5. **Employee training:** The AAP now requires training of employees who will hire, promote, discipline or otherwise be involved in any affirmative action plan obligations.
6. **Collect data:** A new requirement; the contractor is required to gather the following data, retain the data for three years, and maintain its confidentiality:
 - Total number of applicants who self-identify as protected veterans or individuals with disabilities
 - Total number of job openings
 - Total number of jobs filled
 - Total number of applications for all jobs
 - Number of applicants hired who were protected veterans or individuals with disabilities
 - Total number of applicants hired
7. **Recordkeeping:** While records of AAP activities have been kept previously, some records such as the new applicant and job data for protected veterans and individuals with disabilities and outreach and recruitment efforts must now be kept for three years.
8. **Audit and report on the implementation of the AAP:** The program must measure the effectiveness of the AAP, necessity for remedial action, completion of AAP objectives and any action taken to bring the AAP into compliance. It should also note all employee requests for reasonable accommodations. All job ads, postings, interview notes, and employment tests and results should also be retained.

What Are Utilization Goals For Section 503?

The OFCCP has established a new 7% goal for federal contractors' *employee populations* to be made up of individuals with disabilities.

The 7% goal will be measured as:

- 7% of employees in each AAP job group (generally the same job groups as EO 11246's EEO groups); or,
- 7% of the entire workforce (if the contractor employs less than 100 employees)

The OFCCP cautions that this goal is not a quota, ceiling or floor for employment. Failing to achieve this goal does not, by itself, mean the contractor is in violation of the regulation. However, it is very likely a factor the agency will look at when assessing overall compliance. If a contractor fails to meet the utilization goal, it must take steps to determine where and how the impediment exists, design and adopt solutions into the AAP and execute the AAP.

What Are Hiring Benchmarks For VEVRAA?

The benchmark is intended to create a quantifiable method contractors can use to measure progress in *hiring* protected veterans into the workforce. Similar to the utilization goal, the benchmark measures the employer's good faith efforts to take affirmative action, and is another new addition to the rules. However, the focus here is on hiring rather than in employee retention like Section 503. Again, the OFCCP cautions the benchmark is not a ceiling or floor but an aspirational target for contractors. Records must be kept for three years to assess the success of benchmarking efforts.

The benchmark is determined on a facility-wide basis, and the contractor may choose one of two methods to determine the target percentage:

1. Benchmark against the national percentage of veterans in the civilian labor force (approximately 8%); or,
2. Create a benchmark by taking account of specified factors including but not limited to:
 - The average percent of veterans in the civilian labor force in the states where the contractor has been located for the past three years
 - Number of veterans hired in the previous four prior quarters
 - Applicant and hire ratios

What Does This Mean For A Federal Contractor?

Increased scrutiny. Federal contractors are increasingly asked to account for and track their hiring and employment activities for employees and applicants with protected characteristics. Contractors must take care to record data and proactively modify hiring and employment retention approaches to encourage the hiring and continued employment of qualified persons with disabilities and/or protected veterans.

However, despite what you may have heard, the new requirements under Section 503 and the VEVRAA are not as daunting as perhaps first thought. Some current federal contractors may already be accustomed to posting EEO notices and developing AAPs under EO 11246, Section 503 and the VEVRAA. The "new" changes will require a review, but not necessarily an overhaul, of recruitment practices and affirmative action programs currently in place. Contractors should use these new obligations as an opportunity to "spring clean" and review and revise existing employment processes and procedures to not only conform to the new regulations, but to align overall recruiting and hiring to better serve the business needs of the organization.