

OFCCP May Impose Explicit Goals for Federal Contractors' Hiring of Individuals with Disabilities

March 5, 2012 by [Evgenia Fkiaras](#)

Following a trend by the Federal government to liberalize anti-discrimination laws in favor of employees, the Department of Labor Office of Federal Contract Compliance Programs ("OFCCP") has proposed regulations that would require employers who wish to keep their contracts (and subcontracts) with the Federal government to attempt to maintain a workforce where 7% of employees are individuals with disabilities. The public comment period for this proposal has just closed, and the OFCCP is now in the process of reviewing respondents' reactions.

The proposal is a departure from current law in that, for the first time, it imposes a hiring goal on contractors. Currently, Section 503 of the of the Rehabilitation Act of 1973 contains an affirmative action plan but not a quantitative objective. This has been the case since the 1970s. Given the lack of improvement in the unemployment rate of individuals with disabilities, as well as the substantial technological advances that enable more reasonable accommodation of such individuals, the OFCCP concluded that such a goal would be appropriate.

The 7% goal would apply only to contractors that have 50 or more employees and a contract of \$50,000 or more. It would not be satisfied by a single, whole-workforce comparison. This is because a contractor could satisfy such a goal and still conceal discrimination by segregating all employees with disabilities into one or two low-paying jobs. Instead, the goal would be applied to and measured by each job group. The OFCCP is also considering applying a 2% sub-goal for individuals with certain severe disabilities, such as total blindness or missing extremities. Failure to attain a goal would be neither a finding or admission of discrimination, nor would any goal be a ceiling limiting job opportunities for individuals with disabilities or an absolute quota. Nevertheless, failure to reach the goal

could result in cancellation of a government contract or inability to win future contracts with the government.

One tricky aspect of the goal is that employers are prohibited under the Americans with Disabilities Act ("ADA") from making disability-related inquiries prior to employment, with limited exceptions, and are limited in the disability-related inquiries they may make after an offer of employment has been made. The proposal reconciles this by adding a requirement that the contractor invite applicants to self-identify as individuals with disabilities on a voluntary basis, consistent with the ADA. It would retain the requirement that contractors invite self-identification after an offer of employment has been made and before the individual assumes her job responsibilities, and it would also prescribe for the first time the language a contractor should use in its invitation. It further would add a requirement that contractors survey their workforce annually on an anonymous basis regarding disability status.

The annual survey would likely be the best measure of compliance with the goal, as people who are already employed and are assured of anonymity are more likely to identify themselves as having a disability than those seeking a job. However, the voluntary nature of all of these inquiries creates the possibility that contractors would have insufficient data to demonstrate they are complying with the target. On the other hand, mandating responses by employees and applicants (which is not in the proposal) would likely violate the ADA and other privacy laws.

The proposed rule includes a number of other changes that would increase contractors' logistical responsibilities. It would require that contractors develop and implement written procedures for processing requests for reasonable accommodation. It would also require contractors to maintain records on the number of individuals with disabilities applying for positions and the number of individuals with disabilities hired. The proposed rule would also impose additional requirements to facilitate the hiring of individuals with disabilities, including (1) a requirement that contractors engage in at least three types of outreach to recruit individuals with disabilities, (2) a requirement that contractors list job openings in appropriate employment delivery systems, and (3) a requirement that contractors must review personnel processes and job qualifications annually.

The proposal also makes changes to conform to the ADA Amendments Act of 2008 ("ADAAA"). For example, the definition of "disability" conforms with the ADAAA definitions. The proposed rule also clarifies that contractors are not required to provide reasonable

accommodations to individuals who are only regarded as having a disability, consistent with the ADA.

The sweeping changes in Section 503, if implemented, would require the creation of significant new procedures for Federal contractors who do not want to risk loss of their government contracts. Although it is uncertain which of the proposed changes will come to fruition, the proposal reflects a broader trend by the government to fortify the protections and support provided to employees and applicants with disabilities. Employers should therefore examine their accommodation and affirmative action procedures to ensure they are robust and flexible so that possible transitions will create a minimum of disruption.