

More Challenges for Federal Contractors as OFCCP Turns its Focus to Employees with Disabilities

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On December 9, 2011, the Office of Federal Contract Compliance Programs (“OFCCP”) issued proposed regulations (the “Proposed Regulations”) to implement Section 503 of the Rehabilitation Act of 1973, as amended (“Section 503”). Section 503 prohibits discrimination by federal contractors against individuals with disabilities and requires them to take affirmative action in the employment of such individuals. The Proposed Regulations substantially increase the scope and breadth of these non-discrimination and affirmative action obligations.¹

In addition to updating the definition of disability to bring it into harmony with the Americans with Disabilities Amendments Act of 2008 (“ADAAA”), the Proposed Regulations generally expand the obligations of contractors in seven primary areas, including:

- establishing a single, national utilization goal for individuals with disabilities in order to measure the effectiveness of the contractor’s affirmative action efforts;
- strengthening contractors’ affirmative action obligations, replacing the currently *recommended* actions with a list of detailed, *mandated* actions a contractor must undertake to satisfy its requirements;
- imposing an obligation to invite self-identification of disability status from applicants for employment, as well as a requirement to survey incumbent employees annually regarding their disability status;
- requiring the establishment and implementation of written procedures for processing requests for reasonable accommodation;
- encouraging the development and implementation of programs that provide *priority* consideration in employment to individuals with disabilities;
- imposing new notice requirements regarding affirmative action plans and the Equal Opportunity clause; and
- increasing data collection, analysis, and record retention obligations.

The Proposed Regulations add to a growing list of initiatives being pursued by the OFCCP, which in combination will materially increase the compliance burdens and legal risks facing federal contractors. We previously reported on new proposed regulations under 38 U.S.C. § 4212, which increase obligations of non-discrimination and affirmative action towards protected veterans. See [New Challenges Faced as Support of Veterans' Employment Rights Ramps Up](#), May 2011. In addition, final approval is pending from the OMB of the OFCCP's proposed new compliance evaluation scheduling letter and accompanying Itemized List, which, among other things, will require analysis of hiring, promotions, and terminations by job title as well as AAP job group, and the submission of employee level compensation data at the desk audit phase of an evaluation. The agency also has issued an Advance Notice of Proposed Rulemaking seeking input on an anticipated pay data collection tool to which contractors will have to respond annually. Already the most activist OFCCP in the history of the agency, it is not finished yet. Director Shiu has publically promised to publish a revised Compliance Manual and to revise the Sex Discrimination Guidelines.

The 60-day comment period for the Proposed Regulations ends on February 7, 2012. We will keep you updated about all of the OFCCP's initiatives and are available to discuss their potential consequences and strategies to achieve compliance even as we await their final form.

History

Section 503 was enacted in 1973 with two mandates: (1) a prohibition against employment discrimination on the basis of disability by federal contractors; and (2) a requirement that federal contractors take affirmative action in the employment of individuals with disabilities. The question of who qualifies as an "individual with a disability" to trigger the protections under Section 503 tracked the related definition of "disability" under the original Americans with Disabilities Act ("ADA") and its 2008 amendment, the ADAAMA.

The nondiscrimination and general affirmative action requirements of Section 503 apply to all contractors with contracts in excess of \$10,000. The requirement to prepare and maintain an affirmative action program applies only to contractors with both 50 or more employees and contracts of \$50,000 or more. Failure to fulfill the obligations established under Section 503 and its implementing regulations can result in sanctions that range from the withholding of progress payments to the termination of contracts to the debarment from receiving future contracts.

The principal impetus behind the Proposed Regulations was the U.S. Department of Labor's ("DOL") concern that a substantial, intractable, and long-term disparity in the employment rate of individuals with disabilities persists despite affirmative action requirements that have been in place since the 1973 enactment of Section 503. The second driving force was the need to update the current regulations to better align them with the amendments to Section 503 made by the passage of the ADAAMA.

Prior to publishing the Proposed Regulations, the OFCCP conducted town hall meetings, webinars, and listening sessions with interested parties to discuss improvements to the existing regulations. In addition, the OFCCP published an Advance Notice of Proposed Rulemaking on July 23, 2010 (75 Fed. Reg. 43116) through which it requested comment on potential ways to strengthen affirmative action obligations under Section 503. The Proposed Regulations reflect the DOL's consideration of those comments.

Who is Covered as an “Individual with a Disability” under the Proposed Regulations

Under the Proposed Regulations, the definition of “disability” would remain the same and continue to include three prongs: (1) having a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) having a record of such an impairment; and (3) being regarded as having such an impairment. However, the Proposed Regulations seek to track more faithfully the ADA and its implementing regulations of 2011 which, as we reported in our Client Alert of March 2011, greatly broaden the scope of what is covered as a “disability” by: (1) expanding the meaning of “substantially limits”; (2) increasing the breadth of what is considered a “major life activity”; and (3) extending the reach of the “regarded as” prong. See [EEOC Releases Final Regulations Significantly Expanding Coverage under the Americans with Disabilities Act](#), March 28, 2011.

The net effect of the sweeping changes to the definition of “disability” is to expand substantially the proportion of the population that will qualify for coverage under these legal frameworks, which in turn will impose additional obligations on employers. There is little chance that there will be any significant revisions to the Proposed Regulations’ definition of disability, given that they are intended to, and do, track the ADA, whose regulations have been finalized for almost one year.

New and Expanded Non-Discrimination and Affirmative Action Requirements under the Proposed Regulations

The Proposed Regulations, if adopted in their current form, would require, among other things:

A new single, national utilization goal for individuals with disabilities.

The most radical new requirement under the Proposed Regulations is the establishment of a single, national utilization goal for individuals with disabilities that is to be used not as a quota but as an equal employment opportunity objective and measurement benchmark. Concerned that individuals with disabilities have continued to experience “staggering levels of unemployment” when compared to their non-disabled counterparts despite the more than 30-year existence of Section 503, the OFCCP determined that such a goal is warranted.²

The OFCCP initially considered whether to allow individual contractors to set their own goals for each of their job groups based on the percentage of individuals with disabilities available in the particular recruitment area, mirroring the goals framework for minorities and women under Executive Order 11246. However, it found many difficulties in replicating that framework in the context of disability and opted instead for a single, national goal for all jobs in all geographic areas.

The Proposed Regulations set the national utilization goal at 7% by using existing disability data and adjusting it to reflect the effects of “discouraged workers” and “historical discrimination.”³ Acknowledging several problematic aspects of the calculation, the OFCCP invites public comment on using 7% as its utilization goal as well as on a range of values between 4% and 10%. In addition, the OFCCP is considering, and seeks comment on, the inclusion of a 2% sub-goal for individuals with the following targeted/severe disabilities: total deafness, blindness, missing extremities (hand, foot, arm or leg), partial and complete paralysis, epilepsy, severe intellectual disability, psychiatric disability, and dwarfism.

Application of the single utilization goal would be at the job group, rather than overall workforce, level based on the OFCCP’s belief that application at the workforce level has the potential to mask

discrimination and segregation. Whatever the final number, the Proposed Regulations require the Director of the OFCCP periodically to review and update the utilization goal.⁴

Stronger affirmative action provisions detailing mandated actions.

The Proposed Regulations detail specific and extensive requirements for the contents of a contractor's affirmative action program. In addition to mandates outlined below regarding notice, reasonable accommodation, and data collection and analysis, affirmative action programs must also contain:

- an annual review of the contractor's personnel processes to ensure that they do not stereotype individuals with disabilities, including a description of the review and any needed modifications
- an annual review of all physical and mental job qualification standards to ensure that they are job-related and consistent with business necessity, including documentation of methods used to conduct the review, which must be retained as employment records;
- procedures to ensure that employees are not harassed on the basis of disability;
- the listing of all employment openings with the Employment One-Stop Career Center ("One-Stop") nearest the contractor's location;
- linkage agreements with either the State Vocational Rehabilitation Service Agency or an organization listed in the Social Security Administration's Ticket to Work Employment Network Directory, as well as at least one additional organization specified by the OFCCP;
- an annual assessment of the contractor's outreach and recruitment efforts;
- written notification of affirmative action policies to all subcontractors, along with a request for appropriate action on their part;
- internal dissemination of the affirmative action policy through inclusion in the employee manual, discussion at all employee orientation and management training programs, and meetings with union officials to request cooperation, if the contractor is a party to a collective bargaining agreement;
- the design and implementation of an audit and reporting system to measure the effectiveness of the affirmative action program and identify the need for remedial action; and
- training of all personnel involved in the recruitment, hiring, and disciplinary processes.

Earlier and more aggressive self-identification requirements.

The Proposed Regulations would require that contractors solicit job applicants to self-identify as disabled. The applicant solicitation, however, would ask only for self-identification as to the existence of a disability, not about the general nature, type, or severity of the limitations the candidate has as a result of his or her disability. The post-offer, pre-employment solicitation of disability status is retained from the current regulations. Both solicitations must use the language and method to be prescribed in the final rule by the OFCCP, which the agency will make available on its website.⁵

In addition, contractors would be required to survey their incumbent employees annually to provide those employees with an opportunity to self-identify as disabled. Again, contractors would conduct this

survey using the language and method mandated by the OFCCP and provided on the agency's website.

Written procedures for processing requests for reasonable accommodation.

The Proposed Regulations would require those contractors that are obligated to develop an affirmative action program also to develop and implement written procedures for processing requests for reasonable accommodation. According to the preamble, the goal of the written procedure is two-fold: (1) to assist the contractor in consistently satisfying its reasonable accommodation obligation by serving as a "blueprint" for the prompt handling of such requests, and (2) to ensure that applicants and employees know how to request a reasonable accommodation, who is responsible for handling such a request, and the maximum amount of time within which the contractor must complete the processing of such a request.

The OFCCP acknowledges in the preamble that the specific requirements of such written procedures would vary according to the size, structure and resources of the contractor. Still, the Proposed Regulations list the following elements as *required* in every contractor's reasonable accommodation procedures:

- the identification of, and contact information for, the responsible official;
- a statement that a request for accommodation may be either oral or written and may be made by the applicant, employee, or a third party of his/her behalf;
- a statement that, where the need for accommodation is recurrent, such as a sign language interpreter, the individual will not be required to repeatedly submit a request;
- identification of the person to whom a reasonable accommodation request must be made, which at a minimum must be any supervisor or management official in the chain of command or the official responsible for the program;
- assurance that all applicants are aware of the contractor's reasonable accommodation obligation and are invited to request reasonable accommodation to enable their full participation in the application process;
- the provision of written confirmation of receipt of a reasonable accommodation request to be provided by letter or email, and to include the date the request was received and signed by the authorized decision-maker;
- a statement that the request will be processed as expeditiously as possible, including a statement of the timeframe involved (no longer than 5-10 business days if no supporting documentation is needed or not to exceed 30 days if documentation is needed or special equipment must be ordered);
- where the contractor is unable to complete the request within the established timeframes, written notice, duly signed and dated, of such to the employee with an explanation of the delay and a projected date for completion;
- a description of the steps the contractor will take when processing a reasonable accommodation request, including the process by which the final determination will be made and the information needed to make the determination;

- except where the disability is known or readily observable, an explanation of the circumstances where medical documentation (limited to the individual's disability and functional limitations) may be requested and reviewed;
- the denial of an accommodation request must be in writing and must include the basis for the denial, a statement of the right to file a complaint with the OFCCP, and a statement of the right to internal appeal or reconsideration, if offered by the contractor, and a statement that the appeals process does not toll the time to file a complaint with the OFCCP or EEOC;
- a statement that the request for accommodation, including its documentation, will be treated as confidential and included in the employee's separate medical file; and
- training of supervisors and managers on the accommodation procedures must be conducted on an annual basis or upon significant changes in the procedures.

Priority consideration to individuals with disabilities.

Another new provision *encourages* contractors to voluntarily develop and implement programs that provide priority consideration to individuals with disabilities in recruitment and/or hiring. The Proposed Regulations provide a non-exhaustive list of such possible programs, including assigning a weighted value or additional "points" to job applicants who self-identify as being an individual with a disability, developing a job training program focused on the specific needs of individuals with certain disabilities such as traumatic brain injury or developmental disabilities, and utilizing linkage agreements to recruit program trainees.

Where a contractor implements a priority consideration program, the Proposed Regulations would require that a description of the program be included in the contractor's Affirmative Action Program. The Proposed Regulations would prohibit the use of the program to segregate individuals with disabilities and/or discriminate against an individual that has received such priority.

New notice requirements embedded in the Equal Opportunity clause.

The agency proposes substantive modifications to the mandated Equal Opportunity clause that currently must be incorporated by reference in all government contracts, subcontracts, and purchase orders. The changes reflect the OFCCP's intent to draw more attention to contractors' obligations, especially as to individuals with disabilities, by:

- Adding a provision that explicitly recognizes affirmative action for individuals with disabilities;
- Replacing the suggestion that contractors read the affirmative action/non-discrimination notice to visually disabled individuals with a requirement that contractors provide the notice in an accessible form so that visually disabled individuals may read the notice independently (e.g., in Braille or large print);
- Requiring electronic posting of affirmative action/non-discrimination notices on an intranet site or through e-mail if contractors have telecommuting employees or other employees who do not work at the contractor's primary site;
- Modifying the internet-based application process to include an electronic posting with the application that notifies applicants of their rights;

- Requiring contractors to notify labor organizations or other workers' representatives of their non-discrimination obligations, in addition to affirmative action;
- Creating a new obligation that applicant solicitations and job advertisements state that the contractor is an equal employment opportunity employer of individuals with disabilities; and
- Mandating that the *entire* Equal Opportunity clause be included verbatim in federal contracts, including subcontracts, a departure from current practice of incorporating the clause by reference⁶

If the agency's proposed changes to the Equal Opportunity clause are finalized, contractors will have to review and possibly modify their communications with applicants, labor organizations, job placement agencies or websites, and employees.

Increased data collection and retention obligations.

Consistent with the proposed amendments to regulations governing affirmative action plans for veterans, the agency seeks to alter dramatically how contractors prepare affirmative action plans for individuals with disabilities. Currently, such plans contain only narrative descriptions of outreach, recruitment, and hiring of individuals with disabilities. The Proposed Regulations add quantitative analyses to these plans, thereby drastically changing the scope of plans for individuals with disabilities. The agency will demand more rigor in affirmative action plans for individuals with disabilities, such that the plans are not merely a "paperwork exercise,"⁷ but contain quantifiable measurements of the contractor's affirmative action efforts. Under the Proposed Regulations, affirmative action for individuals with disabilities will not be a paper tiger, but "a management tool that includes measurable objectives, quantitative analyses, and internal auditing and reporting systems"⁸ By increasing contractors' record-keeping obligations, the OFCCP empowers itself to quantitatively scrutinize contractors' progress in providing equal opportunity to individuals with disabilities.

Under the Proposed Regulations, contractors will now have to collect "referral data," "applicant data" and "hiring data" to calculate the "applicant ratio," "hiring ratio" and "job fill ratio."⁹ The proposed data collection requirements mirror the proposed regulations for veterans, mandating contractors to compare:

- The total number of applicants who are known to have disabilities to the total number of applicants (i.e., applicant ratio);
- The total number of hires who are known to have disabilities to the total number of hires (i.e., hiring ratio); and
- The total number of job openings to those openings filled (i.e., job fill ratio).¹⁰

Although the Proposed Regulations do not specify that the above data must be grouped by AAP job group, doing so may reduce the risk of discrimination claims. In addition, to evaluate contractors' recruitment of individuals with disabilities, contractors would need to record referrals from organizations with linkage agreements and employment service delivery systems (i.e., state workforce agencies).¹¹

The agency is eager to obtain the new data and calculations, which would arm it with sufficient data to make findings of discrimination. Tellingly, the agency is considering whether contractors should annually provide the above data, *regardless* of whether the contractor was selected for a compliance evaluation.¹² Also under consideration is whether contractors should also annually submit the percentage of applicants, new hires, and total workforce for each EEO-1 group, regardless of whether the contractor is under a compliance evaluation.¹³

Miscellaneous proposals.

There are numerous other changes in the Proposed Regulations, including the following:

- Prospective contractors awarded contracts of \$10 million or more must undergo a pre-award compliance evaluation unless the agency found the contractor in compliance with Section 503 within the preceding 24 months.¹⁴
- Contractors should consider additional outreach efforts, including: formal briefing sessions with representatives from recruiting sources; additional efforts at schools to reach students with disabilities; work-study programs for students or interns with disabilities; making disabled employees available for participation in school career days; and other community activities.
- Contractors should also consider additional opportunities for internal dissemination of their affirmative action policies, including: publication via company newspapers, annual reports, or other electronic publications to employees; discussion at employee meetings; discussion at meetings with executives and management.

Implications for Contractors

As is self-evident from the above summary of the Proposed Regulations, if they become final in their current form contractors will face significant new challenges in achieving compliance. The new recordkeeping and documentation requirements likely will require modifications to applicant tracking systems, which often are costly and difficult to implement. The documentation of referrals from parties to linkage agreements may require additional headcount, as well as possible new technology. Likewise, the risk that the OFCCP will find discrimination with respect to employees with disabilities may increase, given the extensive data that contractors must now maintain as employment records and provide at the agency's request. Finally, the expansion of the definition of who will be considered an individual with a disability, as well as the other requirements generated by the ADAAA, will increase the burdens of the interactive process and the number and scope of reasonable accommodations that will be necessary.

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¹ [Department of Labor Office of Federal Contract Compliance Programs, 76 Fed. Reg. 77,056-105 \(proposed December 9, 2011\) \(to be codified at 41 C.F.R. pt. 60-741\).](#)

² [Id.](#) at 77,056, 77,069 (referring to data from the U.S. Department of Labor's Bureau of Labor Statistics and the U.S. Census Bureau's 2009 American Community Survey).

³ [Id.](#) at 77,069-70 (relying on data from the American Community Survey).

⁴ [Id.](#) at 77,099. The proposed regulations do not address whether a notice and comment period will be required for periodic updates of the utilization goal, or whether the Director of the OFCCP can make such a decision unilaterally.

⁵ The Proposed Regulations provide some suggested language for the solicitation to job candidates that the agency might prescribe and the agency requests comment and alternative text. [Id.](#) at 77,063. The suggested language is very lengthy and would likely require substantial modification to most current applicant tracking software.

⁶ [Id.](#) at 77,060-61.

⁷ [Id.](#) at 77,062.

⁸ [Id.](#)

⁹ [Id.](#) at 77,067.

¹⁰ [Id.](#)

¹¹ [Id.](#)

¹² [Id.](#)

¹³ [Id.](#)

¹⁴ [Id.](#) at 77,100.