

OFCCP Says April 2013 for Final Veterans and Disabled Regulations

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The Department of Labor recently released its fall 2012 Regulatory Agenda, including the agenda of the Office of Federal Contract Compliance Programs (OFCCP). Chief among the OFCCP's projections is the publication of final regulations governing affirmative action for veterans and the disabled in April 2013.

In April and December 2011, OFCCP caused tremendous ongoing clamor in the federal contractor community when it issued proposed regulations significantly increasing documentation, data collection, recordkeeping and other requirements concerning veteran and disabled affirmative action. Federal contractors subsequently provided critical comments and since then, OFCCP has left federal contractors hanging in doubt and turmoil for over a year. In April 2012, the U.S. House of Representatives Subcommittee on Health, Employment, Labor, and Pensions conducted a hearing concerning the proposed regulations where three of four witnesses described them as "extraordinarily" burdensome and lamented the "staggering" financial burden of compliance.

While it remains to be seen whether the critical comments impact the final regulations, and whether OFCCP meets the April 2013 projection, it is clear from the outcome of the presidential election, and now the Regulatory Agenda, that some form of the regulations will soon take effect. Given the additional burdens any version of the final regulations is likely to impose, it would be wise to become familiar with the proposed regulations as they stand today, as well as assess existing systems, processes and procedures (particularly applicant tracking and outreach efforts) in light of the proposals.

Probably the most notable proposals are the goal and benchmarks: (1) a 7% utilization goal per job group for employees with disabilities; and (2) an annual hiring benchmark for protected veterans expressed as the "percentage of total hires who are protected veterans that the contractor seeks to hire in the following year." Contractors will set their own veteran hiring benchmarks based on a documented analysis of a number of veteran availability statistics, some provided by OFCCP and some based on data contractors will be required to collect and maintain, including a veteran referral ratio, applicant ratio, and hiring ratio for the previous year.

In order to collect that data, contractors will for the first time invite *applicants* to self-identify as a "protected veteran" and/or as a person with

a disability on an OFCCP-approved form. Contractors will continue to invite new hires to identify membership in a specific "protected veteran" category, and to identify a specific disability, also on an OFCCP-approved form. Contractors will also conduct an annual, anonymous survey of employees inviting them to identify as a person with a disability.

A major emphasis of the proposed regulations is requiring contractors to take specific steps to fulfill their existing affirmative action obligations, document their efforts, and include such documentation as part of their written affirmative action plan (AAP). This change will affect the review of personnel processes and job qualifications; outreach and recruitment efforts; internal dissemination of the policy; the audit and reporting system; and the training of all personnel involved in affirmative action.

Another controversial and onerous new proposal is the requirement that contractors develop detailed, written accommodation procedures which would be included in the AAP. Contractors would be required to distribute the procedures to all employees, train managers and supervisors on the procedures, and notify applicants of accommodation procedures regarding the application process.

In addition, the procedures would need to contain specific elements too numerous to list here. For instance, a request for accommodation may be written or oral and could be made by a third party; a request could be made to any supervisor or manager in the employee's chain of command; contractor's must provide written acknowledgement of receipt of a request; a response deadline of 10 business days or 30 calendar days depending on whether medical documentation is needed; and written notice of any denial detailing the reasons and notifying the requester of her right to file a complaint with OFCCP.

While the OFCCP will no doubt give federal contractors time to prepare before the final veterans and disabled regulations take effect, some advanced knowledge and organization will not only enhance success in meeting your current obligations but will also help you avoid pitfalls when the final regulations land on your desk with a thud.

Please look for Holland & Hart briefing sessions once the final regulations are published.

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