

CLIENT ALERT

"Sea Change" in OFCCP Disability Regulations Would Mean Increased Turbulence for Contractors

Dec.14.2011

On December 9, 2011, the Office of Federal Contract Compliance Programs (OFCCP) issued a Notice of Proposed Rulemaking (NPRM) that would revise the affirmative action and nondiscrimination obligations of federal contractors and subcontractors (collectively "Contractors") regarding individuals with disabilities. These proposed regulatory changes, which the Director of the OFCCP described as a "sea change" in OFCCP's enforcement of the obligations imposed on Contractors under Section 503 of the Rehabilitation Act, would impose a seven percent "utilization goal" for individuals with disabilities, substantially increase Contractors' data collection and analysis obligations, and mandate prescribed outreach efforts. The proposed changes, if enacted, would dramatically expand Contractors' obligations with respect to individuals with disabilities, and the time and expense required to meet these obligations.

Highlights of the NPRM include the following:

- A nationwide, across-the-board seven percent "utilization goal" for individuals with disabilities, similar to the goals that Contractors are currently required to set for women and minorities. This goal would apply to each of a Contractor's AAP job groups, not the workforce as a whole. The commentary to the proposed regulations also contemplates the imposition of a two percent "subgoal" for individuals with "certain particularly severe disabilities," such as complete blindness or deafness, paralysis, epilepsy and psychiatric disabilities.
- A requirement that Contractors invite *all applicants* to self-identify as an individual with a disability. This is a significant change from the existing requirement to solicit this information only from those who have been offered employment.
- An obligation to extend *a second* invitation to self-identify to all hires after a job offer is extended but before the individual begins work. Thus, the invitation to self-identify would have to be made both pre- and post-offer.
- A requirement that the invitation to self-identify must use language prescribed by OFCCP. Contractors could not develop their own language.
- An obligation to conduct an *annual* survey to allow employees to *anonymously* identify themselves as individuals with disabilities. The language of this survey, too, would be prescribed by OFCCP.
- A mandate that all Contractors conduct an annual analysis of the "hiring ratio" between the number of applicants with and without disabilities and the number of hires with and without disabilities. This requirement is similar to the adverse impact analyses currently required for women and minorities.
- A requirement that Contractors establish "linkage agreements" with either their local State Vocational Rehabilitation Services Agency or a local Employment Network organization *and* at least one other organization from a list specified in the regulations. Contractors would also be required to post all open positions with the nearest Employment One-Stop Career Center – this is already required by the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) regulations.
- A mandate that Contractors must annually document the total number of referrals from employment service delivery systems and each organization with which they have linkage agreements.

- An obligation to conduct an annual evaluation of recruitment efforts and, if they have not been reasonably successful, implementation of at least one more of OFCCP's prescribed outreach efforts.
- A requirement that Contractors develop written procedures for processing requests for reasonable accommodations and inform all employees and applicants of these procedures. The proposed rule would require that the procedures: identify to whom an accommodation request should be submitted; provide written confirmation of receipt of a request; ensure processing of requests within 5-10 days if no medical documentation is required or no more than 30 days if medical documentation is required; and ensure that, if a Contractor denies an accommodation request, the Contractor will provide a written basis for the denial and inform the requester that he or she has the right to file a complaint with the OFCCP.
- A mandate that Contractors conduct annual training of all supervisors and managers on the reasonable accommodation procedures.
- A requirement that Contractors conduct annual reviews of their personnel processes, which would include: identifying vacancies and training programs for which individuals with disabilities were considered; providing a statement of reasons why individuals with disabilities were rejected for such positions/programs; and describing the types of accommodations that were provided to those selected for hire, promotion or training. In any instance in which an applicant or employee with a disability is not selected, Contractors would be required to make the specific reasons for their personnel decisions available to the employee or applicant upon request.
- A requirement that Contractors conduct annual reviews to determine whether their technology is accessible to individuals with disabilities. Contractors would be required to include a description of this review, and any modifications made as a result of the review, in their affirmative action plans.
- Obligate Contractors to annually review the physical and mental job qualifications of each of their positions and document why each mental or physical requirement is related to the position to which it corresponds.
- Require that the "equal opportunity clause" must be included *in full* in every government contract and subcontract. Contractors would no longer be able to flow down the obligations to subcontractors by simply citing to the applicable regulation.
- A *five-year* recordkeeping requirement for information relating to a Contractor's affirmative action program and its outreach efforts.
- The commentary to the proposed regulations also contemplates establishing an annual reporting obligation, similar but more extensive than the current Vets 100 reporting, that would require a Contractor to report on the percentage of its disabled applicants, hires and workforce for each EEO-1 category.
- The proposed regulations would also make changes to certain language in the existing regulations to conform to the Americans with Disabilities Act Amendments Act (ADAAA).

Comments on the NPRM must be submitted to OFCCP on or before February 7, 2012 and the Agency will likely issue final regulations in the second half of 2012.

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