

***Third Thursday* Briefing:**
**New OFCCP Regulations – Affirmative
Action for Protected Veterans and
Individuals with Disabilities**

September 19, 2013

The webinar will begin shortly. You will not
hear any audio until we begin. Please stand by.

Today's Presenters



Tom Gies



Kris Meade



Ira Saxe



Rebecca Springer

Agenda

- Background
- Section 503 Revisions
- VEVRAA Revisions
- Key Proposals Not in Final Rules
- Practical Advice for Implementation

Background – The Proposed Rules

- VEVRAA - Proposed Rule published April 26, 2011
- Section 503 - Proposed Rule published December 9, 2011
- ◆ **Proposed significant changes to affirmative action obligations for veterans and individuals with disabilities**
- ◆ **Proposed substantial increase in data collection, documentation, recordkeeping**
- Outcry from contracting community regarding burden

Background – The Final Rules

- Final VEVRAA and Section 503 Rules announced August 27, 2013
 - Substantial changes from proposed rule – but still onerous
 - Published in Federal Register - next 1-2 weeks
- Revises 41 CFR 60-741 and 41 CFR 60-300; rescinds 41 CFR Part 60-250
- Effective date estimated to be March 2014
- ♦ **“Phased in” compliance for AAPs**
 - ♦ If AAP in place before effective date, then no changes to plan required until next AAP year

Section 503 - Highlights

- 7% utilization goal
- Periodic solicitation of disabled status from all employees
- Solicitation of disabled status from all applicants
- Documentation of outreach efforts
- Collection of disabled applicant and hire data
 - Ongoing assessments of same
- New subcontract “flow down” language
- Three-year recordkeeping requirement
- Expanded audit scope

Section 503 – Solicitation of Disability Status

- Must invite all “applicants” (pre-offer) to self-identify as disabled
- Must invite selected applicants (post-offer) to self-identify again (requirement existed in prior regulation)
- Must invite all employees to self-identify within first year after revised regulations effective, and every 5 years thereafter
- Once within the 5 year period, must remind employees that they can voluntarily update their disability status

Section 503 – Solicitation of Disability Status (cont.)

- Must use invitation prescribed by OFCCP – not yet issued
- Contractor can identify someone as disabled even if he/she does not self-identify when disability is “obvious” or “known”
 - Process issues – not addressed
- Must keep self-identification responses in separate data analysis file, not in personnel file

Section 503 – Utilization Goals

- Utilization goal of 7% disabled
 - If 100 or more employees, must be 7% in each job group
 - If fewer than 100 employees, may apply 7% to workforce as a whole
- Must conduct annual evaluation of utilization
 - If percentage of disabled in job group/workforce is less than 7%, must identify problem areas and implement additional action oriented programs
 - Tracks approach under EO 11246 for women and minorities
- 2% “sub goal” for severe disabilities from proposed rule not adopted in final rule

Section 503 – Data Collection Analysis

- Must document the following:
 - Number of applicants who self identified as disabled
 - Total number of applicants
 - Number of disabled applicants hired
 - Total number of applicants hired
 - Total number of job openings and total number of jobs filled
- No obligation to conduct adverse impact analyses
 - But. . . .
- Must maintain records for three years

Section 503 – Outreach Efforts

- Must annually assess (and document) effectiveness of outreach efforts
 - Assessment must document criteria used and explicitly state the outcome
 - Evaluation of effectiveness must consider the applicant/hire data collected over prior two years
 - Evaluation of effectiveness must be “reasonable as determined by OFCCP”
- Where outreach efforts where not effective, contractor must implement additional outreach efforts

Section 503 – Outreach Efforts (cont.)

- Must send written notification of affirmative action obligations to all subcontractors, vendors, suppliers, requesting “appropriate action on their part”
- Must disseminate summary of outreach efforts to employees and union officials
- Must maintain all records related to outreach for three years
- “Linkage agreements” from proposed rules not in final rules

Section 503 – Flow-Down Clause

- Can no longer simply incorporate obligations by reference to the EO clauses
- Must now also include the following **in bold text**
 - Sec. 503 - “This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.”

Section 503 – Expanded Audit Scope

- Regulations expressly state “OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part.”
- References OFCCP v. Frito-Lay and United Space Alliance v. Solis.

VEVRAA - Highlights

- Solicitation of veteran status
- Annual hiring benchmarks
- Documentation of outreach efforts
- Collection of veteran applicant and hire data
- New subcontract “flow down” language
- Three-year recordkeeping requirement
- Expanded audit scope

VEVRAA – Solicitation of Veteran Status

- Must invite all “applicants” (pre-offer) to self-identify as a protected veteran – but not identify which subcategory
- Must also invite selected applicants (post-offer) to self-identify their particular veteran category(ies) (requirement existed in prior regulation) before beginning job duties
- No obligation to re-issue invitation to self-identify on periodic basis
- OFCCP provides sample invitation - does not mandate use, but some elements mandatory

VEVRAA – Hiring Benchmarks

- “Hiring benchmark” for veterans based on either:
 - Percentage of veterans in the civilian labor force (currently 8%)
 - Benchmark set annually by contractor based on combination of 5 factors
- Benchmarks apply to entire AAP location (not each job group separately)
- Must conduct annual evaluation of benchmarks
 - Where percentage of veteran hiring is less than benchmark, must identify problem areas and implement additional action oriented programs
 - Tracks approach under EO 11246 for women and minorities, but only as to hiring activity

VEVRAA – Obligations Parallel to 503

- Applicant/Hire data collection and analysis
- Flow-down clause – referencing VEVRAA regulations rather than Section 503 regulations
- 3-year recordkeeping
- Outreach Efforts (but with some additional outreach requirements)

VEVRAA – Additional Outreach Obligations

- Additional VEVRAA outreach obligations
 - Must post most jobs with employment services delivery system (ESDS) in “manner and format permitted” by ESDS
 - Must inform ESDS of contractor status
 - Must specifically request priority referrals of veterans
 - Must provide the name and location of each hiring location in the state, contact information for official responsible for hiring at each location, contact information for any external job search organizations used by contractor
- Not required to track referrals from ESDS
- Must maintain documentation of outreach efforts for three years

Key Proposals NOT in Final Rules

- Mandatory reasonable accommodations provisions - non-mandatory “best practices” in Final Rules
- Final Rules omit obligation to provide writing that explains decision to not accommodate and right to file complaint with OFCCP
- Not require:
 - Annual, documented review of personnel processes
 - Annual, documented review of physical and mental qualifications
 - Annual training of all employees
 - Annual training of all employees involved in recruitment, hiring, promotion processes
 - Considering all protected veterans for all open positions – OOPS!

Implementation Issues

- Extent of effort to achieve 7% disabled goal
- 8% veteran benchmark vs. 5-factor analysis
- How to document audit and reporting system
- Reasonable accommodations guidelines – adopt?
- Adding “if applicable” language to flow-down clauses
- Language for self-identification

NEXT MONTH'S PROGRAM

- October 17
- Noon eastern
- ADA/FMLA Compliance and Litigation Issues

Contacts

Kris Meade

kmeade@crowell.com

202.624.2854

Ira Saxe

isaxe@crowell.com

212.895.4230

Rebecca Springer

rspringer@crowell.com

202.624.2569