

5 Tips For Federal Contractors Facing New Hiring Rules

By **Dietrich Knauth**

Law360, New York (March 24, 2014, 9:13 PM ET) -- With new rules for contractors' affirmative action responsibilities taking effect Monday, companies have a lot of work to do to ensure they meet the U.S. Department of Labor's goals for hiring veterans and people with disabilities, and attorneys are preparing to get their clients in shape for DOL audits.

The DOL's Office of Federal Contract Compliance Programs, which audits the nondiscrimination and affirmative action responsibilities of federal contractors, finalized two rules in August that aim to revamp the enforcement of affirmative action goals for veterans and people with disabilities. The game-changing rules require contractors to set hiring goals for veterans and disabled employees, invite job applicants to self-identify as veterans or disabled, compile additional data on hiring decisions, periodically survey their employees for disability status, and keep relevant records for three years.

Keeping up with the regulations, which took effect 180 days after their formal publication in the Federal Register, will likely require significant investments in human resources departments, such as hiring additional staff to conduct outreach efforts and updating online job applications and information technology systems to help capture the newly required hiring data, experts say.

"This is the first time that affirmative action programs for veterans and persons with disabilities have any statistical component," said Valerie Hoffman, head of the affirmative action and OFCCP compliance practice at Seyfarth Shaw LLP. "This effort to collect data is a major undertaking because of the need to modify applicant tracking systems and human resources information systems. Systems changes don't happen overnight, and most companies' IT budgets are already strained — this is a significant undertaking by every contractor."

Now that the rules are in effect, here are five tips to help employers manage their new responsibilities.

Update your subcontracts and equal employment materials immediately.

Some of the rules' requirements won't actually hit home until contractors update their annual affirmative action programs, which could start as late as Jan. 1, 2015, for the many companies that update their plans at the start of a calendar year. But while some companies will have additional time to revamp their hiring, outreach and applicant tracking systems, all contractors must immediately update language used in subcontracts and equal employment opportunity materials.

The rules require contractors to "flow down" the new affirmative action responsibilities to their

subcontractors and suppliers who meet certain thresholds of business — \$10,000 for the disability rule and \$100,000 for the veterans rule. To comply with the rules, all new subcontracts and purchase orders must include a specific paragraph highlighting the veteran and disability hiring responsibilities in bold text.

"If you haven't yet, inventory all of your internal and external communications that make reference to EEO and make sure that they're compliant with these new regulations," said Mickey Silberman, head of the affirmative action compliance and OFCCP practice at Jackson Lewis LLP. "Everywhere that an employer makes references to EEO or affirmative action compliance in internal or external communications, that needs to be reviewed, and in all likelihood, needs to be changed as of this March deadline."

External communications and subcontracts are particularly important because they leave a paper trail that could get a company into trouble during future OFCCP audits if they don't include the new references to hiring veterans and people with disabilities, Silberman said.

Companies' equal opportunity tag lines will also need to be updated immediately. It's no longer enough to merely state "this company is an equal opportunity employer" — the new rules require specific references to veterans and people with disabilities, a change that will likely lead to more comprehensive listings in order to ward off misconceptions that only veterans and people with disabilities are protected.

"Now that you're required to make specific references to veterans and the disabled, do you have to make references to other protected classes?" Silberman said. "Might that indicate, incorrectly, that you're only extending those protections or that consideration to veterans and the disabled?"

Educate managers and employees about the new rules.

The rules require employers to ask applicants and employees to self-identify as veterans or disabled, and the disability question in particular could cause consternation for employees. The disability regulation requires companies to ask for disability status before a job offer, after a job offer, as well as a survey of employees within a year of the regulation's start date and an additional employee survey every five years.

"It's very important for employers to think about how these changed requirements might be perceived or misperceived by applicants and employees," Silberman said. "Reasonably enough, an applicant or employee can perceive this as an employer being obsessed with their disability, asking them for the same information over and over again."

Setting the right tone with employees is an important step towards ensuring employee participation in the self-surveys. Since the OFCCP will count the number of employees who self-identify as disabled against the entire company, rather than the portion who participated in surveys, low participation could make a company seem like it has a smaller percentage of employees with disability than it truly does.

"One of the most challenging aspects is for companies to administer this all-employee survey and the communications that are likely to precede that," said Alissa Horvitz, a shareholder with Littler Mendelsson. "If a company doesn't spend a little bit of time explaining why this survey is being taken and why it is required, it's not going to get a very high response rate."

Companies should also train their managers to look out for ways to classify employees as disabled even if they don't self-identify, such as listing employees who seek leave under the Family and Medical Leave Act for chronic conditions or employees who seek accommodation for a disability under the Americans with Disabilities Act, according to Connie Bertram, a partner in Proskauer's employment group. Those kinds of decisions will be sensitive, and managers should be sure not to create the impression that they are discriminating against such employees, she said.

With the increased focus on employees with disabilities, managers should also be prepared for an uptick in employee requests for a reasonable accommodation of their disabilities, Hoffman said.

"Contractors should do some significant training, especially regarding ensuring that their managers know how to handle the interactive process for people who request a reasonable accommodation," Hoffman said. "It's essential that contractors be ready for that and ensure that managers can follow the law."

Budget time and money for an HR overhaul.

For companies with annual affirmative action plans that won't be updated for months, it is important to invest the time and money needed to get human resources information systems into shape.

"Some of the biggest that we're seeing from our clients right now is the obligation to solicit and collect veterans and disability status from applicants and from current employees," Springer said. "It is a big change to your applicant tracking system and your HRIS system to collect that information and put the necessary controls in place to ensure that that information remains confidential."

Many contractors use third-party vendors and suppliers for their HR information systems, and those companies are already preparing solutions that will help contractors meet the OFCCP's data requirements, Bertram said.

"That might ease the burden on some of the contractors," Bertram said. "You can find some fairly efficient and cost effective vendors to handle applicant tracking, even if you're a small contractor with limited resources."

The specifics of the rule have created some kinks that are more expensive to iron out than initially predicted, Springer said. For example, the OFCCP requires a very specific form for employees to self-identify as disabled and requires that any electronic survey of employees use a form that looks exactly like the one provided by OFCCP and requires that employees check the boxed for disabled, not disabled, or no answer on the same place in the electronic form as it would be on a printed form — a requirement that isn't quite so easy to drop into existing electronic systems, she said.

"It's very difficult to recreate that form exactly and have that technology so that an applicant that can check the box that's in that form," Springer said. "In some ways, that's a win of form over substance, unfortunately."

Still, for all the concerns about the burden of the rules, companies with good lawyers should be able to navigate the new regulations without too much difficulty, Bertram said.

"I think there's been a lot of unnecessary hysteria by some of the outside counsel and outside sources," Bertram said. "I think for a company that's already in compliance with existing requirements, this is not

a Herculean task. It's [achievable] as long as you take it step by step and work with experienced outside counsel."

Get a head start on evaluating your recruitment sources.

While companies won't be audited under the new rules until they revamp their annual affirmative action programs, they should start laying the groundwork for audits that focus more and more on the effectiveness of their outreach efforts. Based on OFCCP scrutiny and a simple desire to ensure that they aren't throwing good money away, companies should examine their outreach and advertising efforts to see which ones actually net qualified job applicants.

"In the past employers typically considered success to be the 'push out' element of outreach, simply getting your jobs out there," Silberman said. "What most employers have not thought of traditionally, and what OFCCP is compelling them to think about differently, is the 'pull in' aspect of outreach. You might have 20 recruitment sources, but if 10 of them don't send you any applicants, those are not effective recruitment sources."

The OFCCP focus on effectiveness could carry some short-term research and assessment costs but should help companies improve their affirmative action hiring in the long run, Silberman said.

"The silver lining that can come out of this requirement is that employers will have a better handle than ever before on their return on investment regarding their outreach and recruiting efforts," Silberman said.

Keep in touch with OFCCP.

OFCCP, recognizing the game-changing nature of the new rules, has offered contractors help in complying with the regulations. It has posted a series of Frequently Asked Questions on its website to address common concerns about the rules and created a new directory of government and nonprofit groups that can serve as possible sources of referrals for veterans and disabled job applicants.

The OFCCP recently told contractors in an FAQ that their subcontracts and purchase orders can combine the new required text for the veteran and disability rules, reducing the chance that companies would waste time and paper printing separate clauses that contain duplicative language, for example.

"There's quite a bit of vagueness in the regulations and how they're being interpreted, so the OFCCP is using FAQs to address some of the questions that contractors have," said Rebecca Springer, a counsel in Crowell & Moring LLP's labor and employment group. "The downside is that it's just an FAQ. It's not written into the regulation, and the OFCCP could change those FAQs at any time."

The OFCCP's directory of possible recruitment sources, while helpful, should not be seen as the final word, Springer said. The information collected by OFCCP may be out of date or incomplete, and the agency will likely want to see more proactive efforts by contractors, she said.

--Editing by John Quinn and Philip Shea.