Key Employment and Labor Law Issues Facing Government Contractors

Blake Guy
Rebecca Springer
Peter Eyre
Chris Calsyn
Kris Meade

December 3, 2013
Today’s Panelists

Blake Guy
VP, Chief Labor & Employment Counsel
DRS Technologies, Inc.
Email: bguy@drs.com

Rebecca Springer
Counsel
Crowell & Moring LLP
Email: rspringer@crowell.com

Peter Eyre
Partner
Crowell & Moring LLP
Email: peyre@crowell.com

Chris Calsyn
Counsel
Crowell & Moring LLP
Email: ccalsyn@crowell.com

Kris Meade
Partner
Crowell & Moring LLP
Email: kmeade@crowell.com
OFCCP Watch
New Section 503 and VEVRAA Regulations

- Proposed rules published in 2011
- Proposed significant changes to affirmative action obligations for veterans and individuals with disabilities – mirror obligations under EO 11246
- Outcry from contracting community regarding burden
- Final rules announced August 27, 2013 – substantial changes but still onerous
- Effective date March 24, 2014
- “Phased in” compliance for AAPs
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
- New subcontract “flow down” language
- Three-year recordkeeping requirement
- Expanded audit scope
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
Practical 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?
- Other
  - Adding “if applicable” language to flow-down clauses
  - Language for self-identification
OFCCP Audits – Areas of Focus

• Compensation, Compensation, Compensation
  • New approach – individualized assessment
  • Defenses
• “Applicant” tracking – “Internet Applicant rule”
• Promotions and terminations – focus on single decisions
• “Reverse discrimination”
• Veteran and disabled outreach
Enforcement Trends

- Significant expansion of document and data requests at desk audit stage
- Near-automatic request for individualized compensation data
  - Focus currently on base pay, but . . . .
- Focus on any statistical disparities – even if few selections
- Unwillingness to share information
- Have “discovered” email
Ending Trafficking in Persons
Proposed Rule: Ending Trafficking in Persons

• Background
  – Proposed FAR provision to strengthen existing zero-tolerance policy regarding contractors engaging in prohibited trafficking activities
  – Comment period was extended and now closes on December 20, 2013
Proposed Rule: Ending Trafficking in Persons

- Key features of proposed rule
  - Expanded definition of trafficking in persons
  - Mandatory notification
  - Channels for reporting suspected violations and mechanisms for investigation by company
  - Subcontractor flow-down
  - If contracts or subcontracts performed abroad involving supplies or services exceeding $500,000, company must have detailed compliance plan
    - Exception for commercial-off-the-shelf items
Proposed Rule: Ending Trafficking in Persons

• Minimum elements of compliance plan
  – Awareness program
  – Recruitment and wage plan
  – Housing plan
  – Procedures to monitor subcontractors and their employees
  – Certification to government
  – Posting compliance plan
Proposed Rule: Ending Trafficking in Persons

- DOD proposed rule
  - Issued on the same day as the proposed FAR provision
  - If adopted, the DOD proposed rule would supplement the generally applicable FAR provision
  - Two notable features
    - Representation when submitting offers
    - Poster requirement
Background Checks: Between a Rock and a Hard Place
Background Checks: EEOC Guidance and Lawsuits

- April 2012 Guidance
  - Concern about disparate impact
  - Arrest v. conviction records
  - Targeted checks that are job related and consistent with business necessity
  - Individualized assessments
  - Impact of compliance with other federal laws/regulations v. state laws/regulations

- EEOC Background Check Lawsuits
  - Dollar General
  - BMW Manufacturing
  - G4S Secure Solutions
Background Checks: Pushback by States

- July 2013 letter from nine state Attorneys General to EEOC and the EEOC’s response
  - AG letter highlighted EEOC lawsuits as misguided and overreaching
  - EEOC Chair Berrien responded in August
    - Claims EEOC is not trying to trump state and local laws, but that Title VII would if state or local law required practice inconsistent with Title VII
  - EEOC Counsel’s Speech at ABA Conference
    - Suggests targeted screen should work by employers using a matrix that takes into account severity of crime, how distant in time, and relevance to job followed by offering individual chance to explain conviction unless overtly relevant

- Texas filed suit on state sovereignty grounds on November 4, 2013
  - Seeks a declaratory judgment that its “no felons” policy does not constitute an unlawful employment practice
  - Alleges the EEOC guidance is unlawful and should never be the basis of a right-to-sue letter from the EEOC
Background Checks: Pushback by Courts

• EEOC v. Peoplemark Inc. (6th Cir. Oct. 7, 2013)
  – Upheld award of $750,000 in fees to Peoplemark for having to defend the case after it had corrected an earlier misstatement and made clear to EEOC that it did not have a company-wide policy to reject all applicants with felonies

• EEOC v. Freeman (D. Md. Aug. 9, 2013)
  – EEOC’s expert’s analysis was fundamentally flawed as it looked at only a very small subset of data from a small subset of time in the litigation

  – EEOC’s expert analysis was also flawed
  – Kaplan noted that the EEOC runs similar credit checks for similar reasons on many of its own employees
Background Checks: Best Practices

• Take the EEOC Guidance to heart
  – Blanket “no-hire” policies are more expensive to defend than they are worth
  – Use targeted screens based on the job, severity of crime and distance in time to job application
    • Document basis for exclusions
• Understand the limits of background checks in light of Navy Yard shooting and Snowden incident
• Comply with both federal and state laws/regulations that require background checks
  – Title VII not a bar to federal laws/regulations
  – Business likely to be able to justify compliance with state laws/regulations
Post-Shutdown Recovery
Post-Shutdown Recovery

• Theories for recovery
  – Constructive stop work order
  – Breach of contract

• Responses to government’s invocation of Sovereign Acts defense
  – Interpretation of Pay Our Military Act
  – Alternative sources of funding
  – Risk shifting provisions in cost reimbursement contracts
Planning for Possible Future Lapses in Funding

• Key mitigation techniques
  – Engage with contracting officers
  – Be aware of incremental funding clauses
  – Be aware of risk shifting clauses
  – Track actual costs to preserve ability to recover quantum
  – Carefully draft subcontracts
  – Clearly state assumptions and critical path items
Whistleblower Watch
NDAA Whistleblower Protections

• Applies to prime and subcontractors
• “Pilot program” extends to civilian agencies
• Internal disclosures protected
• Expanded protected disclosures
  – “abuse of authority”
• Reprisal at agency’s request is not safe harbor
• Notification of rights and remedies
FCA Retaliation Cases: A New Paradigm

• Spike in recent years in cases alleging only False Claims Act whistleblower claims
  – Impact of *Dukes* and its progeny on plaintiffs’ bar
  – Impact of FERA/Dodd-Frank amendments

• Threat of substantive FCA claims looms
  – DOJ and SDO lurking in the background pushes employers to settle
Preventing Whistleblowers: Best Practices

- Foster an ethical culture
  - Compliant v. Ethical – messaging matters
  - Tone at the top and implementation at all levels
- Assess and adjust
  - Surveys of employees
  - Audits of practices
- Communicate regularly about ethics
- Collecting, tracking, investigating, and responding to complaints is paramount
  - Analyze trends in complaints received
- Self-reporting protocols
Questions?