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OFCCP issued its long-awaited proposed revisions to its affirmative action regulations for veterans. As anticipated, the new regulations add a significant data tracking component to contractors' obligations.

OFCCP Issues Proposed Regulations Requiring Significantly Broader Veterans Affirmative Action Obligations for Federal Contractors and Subcontractors

By Joshua Roffman and Alissa Horvitz

The United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued its long-awaited proposed revisions to the affirmative action regulations for veterans on April 26, 2011.¹ Comments to the proposed rule are due by June 27, 2011. As expected, the proposed regulation significantly expands the obligations of federal contractors and subcontractors by imposing detailed data tracking requirements and hiring benchmarks and mandating for the first time that contractors solicit information on the generic veteran status of all applicants (pre-offer), not just of applicants offered a job (post-offer). In addition, the proposed regulation would require contractors to document employment decisions affecting veterans in much more detail than previously required, in what in part appears to be a subtle attempt to erode the definition of Internet Applicant. OFCCP also expands the mandated recordkeeping timeframe from two years to as long as five years for certain documents related to the affirmative action plan. Finally, OFCCP seeks to expand the temporal scope of a desk audit from the current two years going back from the date of the scheduling letter to an open-ended time period in the future, so long as the audit remains open and OFCCP deems it necessary to investigate a potential violation (regulatory change to the *Frito-Lay* ALJ holding).²

Data Tracking Requirements

The most significant proposed change is the requirement that contractors engage in an annual data collection analysis. The regulation would require contractors and subcontractors to track and maintain the following information:

- The number of priority referrals of protected veterans the contractor received from the applicable employment service delivery systems.³
- The number of total referrals (not limited to protected veterans) that the contractor received from the applicable employment service delivery systems.
- The ratio of priority (protected veteran) referrals to all referrals received from the applicable employment service delivery systems (the referral ratio).
- The number of applicants who self-identified as protected veterans or are otherwise known as protected veterans.

- The total number of job openings and total number of jobs filled.
- The ratio of jobs filled to job openings.
- The total number of applicants for all jobs.
- The ratio of protected veteran applicants to all applicants (applicant ratio).
- The number of protected veteran applicants hired.
- The total number of applicants hired.
- The ratio of protected veteran hires to all hires (hiring ratio).

The first two bullets would require companies to track expressions of interest that would otherwise not have been considered for a particular vacancy, including individuals who are also not qualified, in direct contravention to the current Internet Applicant recordkeeping obligations.

Moreover, the contractor is expected to evaluate this data for its current affirmative action plan year as well as its two most recent previous plan years in assessing the effectiveness of its external outreach and recruitment efforts. This will have the effect of creating a three-year recordkeeping requirement for this information, which is different from the current two-year recordkeeping requirement that applies to companies with more than 150 employees or a contract more than \$150,000, and two years longer than the current requirement for small contractors who have fewer than 150 employees or a contract valued at less than \$150,000.⁴ OFCCP is not proposing any exception for small businesses or contracts with very low dollar thresholds.

Benchmarks for Hiring

The new regulations also require for the first time that contractors and subcontractors establish benchmarks for hiring, similar to the placement goals already required for the women and minorities affirmative action plan. Unlike women and minorities placement goals, the benchmarks for hiring are not location or job-group specific, potentially requiring employers to set up new tracking fields in existing applicant tracking systems to enable contractors to aggregate applicant data across separate affirmative action plan data sets.

Under the proposed regulations, the contractor will be required to establish a percentage of its total hires that it will try to ensure are protected veterans. Contractors will account for the following in establishing these benchmarks:

- The average percentage of veterans in the civilian labor force in the state(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and maintained on OFCCP's website.
- The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the state where the contractor is located, as tabulated by the U.S. Department of Labor's Veterans' Employment and Training Service (VETS) and published on OFCCP's website.
- The contractor's referral ratio, applicant ratio, and hiring ratio for the previous year.
- The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts.
- Other factors, including but not limited to, the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.

Also, contrary to the proposed amended veterans' regulations described above under the "data tracking" sub-heading, and the general two-year recordkeeping requirement for larger employers found at 41 C.F.R. section 60-300.80, the proposed regulations would require that contractors document and retain this hiring benchmark information for five years.

Pre-Offer "Generic" Self-Identification Invitation Required for All Applicants

Consistent with the new data tracking and benchmarking obligations, the proposed regulations will require contractors to solicit all

applicants to self-identify as a “protected veteran,” without asking which of the four precise veterans categories might apply. In this manner, the solicitation will not ask about disabled veteran status pre-offer of employment. This solicitation may be made any time in the application process prior to making an offer of employment to a job applicant, but must be made of all applicants. Consistent with current existing regulations, contractors may invite special disabled veterans and/or disabled veterans to self-identify prior to making a job offer when: (1) the invitation is made when the contractor actually is undertaking affirmative action for special disabled and/or disabled veterans at the pre-offer stage; or (2) the invitation is made pursuant to a federal, state, or local law requiring affirmative action for disabled veterans.

After being offered employment, the contractor will still be expected to invite candidates to self-identify as one of the four specific covered veteran categories protected by the Jobs for Veterans Act of 2002: (1) Active Duty Wartime or Campaign Badge (Other Protected) Veteran; (2) Armed Forces Service Medal Veteran; (3) Disabled Veteran; or (4) Recently Separated Veteran.

Companies should begin to identify the amount of time and cost it will take to modify existing self-identification screens in electronic applicant tracking systems, and the accompanying databases that store this information. This will allow companies to provide OFCCP with an accurate assessment of the time needed to implement this proposed change, as well as its costs, through the comment process.

It remains to be seen whether OFCCP will require self-identification and specific data-driven affirmative action at the applicant stage in its revised proposed regulations for affirmative action plans for individuals with disabilities scheduled for release later this year, although we suspect that it will. Note that under the current regulatory structure, the affirmative action regulations for individuals with disabilities very closely parallel the affirmative action regulations for veterans. As such, contractors should view these proposed regulations for veterans as a preview of what OFCCP may propose later this year for its affirmative action regulations for individuals with disabilities and consider commenting on these regulations’ impact if the same approach were to be adopted for the individuals with disabilities regulations.

More Specific Requirements for Contractor Outreach Efforts

Another change in the proposed regulations is the fact that OFCCP has now established specific *required* outreach efforts in addition to a series of suggested outreach efforts. Required outreach efforts include linkage agreements with the Local Veterans’ Employment Representative as well as at least one of the following: the Department of Veterans Affairs Regional Office nearest to the contractor’s establishment; the veterans’ counselors or coordinators on college campuses; the service officer of the national veterans’ groups active in the area of the contractor’s establishment; local veterans’ groups and veterans’ service centers near the contractor’s establishment; and the Department of Defense Transition Assistance Program (or any subsequent program) that might replace it.

In addition, the proposed regulations require that contractors use the Employer Resources in the OFCCP’s National Resource Directory⁵ and establish a separate linkage agreement with one or more veterans’ service organizations in the directory that is not one of the types of organization already enumerated directly in OFCCP’s regulations.

The *suggested* outreach efforts mirror the remaining existing outreach efforts in the current regulations, with one notable change. Although listed in the suggested outreach efforts section, OFCCP has changed the language from *should* to *shall* on whether the contractor must consider protected veteran applicants for all positions for which they may be qualified when the position that they applied for is unavailable. The combination of this mandate along with the obligation to track all position openings and not just positions filled contradict OFCCP’s 2005 Internet Applicant definition. The Internet Applicant regulations require tracking only of positions that the contractor fills and places no requirements regarding what positions a contractor must consider an employee for, so long as the contractor is applying a neutral criteria or a data management technique that does not involve qualifications for the job. OFCCP’s Frequently Asked Questions under the Internet Applicant topic expressly stated that “the contractor does have to consider for employment individuals who do not specify a particular position, so long as that is the contractor’s consistent practice.”

Finally, like the hiring benchmark recordkeeping changes, but contrary to the other proposed regulatory sections and the existing general two-year recordkeeping requirement, the proposed regulations would require that contractors document and retain linkage agreements and all other outreach and positive recruitment activities for five years.

Certain Internal Dissemination Obligations Now Mandatory

Under the current regulations, each specific internal dissemination activity was suggested, as the regulations used only “should” rather than “shall.” The proposed regulations now will mandate some of the affirmative action policy internal dissemination requirements. The following internal dissemination activities will now become mandatory:

- Including the contractor’s veterans affirmative action policy in its policy manual.
- Informing all employees and prospective employees of its affirmative action policy for qualified veterans, including conducting annual meetings with employees about its policies, responsibilities, and opportunities for advancement under the plan.
- Conducting meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibilities to implement the policy.
- Discussing the policy thoroughly in any employee orientation and management training programs.
- Meeting with union officials and employee representatives to inform them of the policy and request their cooperation if the contractor is a party to a collective bargaining agreement.

Moreover, OFCCP will impose mandatory training topics for the training contractors are required to provide to “individuals who implement the personnel decisions pursuant to its affirmative action program.” The required topics will be:

- the benefits of employing protected veterans;
- appropriate sensitivity toward protected veteran recruits, applicants and employees; and
- the legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically, such as reasonable accommodation for qualified disabled veterans and the related rights and responsibilities of the contractor and protected veterans.

The proposed regulation would require that the contractor record which of its personnel receive the training, when they receive it, the person(s) who administer the training, along with all written or electronic training materials used in the training.

Requirements to Record Rationale for Specific Employment Decisions Affecting Veterans

In reviewing its personnel processes, the proposed regulation would impose requirements that the contractor record and maintain specific information on the contractor’s consideration of applicants and employees as follows:

- Each position for which a protected veteran *applicant* was considered and each training program for which a protected veteran *applicant* was considered.
- Each promotion for which a protected veteran *employee* was considered and each training program for which a protected veteran *employee* was considered.
- A statement of the reason a protected veteran applicant or employee was rejected for employment, promotion, or training.
- A description of the accommodations considered for a rejected disabled veteran or special disabled veteran.
- A record of any accommodation made and a description of that accommodation for any hire, promotion, or training of a disabled veteran or special disabled veteran.

OFCCP’s Access to All Forms of Records

OFCCP’s proposed regulations state, for the first time, that OFCCP must be provided records in any available format requested by OFCCP. Included with this obligation is a requirement that the contractor provide, upon request, information about all formats, including specific electronic formats, in which its records and other information are available.

Expanded Recordkeeping Periods

OFCCP's proposed regulations expand the recordkeeping period beyond the standard two-year timeframe in three specific areas. First, they propose a *de facto* three-year requirement for the new data tracking requirements. Second, the regulations propose a five-year requirement for documents related to the new hiring benchmark requirement and for all records related to outreach efforts and positive recruitment for protected veterans.

Other Issues

In addition to the above requirements, there are additional issues implicated, either directly or indirectly, by OFCCP's proposed regulations.

Internet Applicant

There are at least two aspects of the proposed regulations that seem to be in direct conflict with OFCCP's 2005 Internet Applicant regulations. The first conflict is the requirement that contractors track all positions ever opened and not just those that the contractor actually filled. The second conflict is in the mandate that contractors consider protected veteran applicants for any position for which they may be qualified when the position(s) applied for are unavailable.

Temporal Scope of Desk Audits

OFCCP has stated in its proposed regulations that it may extend the temporal scope of a desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations. This regulatory statement is a direct reversal of the Administrative Law Judge's holding in *OFCCP v. Frito-Lay* (2010-OFC-00002; ALJ July 23, 2010). OFCCP comments to the proposed regulations state that this language "merely clarifies OFCCP's longstanding policy" and "does not represent a change in policy or new contractor obligations." The notion that there was indeed a policy that allowed OFCCP to keep its audits open indefinitely was directly rejected by the ALJ in *Frito-Lay*, who found that "OFCCP's position [was] a marked departure from how OFCCP has interpreted its own regulations and has conducted its compliance reviews in the past." Moreover, this language is not being added to the women and minorities regulations, which would mean that the change would exist under the veterans regulations, but, so long as *Frito-Lay* remains good law, would not exist in the women and minorities regulations.

Potentially Controversial Changes and Opportunity for Public Comment

As noted above, comments are due before June 27, 2011. Companies wishing to make comments should contact their employment counsel.

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¹ 76 Fed Reg. 23,358 (Apr. 26, 2011).

² OFCCP is also accepting comments on whether it should eliminate the regulations found at 41 C.F.R. Part 60-250. Under the Jobs for Veterans Act of 2002, Congress created two separate veteran categories. For contracts above \$25,000 entered into prior to December 1, 2003, and not modified since then, the OFCCP's regulations at 41 C.F.R. Part 60-250 apply. For contracts above \$100,000 entered into after December 1, 2003, the regulations at 41 C.F.R. Part 60-300 apply. As part of this Proposed Rulemaking, OFCCP is seeking comments about whether the Part 60-250 regulations could be rescinded.

³ An employment service delivery system refers to the state or local veterans or employment office.

⁴ This is the current requirement under 41 C.F.R. section 300-80.

⁵ This requirement is somewhat troubling as the resources in OFCCP's National Resource Directory are often no longer active, the information is often dated, and it is not uncommon to have few or even no choices from the Resource Directory of active veterans' organizations in many geographic areas. See www.nationalresourcedirectory.gov/employment/resources_for_employers_and_veterans_employment_service_providers.