

EXPERT ANALYSIS

The OFCCP's Final Regulations on Affirmative Action for Veterans and the Disabled

By David J. Goldstein, Esq.
Little Mendelson PC

The publication in 2011 of proposed changes to the Office of Federal Contract Compliance Programs regulations regarding affirmative action for veterans and the disabled produced cries of outrage and grief from the business community. If adopted, the proposals would have added substantially to contractors' costs of compliance, but they seemed unlikely to actually lead to any significant gains in the employment and advancement of veterans or disabled persons.

The response to the proposals was unprecedented. Employer and contractor groups, individual companies, law firms and consultants submitted hundreds of comments to the agency on behalf of thousands of entities. The comments expressed broad opposition to many of the proposed changes and pointed out with great specificity many of the problems that the proposals would create.

Congress, too, responded to the situation, with the House Committee on Education and the Workforce holding a hearing in April 2012 — the first exercise of congressional oversight over the OFCCP in more than 15 years.

Since then, it has been a waiting game, with federal contractors nervously anticipating publication of the final rules regarding affirmative action for veterans and the disabled.

The suspense finally ended Sept. 24, 2013, when the OFCCP published its final rules in the Federal Register. The good news is that the burden will be less than was anticipated. The bad news is that complying with the new rules in their final form is going to take a lot of work.

BACKGROUND

Entities that do business with the federal government are subject to several statutes and an executive order requiring equal opportunity in employment and mandating affirmative action. These obligations are enforced by the OFCCP, an agency within the U.S. Department of Labor.

One of the laws enforced by the OFCCP, Section 503 of the Rehabilitation Act of 1973, requires all contractors to take affirmative action to employ and advance in employment qualified individuals with disabilities. These obligations apply to contractors with a covered federal contract or subcontract of \$10,000 or more, and they apply to supply and service contractors, as well as construction contractors. In addition, covered contractors and subcontractors with 50 or more employees and a government contract or subcontract of \$50,000 or more must develop and maintain a written Section 503 affirmative action program.

A second statute enforced by the OFCCP is the Vietnam Era Veterans' Readjustment Assistance Act of 1974. VEVRAA requires contractors to take affirmative action to employ and advance in employment certain categories of veterans and disabled veterans. This act applies to contractors with covered

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federal contracts or subcontracts of \$100,000 or more. As with the obligations under Section 503, VEVRAA applies to supply and service contractors, as well as construction contractors.

Although the OFCCP has long had in place rules implementing Section 503 and VEVRAA and requiring contractors to engage in outreach, these regulations were rarely enforced before the Obama Administration. Since 2009, however, the OFCCP has been aggressively reviewing contractors' compliance with the existing regulations.

Not surprisingly, given the limited interest that the OFCCP has historically taken in the enforcement of these regulations, when the agency finally began paying more attention to affirmative action for veterans and the disabled, it found that many contractors were not fully in compliance. Of course, as word spread of the OFCCP's increased interest in affirmative action for veterans and the disabled, contractors shifted resources to this area and stepped up their compliance efforts.

Nevertheless, even though the OFCCP was able to motivate contractors to increase their outreach to veterans and the disabled through changes in enforcement priorities, it has continued to argue that it needs to do more. In particular, early in the term of the Obama administration, the OFCCP began to publicly discuss the possibility of making a number of significant changes to its regulations, such as requiring contractors to invite applicants to self-identify as to disability.

Historically, the OFCCP has required contractors to invite applicants to self-identify as to their sex and race or ethnic group. However, it has been generally understood that asking an applicant to self-identify as to disability would violate the Americans with Disabilities Act, which narrowly limits employer inquiries into an employee's disabilities or medical conditions, and which is particularly strict in barring such inquiries in connection with applications for employment. Accordingly, under existing law, contractors may not inquire as to an individual's status as a disabled person or veteran until after a conditional offer of employment has been extended.

Another change proposed by the OFCCP involved setting a national goal for the "utilization" of disabled people. In other words, the OFCCP indicated that some percentage of every contractor's workforce would have to consist of individuals with disabilities.

On Aug. 27 the OFCCP released the text of the final rule, which was published in the Federal Register in September. The following discussion explains what will be required under the new Section 503 (pertaining to the disabled) and VEVRAA (pertaining to veterans) rules. Although these new rules are substantially less exacting than the 2011 proposals, they still add considerably to contractor burdens.

THE NEW RULES

Although they were issued separately, the new regulations on veterans and the disabled are very similar in their structure and requirements. Accordingly, the two rules can be discussed simultaneously with regard to most of their elements.

Federal contractors are already accustomed to the process of assessing their equal employment opportunity/affirmative action efforts by estimating the availability of women and minorities who are qualified for particular jobs and then comparing that estimated availability to the percentage of women and minorities they actually employ in those positions. Construction contractors deal with a somewhat different process that requires them to track the hours that women and minorities work in trade jobs as a percentage of all of the hours worked in such jobs and by attempting to meet percentage goals for the utilization of women and minorities as established by the OFCCP.

Under the new regulations, similar concepts will now apply to affirmative action programs for veterans and the disabled. The requirements are slightly different for each group. With regard to veterans, contractors will be analyzing a flow by measuring the representation of veterans among all of the individuals hired each year. With regard to the disabled, contractors will be monitoring employee populations (that is, the percentage of disabled individuals in the workforce as of particular points in time).

The hiring benchmark for veterans

The new regulations require contractors to periodically calculate the percentage of all new hires who are veterans, compare that percentage to a benchmark, periodically assess the effectiveness of their efforts to hire veterans, and take affirmative action as necessary to effectively attract and hire veterans.

Contractors have two options for determining the benchmark for veteran hires. The OFCCP will publish and annually update a hiring benchmark based on the national percentage of veterans in the civilian labor force. Alternatively, contractors are permitted to establish their own benchmarks in accordance with OFCCP guidelines. Contractors who wish to set their own benchmarks may take into account:

- The average percentage of veterans in the civilian labor force in the state where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP 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 Veterans' Employment and Training Service and published on the OFCCP website.
- The applicant ratio and hiring ratio for the previous year based on the data collected by the contractor for its affirmative action plan data analyses.
- The contractor's recent assessment of the effectiveness of its external outreach and recruitment efforts.
- Any 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.

Given the complexity involved in attempting to calculate individualized benchmarks and the relatively small benefit of doing so, it seems likely that most contractors will elect to use the benchmark published by the OFCCP.

Contractors must then use the benchmark to annually review their protected veteran hiring for the current year and two prior plan years. Contractors are expected to use this review as an assessment of their external outreach and recruitment efforts which will then inform or direct their veteran outreach and positive recruitment efforts going forward.

In performing this assessment, contractors will be looking at their entire workforce rather than performing the analysis on a job-group-by-job-group basis. However, it is not clear whether the OFCCP expects this assessment to be performed on an establishment-by-establishment basis or across all of the companies' facilities and plans.

For convenience, some contractors may prefer to track the data on a company-wide basis. However, it may be advantageous for contractors to maintain the data in a way that permits easy disaggregation in the event that these data must be produced in connection with an OFCCP audit. Because OFCCP audits will continue to focus on single establishments, the agency may not have jurisdiction, at least under its current rules, to compel a contractor to produce these data on a company-wide basis.

The utilization goal for individuals with disabilities

The new regulations establish a goal for the utilization of disabled individuals which is to be used by contractors to assess the sufficiency of their efforts to employ such persons. This is similar to the use of placement goals in connection with affirmative action plans for women and minorities. The goal established by the OFCCP applies nationally and to all job groups, but it remains subject to future revision.

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For now, the goal has been set as 7 percent utilization for the employment of qualified individuals with disabilities for each of the job groups established in the contractors' affirmative action plans for women and minorities.

The requirement of an analysis according to a job group will pose significant difficulties for construction contractors who are not required under the OFCCP's existing rules to create affirmative action plans or define job groups. Although some of the comments submitted in response to the OFCCP's proposed rule requested an exemption from this requirement for construction contractors, the agency rejected that request in its final rule without offering any analysis of the problem.

Although it is clear that the utilization analysis must be conducted separately for each job group, it is not clear whether the goal is to be assessed by each establishment or organization-wide.

Small contractors (those with 100 or fewer total employees) are permitted to conduct a single utilization analysis for the entire workforce, rather than according to job group.

Potential challenges to the new requirements

In a Sept. 20 letter to Secretary of Labor Thomas Perez, the House Committee on Education and the Workforce questioned whether the OFCCP has "statutory authority under VEVRAA and Section 503 to establish a numerical hiring 'benchmark' or 'utilization goal' for protected veterans and individuals with disabilities, respectively." The committee has scheduled hearings to review this issue.

Although Congress does have the authority to void the new regulations by passing a resolution of disapproval (which would also have to be signed by the president or his veto would then have to be overridden), it seems extremely unlikely to happen. Thus, it is nearly certain that the new regulations will become law. Of course, it is still possible that the OFCCP's statutory authority may be challenged at some later date by a contractor seeking to avoid the application of the new requirements.

Inviting applicants to self-identify

The second major change arising under the new regulations relates to expanded obligations to invite applicants to self-identify.

Under existing law, it has generally been understood that contractors may not solicit information from applicants regarding disability without violating the ADA as well as many state fair employment statutes. Accordingly, contractors currently do not invite employees to self-identify regarding disability or status as a protected veteran (which includes status as a disabled veteran) until after the individual is given at least a conditional offer of employment.

Under the new rules, contractors must solicit information about protected veteran and disability status at the application stage.

The scope of this obligation will be the same as the existing applicant solicitation obligations for information about sex and race or ethnic group. This means that every "Internet applicant" (a somewhat misleading term as defined under existing OFCCP rules and explained below) must be invited to voluntarily self-identify as a protected veteran and/or an individual with a disability.

The OFCCP's Internet applicant rule determines when an individual must be invited to self-identify and gives the employer some discretion as to when to extend the invitation.

Specifically, employers are not required to invite every person who expresses interest in a job to self-identify. The duty only applies to individuals who meet the definition of an Internet applicant; that is, a person who:

- Submits an expression of interest in a job through the Internet or related electronic data technologies
- Is considered by the employer for a particular position.

- Indicates, as part of the expression of interest, that he or she has the basic qualifications for the position.
- Does not remove himself or herself from consideration before receiving a job offer or otherwise indicate that he or she is no longer interested.

Whether or not a particular individual who has expressed interest in a job qualifies as an Internet applicant may not be apparent until relatively late in the hiring process.

Contractors have the option of inviting self-identification from every applicant at the beginning of the application process. A contractor who does this, however, will probably be soliciting information about race or sex from many individuals who ultimately will not meet the criteria of an Internet applicant. The alternative, however, is to send out the invitation to self-identify later in the process, which means that employers may have to request this information from some individuals who have already been rejected for the position. Such situations are awkward and are unlikely to result in a high rate of response to the invitations.

For these reasons, many contractors invite applicants to self-identify as to race and sex as part of the initial application process. Such contractors are probably going to be inclined to also invite applicants to self-identify as a veteran or disabled person at the same time.

There is reason to proceed cautiously in this regard, however. Although inviting an applicant to communicate information about race or sex is unlikely to cause problems in the event the individual is not ultimately offered an interview or a job, the solicitation regarding disability may be different. Some individuals may be more concerned when asked to identify as to disability than when asked about their sex and race or ethnic group. Moreover, an individual with a disability who has been asked to self-identify and then is denied employment may be more likely to suspect discrimination than a rejected applicant who was asked to self-identify only his or her sex and race. For these reasons, there may be an incentive to invite self-identification only after a determination that such an invitation is required under the Internet applicant rule.

Either way, employers must be extremely careful to make sure that the disclosure of information regarding disability and veteran status is kept confidential and entirely separate from the individual's other application-related records. Employers must also make sure that the information is not known to anyone involved in making employment selection decisions. Information obtained at the application stage should only be used for compiling the data required by the OFCCP.

Regarding the form of the invitation to applicants regarding veteran status, contractors will need to define the four "protected" veteran categories and then invite the applicant to self-identify simply as a "protected veteran." The regulations permit contractors to develop their own forms provided the document:

- States that the contractor is a federal contractor required to take affirmative action to employ (and advance in employment) protected veterans.
- Summarizes the relevant portions of the law and the contractor's affirmative action program.
- States that the information is being requested on a voluntary basis, will be kept confidential and will not be used in a manner inconsistent with the law.
- States that the refusal to provide the information will not subject the applicant to any adverse treatment.

In connection with the invitation to self-identify, the OFCCP is discontinuing its use of the term "other protected veteran" and replacing it with the term "active-duty wartime or campaign badge veteran." The agency has indicated that it believes this new term is more descriptive and will help avoid the incorrect presumption that this category includes every veteran who is not in one of the other three categories. Although the new term will have to be used on self-identification forms

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and other program-related documents, the Vets 100A form, which is administered by a separate agency, will continue to use the term “other protected veteran.”

With regard to the invitation to identify as to disability, the OFCCP indicated it will develop a form that contractors will be required to use. This form will be posted on the OFCCP’s website later.

Although the OFCCP does not require the use of its own form for soliciting information from veterans, the agency did include a proposed form as an appendix to the VEVRAA rule. Unfortunately, the OFCCP’s proposed form is very long and extremely dense, so applicants may be less likely to read the full text, and those who do may find portions of it difficult to understand. The flaws in the OFCCP’s suggested form for veteran status causes concern that the required form for soliciting disability information may be similarly flawed. At this point, it seems possible that employers will be required to present new applicants with two or even three separate self-identification forms (one for sex and race or ethnic group, one for status as a veteran and one for disability). Complex or lengthy forms are unlikely to encourage individuals to provide the requested information.

Inviting employees to self-identify

Because disabilities are not immutable (they may be acquired or overcome during the course of employment), the new rules require contractors to periodically survey their employees to determine the current utilization of disabled individuals. Within the first year after becoming subject to the new rule, contractors must invite all of their current employees to voluntarily self-identify as to whether or not they have a disability. Therefore, current contractors must survey their workforce sometime between March 24, 2014, and March 23, 2015.

After the first survey is conducted, employers must then conduct a new survey at least once every five years. In addition, at least once between each five-year re-survey, contractors must remind employees that they may voluntarily update their disability status information. Again, the self-identification form that is to be used for this purpose will be developed by the OFCCP and posted on its website.

Data collection and analysis

The draft regulations required contractors to collect 12 different data points (for example, the raw number of “priority referrals” of protected veterans received from employment service delivery systems or the number of referrals of individuals with disabilities received from other entities with which the contractor has linkage agreements) and then use that data to calculate seven different ratios. Collecting this information and calculating the ratios promised to be a lot of work, and the resulting data seemed unlikely to be of much value.

Most of these requirements were dropped from the final rule, which requires contractors to annually record the following information:

- Number of job openings.
- Number of jobs filled.
- Number of applicants for all jobs.
- Number of applicants who self-identified as, or who are otherwise known to be, individuals with disabilities and protected veterans.
- Number of applicants hired.
- Number of applicants with disabilities hired.
- Number of applicants who are protected veterans hired.

Some individuals may be more concerned when asked to identify as to disability than when asked about their sex and race or ethnic group.

The regulations regarding veterans and individuals with disabilities do not mandate an analysis of the data according to job group. It would appear that a single number for the entire workforce will be accepted with regard to each category. However, because OFCCP audits will continue to be establishment-based, an employer will generally only want to provide this data for an establishment that is being audited. Accordingly, contractors may wish to maintain this data in a manner that allows disaggregation by affirmative action plan establishments.

Outreach and action-oriented programs

The final regulations continue to permit a flexible, open-ended approach to outreach and action-oriented programs, consistent with the current version of VEVRAA and Section 503 regulations as well as the Executive Order 11246 regulations. The contractor's activities must be documented and companies must prepare an annual written assessment of the effectiveness of each activity. Where the efforts have not been effective, the contractor is required to identify and implement alternative efforts.

Employment advertising

The new regulations also create certain obligations in connection with employment advertising. The regulations provide that "the contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability."

A similar provision in the VEVRAA rule states that contractors must include language stating that "all qualified applicants will receive consideration for employment without regard to their protected veteran status."

Most federal contractors currently comply with the obligation to provide notice of their affirmative action programs by including in advertising a notation along the lines of "EEO/AA employer." A common variation on this practice is to include the notation "EEO/AA/M/F/V/D," which indicates that the employer takes affirmative action with regard to minorities, females, veterans and the disabled. Whether this type of shorthand will continue to suffice is not clear given the language of the new regulations.

Notices to applicants and employees

The new regulations also require contractors to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the OFCCP. This obligation is substantially the same as the requirement under the old rules. However, the regulations now provide that notices may be distributed by electronic means.

Less helpfully (and somewhat obscurely), the regulations provide that if the contractor uses electronic or Internet-based application processes, an electronic notice of employee rights and contractor obligations must be "conspicuously stored with, or as part of, the electronic application." What this seems to mean is that the notice must be given as part of the application form. Many Web-based application processes require applicants to complete an electronic application form. Only after that form has been completed and submitted is the applicant re-directed to a screen that includes the required notice of employee rights and contractor obligations. Under the new rule, this notice must be included as part of the same screen or screens that constitute the application form.

Required language for purchase orders and subcontracts

The new VEVRAA regulations require contractors to include the following language in bold type in subcontracts and purchase orders:

This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

Complex or lengthy forms are unlikely to encourage individuals to provide the requested information.

The regulations regarding veterans and individuals with disabilities do not mandate an analysis of the data according to job group.

The Section 503 regulations also require contractors to include specific language in subcontracts and purchase orders as follows:

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.

The use of these clauses is complicated by the fact that the two regulations may not apply to some contracts simultaneously. The VEVRAA clause applies only to subcontracts worth \$100,000. The Section 503 clause, in contrast, applies only to contracts in excess of \$10,000. In addition, the clauses will not apply to every entity that does business with a federal contractor; rather, they apply only when the subcontractor is providing goods or services that are necessary to the performance of a government contract.

Almost all contractors will want to have standard purchase orders and subcontracts and will not wish or be able to limit the inclusion of these clauses to the transactions to which they clearly apply. Therefore, most contractors will choose to incorporate a conditional version of these provisions into their standard documents.

For example, the contractor may include a modified version of the clause that begins, "if applicable, this contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a)."

In addition, contractors looking to save space on an already crowded standard document may wish to combine the clauses required under Section 60-300(a) and 60-741.5(a). For example, the following language might suffice:

This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified protected veterans and qualified individuals on the basis of disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and qualified individuals with disabilities.

Unfortunately, however, it is not easy to draft a reasonably simple, clear clause that both combines the requirements of both sections and incorporates the concept of conditional application. Most contractors will probably choose to include the conditional language and accept the necessity of including separate clauses regarding veterans and disability.

The fact that contractors are required to add this additional language to their contracts and purchase orders may also lead to an increase in questions from subcontractors who want to know whether the goods or services that they are supplying to the purchaser are necessary for performance of a government contract. Unfortunately, this is a question that can often be difficult to answer. In situations in which a vendor or subcontractor is unwilling to enter into an arrangement that results in federal affirmative action obligations, the parties may need to deal with this risk through contractual representations and remedies.

State job postings

The existing requirement that VEVRAA-covered contractors post job openings with state workforce agencies remains unchanged. The new regulations, however, formalize the OFCCP's longstanding position that the burden to post jobs (and to prove that they have been posted) rests entirely with the contractor. In particular, the regulations state that it is the contractor's responsibility to provide information about job vacancies in a manner and format that will allow the workforce agency system to provide priority referrals of veterans protected by VEVRAA for those vacant positions.

Accordingly, multi-state contractors will either need to develop expertise in the states' various procedures for posting jobs or outsource this activity to a third party. When engaging a third

party to satisfy the obligation, contractors will want to make sure that they enter into an explicit agreement that requires the third party to make information about compliance available to the contractor to either audit or to turn over to the OFCCP in the context of a compliance review. The agreement should further provide that the third party's obligation survives the termination of its relationship with the contractor.

Timetable for compliance

The new regulations were published in the Federal Register on Sept. 24 and become effective March 24, 2014, which is the date on which contractors must start inviting applicants to self-identify regarding their status as a veteran or disabled person.

Contractors are not required, however, to revise affirmative action plan documents that are already in place on March 24, 2014, before the next annual revision after the effective date of the new regulations. In other words, contractors who will be drafting their annual affirmative action plans between now and March 23, 2014, will continue to use the same language that is in their existing plans. Plans that are being renewed on or after March 24, 2014, must comply with the new regulations.

Contractors must not invite self-identification as to disability or veteran status before the effective date of the regulations. Until the regulations become effective, it is unlawful under the ADA and many state laws to solicit this information.

However, there is no reason for employers to wait to enhance their outreach efforts (especially in light of the Obama administration's focus on veterans and the disabled in OFCCP compliance reviews). As a result of the new rules, organizations and agencies that serve veterans and the disabled are likely to receive numerous requests for assistance from government contractors. These organizations and entities may not have the resources to adequately respond to the new demand. Accordingly, effective outreach will require a thoughtfully implemented strategy.

Where possible, contractors will probably want to conduct the required survey of existing employees before preparing their first plans under the new regulations. Although this survey can be legally conducted before the effective date of the regulations, it cannot be conducted until the OFCCP publishes the required form for soliciting information regarding disability.

Most employers with calendar year affirmative action plans (or plans that otherwise renew before March 24, 2014), will probably choose to wait until the third or fourth quarter of 2014 before surveying employees. However, contractors with plans expiring in the first quarter of 2014 (on or after March 24) or even in the second quarter, may find it hard to conduct the survey before preparation of their first affirmative action plan under the new rules and may, therefore, decide to conduct the survey later. Existing contractors have until March 23, 2015, to conduct their initial survey of the workforce.

Record retention

The new regulations provide that relevant records under the affirmative action regulations related to protected veterans and individuals with a disability must be maintained for three years — an increase as compared with the current two-year record retention requirement under the executive order regulations (or one-year requirement for certain smaller contractors).

The new regulations also explicitly allow the OFCCP to extend the temporal scope of desk audits beyond the period set forth in the scheduling letter if the agency deems it necessary to its investigation of potential violations of VEVRAA or Section 503 regulations. This provision is intended by the OFCCP to address an issue currently being litigated under the Executive Order 11246 regulations. The regulations also expand the OFCCP's authority to demand the production of documents that are off site during an audit.

Multi-state contractors will either need to develop expertise in the states' various procedures for posting jobs or outsource this activity to a third party.

CONCLUSION

One negotiation strategy is to start with an outrageous opening position, so while the bargaining continues, positions that would otherwise have seemed unreasonable become reasonable by comparison. Perhaps that is the dynamic at play here. The initial rules proposed by the OFCCP in 2011 were widely criticized — many even viewed them as outrageous. For example, compliance would have been difficult, the OFCCP significantly underestimated the cost of compliance and the benefits seemed slight indeed.

The final rules published Sept. 24 are an improvement over the proposed rules. But, make no mistake, they are still burdensome. The policy concerns voiced by many persons regarding the wisdom of asking applicants to self-identify as to disability remain. Whether or not these rules will actually result in additional employment opportunities for veterans or the disabled is not clear. At a minimum, it seems that resources used to comply with the OFCCP's new rules could be better used to create real opportunities. The generally favorable reception the final rules have received may speak more to the flaws in the initial proposed rules than the merit of the final rules.

Contractors will want to begin working now if they want to be in compliance in 2014. There is a lot to do.



David J. Goldstein, a shareholder in **Littler Mendelson PC's** Minneapolis office, advises employers on legal and regulatory compliance, including the preparation and approval of affirmative action plans. He represents employers in connection with Office of Federal Contract Compliance Programs and state and local compliance reviews, as well as federal and state court litigation. He can be reached at dgoldstein@littler.com.

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