



Labor & Employment ADVISORY ■

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OFCCP Issues Final Rules Expanding Affirmative Action Obligations Regarding Individuals with Disabilities and Protected Veterans

On August 27, 2013, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published its Final Rules revising the regulations that implement and further define the affirmative action obligations of federal contractors (and subcontractors) with respect to disabled individuals under Section 503 of the Rehabilitation Act of 1973 (Section 503) and with respect to military veterans under the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA). When these regulations were first proposed by the OFCCP in two Notices of Proposed Rule Making (NPRMs) issued in 2011, they called for sweeping changes to both Section 503 and VEVRAA that would have imposed substantial burdens on federal contractors. The proposed changes were viewed by the contractor community as a dramatic and unwelcome shift from the current regulatory requirements under these statutes. After receiving more than 400 comments on the proposed disability regulations and more than 100 comments on the veterans regulations, OFCCP cut back on some of its most drastic proposals, but the final regulations still implement significant changes that materially expand the affirmative action obligations of federal contractors with respect to individuals with disabilities and protected veterans.

Changes to the Section 503 Regulations

Federal contractors have faced obligations under Section 503 for decades, but the requirements of OFCCP's previous regulations implementing Section 503 generally have been less demanding and less rigorous than the agency's requirements for compliance with Executive Order 11246, which imposes affirmative action obligations on federal contractors with respect to race and gender. OFCCP's Final Rule under Section 503 implements a number of significant changes that will make compliance more onerous, the most important of which are the following:

- **Workforce Utilization Goal:** The most significant development in the Final Rule is the creation of a seven-percent workforce utilization goal for individuals with disabilities. Utilization is to be measured by job group, with the same seven-percent goal applying for each job group without regard to any data regarding the availability of individuals with disabilities who are qualified for the relevant jobs in the relevant geographic area.¹ Although the final regulations make clear that this utilization goal is not a quota, and that contractors will not be in violation of their Section 503 obligations solely for failing to meet the goal, contractors are required to design and implement action-oriented programs to increase the representation of individuals with disabilities in each job group that falls below the seven-percent utilization goal.

¹ Note that contractors with fewer than 100 employees may analyze their progress toward the seven-percent utilization goal on a workforce-wide basis, rather than by job group.

- **Changes to Applicant Self-Identification Invitation Requirements:** Another significant change is in the self-identification invitation requirements. Under the previous regulations, contractors were required to invite applicants to self-identify as disabled only after an offer of employment was made. Under the Final Rule, this requirement remains, but contractors must now also make an earlier invitation to each applicant to self-identify as an individual with a disability at the pre-offer stage of the hiring process.² The final regulations require that all invitations to self-identify be made “using language and in a manner prescribed by [OFCCP] and published on OFCCP’s website.” The agency’s stated goal in imposing this new requirement is to provide contractors with information about the extent to which their outreach and recruiting efforts are effectively reaching people with disabilities. All information regarding self-identification must be kept confidential and maintained in a separate data analysis file.
- **Changes to Employee Self-Identification Invitation Requirements:** In addition to the dual pre-hire, self-identification invitations, contractors must also invite incumbent employees to self-identify as disabled every five years and—at least once per year during the years in between invitations—must remind employees that they may voluntarily update their disability status at any time.
- **Data Collection and Analysis Obligations:** The new final regulations also for the first time impose several data collection and analysis obligations on contractors. Contractors must now collect, analyze and annually update the following data:
 - the total number of applicants for employment who self-identified as, or are otherwise known to be, individuals with disabilities;
 - the total number of job openings and total number of jobs filled;
 - the total number of applicants for all jobs;
 - the total number of individuals with disabilities hired; and
 - the total number of applicants hired.

All of this data must be retained for three years.

- **Annual Evaluation of Outreach Efforts:** Contractors must now evaluate on an annual basis the effectiveness of their outreach efforts, and they must document the evaluations. The evaluation must include a review of the disability data points listed above.
- **Documentation of Internal Audit and Reporting Systems:** The final regulations retain the existing requirement that contractors implement an internal audit and reporting system that measures the effectiveness of their affirmative action programs and indicates the need for any remedial action, but it also adds a requirement that contractors now document their efforts in this regard.
- **Revised Subcontract Clause Requirement:** The Final Rule requires that prime contractors include specific, mandated language in their subcontracts in order to provide notice to their subcontractors of their affirmative action obligations as federal contractors.

² Many of the comments to the proposed regulations raised the concern that an invitation to self-identify at the pre-offer stage would run afoul of the Americans with Disabilities Act (ADA). In implementing this requirement in the Final Rule, the OFCCP obtained an opinion letter from the Equal Employment Opportunity Commission (EEOC) stating that the invitation as required by the final regulations would not violate the ADA. The OFCCP also clarified that the Internet Applicant regulation applies to Section 503 in that individuals who apply to online job postings do need to be asked to self-identify as an individual with a disability unless they are considered an Internet Applicant.

- **ADAAA-Related Changes:** The Final Rule implements changes necessitated by the ADA Amendments Act (ADAAA) of 2008 by revising the definition of “disability” and certain non-discrimination provisions of the Section 503 regulations.

The Final Rule is also notable for what it did *not* include. The final regulations under Section 503 do not include the following significant obligations that were proposed in the NPRM:

- Developing and implementing written procedures for processing requests for reasonable accommodation, including specifically enumerated and cumbersome mandatory elements.
- Establishing multiple linkage agreements with disability-related agencies for each covered location.
- Reviewing personnel processes and physical and mental job qualification requirements on an annual basis. OFCCP instead retained the currently required periodic review of these items.
- Following a list of mandated steps when reviewing personnel processes, including a requirement to create substantial documentation regarding employment decisions relating to applicants and employees with disabilities, including the reasons for the decisions.
- Maintaining data related to job referrals received from state agencies and other employment-related organizations.
- Requiring training for all new hires on the affirmative action policy and specifically training those employees involved in hiring and selection.
- A five-year record retention requirement (the final regulations impose a three-year retention requirement).

[OFCCP's website regarding the Section 503 Final Rule](#) contains helpful resources regarding the new regulations, including the agency's [summary and preamble](#), [the regulatory text](#), [a fact sheet](#) and [a list of answers to frequently asked questions](#).

Changes to the VEVRAA Regulations

VEVRAA requires federal contractors to engage in affirmative action efforts to hire and promote protected veterans, including disabled veterans, and makes it illegal to discriminate against protected veterans when making employment decisions. Many of the changes to the VEVRAA final regulations mirror changes in the Section 503 regulations, though there are some important differences. Like the Final Rule under Section 503, OFCCP's final regulations under VEVRAA implement a number of significant and burdensome changes. The most important of these changes are the following:

- **Annual Hiring Benchmark:** The Final Rule establishes an annual hiring benchmark for veterans. This benchmark is set on a facility-wide basis and can be determined in one of two ways, depending on which calculation method the contractor chooses. Contractors may set a hiring benchmark that is based on the national percentage of veterans currently in the civilian labor force (as posted on OFCCP's website—currently eight percent), or they may establish their own benchmark based on five specifically enumerated factors. OFCCP has been careful to note that the benchmark is not meant to be an aspirational goal, such as the goals established under Executive Order 11246 and now under Section 503, but rather is intended to measure the progress of the contractor's affirmative action efforts. All records related to this benchmark must be retained for three years in order to allow contractors to evaluate the success of their outreach and recruitment efforts.
- **Changes to Applicant Self-Identification Invitation Requirements:** Similar to the Section 503 Final Rule, the

VEVRAA Final Rule requires that applicants be invited to self-identify as a protected veteran, both pre-offer and post-offer. At the pre-offer stage, applicants must be invited to self-identify generally as a protected veteran without identifying their specific protected veteran classification. At the post-offer stage, applicants must be invited to identify as a specific class of protected veteran.

- **Clarification Regarding Job Posting Requirements:** The Final Rule also clarifies contractors' existing obligation to list job openings with appropriate state or local employment service offices by requiring contractors to provide the employment services with information in any manner and format that is permitted by the appropriate employment service.
- **Required Notification to State Employment Services:** Contractors will also now be required to notify the employment services in each state in which they operate of their status as a federal contractor, their desire for priority referrals of veterans at all of the contractor's locations in the state, the name and location of each hiring location in the state, and contact information for a manager who can verify information contained in job listings. This information must be provided at the time of the first job listing with the service and then updated if the provided information changes.
- **Data Collection and Analysis Obligations:** Much like the Section 503 Final Rule, the VEVRAA Final Rule also requires contractors to collect various data points and analyze them annually. Contractors must now collect, analyze and annually update the following data:
 - the total number of applicants for employment who self-identified as, or are otherwise known to be, protected veterans;
 - the total number of job openings and total number of jobs filled;
 - the total number of applicants for all jobs;
 - the total number of protected veteran applicants hired; and
 - the total number of applicants hired.
- **Annual Evaluation of Outreach Efforts:** Contractors must now evaluate on an annual basis the effectiveness of their outreach efforts, and they must document the evaluations. The evaluation must include a review of the disability data points listed above.
- **Documentation of Internal Audit and Reporting Systems:** The final regulations retain the existing requirement that contractors implement an internal audit and reporting system that measures the effectiveness of their affirmative action programs and indicates the need for any remedial action, but it also adds a requirement that contractors now document their efforts in this regard.
- **Revised Subcontract Clause Requirement:** Like the Section 503 Final Rule, the VEVRAA Final Rule requires contractors to include specific, mandated language in all subcontracts to notify subcontractors of their affirmative action responsibilities with respect to protected veterans.

Like the Section 503 Final Rule, the VEVRAA Final Rule is also notable because it does *not* include the following

significant obligations that were proposed in the NPRM:

- Establishing multiple linkage agreements with veteran-related agencies for each covered location.
- Reviewing personnel processes and physical and mental job qualification requirements on an *annual* basis. OFCCP instead retained the currently required periodic review of these items.
- Affirmatively asking disabled veterans if they require a reasonable accommodation.
- Following a list of mandated steps when reviewing personnel processes, including a requirement to create substantial documentation regarding employment decisions relating to applicants and employees with disabilities, including the reasons for the decisions.
- Holding annual meetings with employees discussing the affirmative action policy and providing specific training to all employees involved in hiring or selection.
- Collecting and analyzing referral data, including the number of referrals of protected veterans received and the total number of referrals received.
- Requiring records to be retained for five years (the Final Rule calls for a three-year record retention period).

OFCCP's [website regarding the VEVRAA Final Rule](#) contains helpful resources regarding the new regulations, including the agency's [summary and preamble](#), [the regulatory text](#), [a fact sheet](#) and [a list of answers to frequently asked questions](#).

Effective Date of the New Rules

The Final Rules do not go into effect until 180 days after the Regulations are published in the Federal Register, which the OFCCP anticipates will happen within the next two weeks. Additionally, for the aspects of the Final Rules that require changes to contractors' written affirmative action plans, if the effective date for the Final Rules falls during a contractor's affirmative action plan year, the contractor may wait until the start of its next affirmative action planning cycle to implement the required changes to its AAPs.

Conclusion

Though not as onerous as the earlier proposed regulations, OFCCP's recently issued Final Rules represent a significant change from current compliance obligations for federal contractors under Section 503 and VEVRAA. Implementing appropriate policies and practices to comply with these new obligations will require a significant amount of time, resources, and strategic thinking and analysis. Given the significant amount of time for implementation of many the new obligations, federal contractors should consult counsel soon to formulate a strategic plan for ensuring compliance while minimizing burdens and risks.

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If you have any questions or would like additional information, please contact your Alston & Bird attorney or any of the following:

ATLANTA

Shama Barday
404.881.7437
shama.barday@alston.com

Alexandra Garrison Barnett
404.881.7190
alex.barnett@alston.com

Ashley D. Brightwell
404.881.7767
ashley.brightwell@alston.com

Lisa H. Cassilly
404.881.7945
lisa.cassilly@alston.com

Brett E. Coburn
404.881.4990
brett.coburn@alston.com

Clare H. Draper IV
404.881.7191
clare.draper@alston.com

R. Steve Ensor
404.881.7448
steve.ensor@alston.com

Kimberly L. Fogarty
404.881.4502
kim.fogarty@alston.com

Marilee Fiebig Holmes
404.881.4374
marilee.holmes@alston.com

Molly M. Jones
404.881.4993
molly.jones@alston.com

J. Thomas Kilpatrick
404.881.7819
tom.kilpatrick@alston.com

Christopher C. Marquardt
404.881.7827
chris.marquardt@alston.com

Wes R. McCart
404.881.7653
wes.mccart@alston.com

Charles H. Morgan
404.881.7187
charlie.morgan@alston.com

Edmund M. Morrell
404.881.7953
edmund.morrell@alston.com

Glenn G. Patton
404.881.7785
glenn.patton@alston.com

Robert P. Riordan
404.881.7682
bob.riordan@alston.com

Eileen M. Scofield
404.881.7375
eileen.scofield@alston.com

Alicia P. Starkman
404.881.4994
alicia.starkman@alston.com

Brooks Suttle
404.881.7551
brooks.suttle@alston.com

Kristen Willoughby
404.881.4284
kristen.willoughby@alston.com

CHARLOTTE

Susan B. Molony
704.444.1121
susan.molony@alston.com

DALLAS

Jon G. Shepherd
214.922.3418
jon.shepherd@alston.com

NEW YORK

Erin L. Connolly
212.210.9461
erin.connolly@alston.com

LOS ANGELES

Lindsay G. Carlson
213.576.1038
lindsay.carlson@alston.com

Martha S. Doty
213.576.1145
martha.doty@alston.com

James R. Evans, Jr.
213.576.1146
james.evans@alston.com

Jesse M. Jauregui
213.576.1157
jesse.jauregui@alston.com

Deborah Yoon Jones
213.576.1084
debbie.jones@alston.com

Sayaka Karitani
213.576.1026
sayaka.karitani@alston.com

Ryan T. McCoy
213.576.1062
ryan.mccoy@alston.com

Claire Lucy Readhead
213.576.1181
claire.readhead@alston.com

Nicole C. Rivas
213.576.1021
nicole.rivas@alston.com

Casondra K. Ruga
213.576.1133
casondra.ruga@alston.com

WASHINGTON, D.C.

Emily Seymour Costin
202.239.3695
emily.costin@alston.com

Charles A. Gartland II
202.239.3978
chuck.gartland@alston.com

Jonathan G. Rose
202.239.3693
jonathan.rose@alston.com

ALSTON & BIRD LLP

WWW.ALSTON.COM

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ATLANTA: One Atlantic Center ■ 1201 West Peachtree Street ■ Atlanta, Georgia, USA, 30309-3424 ■ 404.881.7000 ■ Fax: 404.881.7777

BRUSSELS: Level 20 Bastion Tower ■ Place du Champ de Mars ■ B-1050 Brussels, BE ■ +32 2 550 3700 ■ Fax: +32 2 550 3719

CHARLOTTE: Bank of America Plaza ■ 101 South Tryon Street ■ Suite 4000 ■ Charlotte, North Carolina, USA, 28280-4000 ■ 704.444.1000 ■ Fax: 704.444.1111

DALLAS: 2828 North Harwood Street ■ 18th Floor ■ Dallas, Texas, USA, 75201 ■ 214.922.3400 ■ Fax: 214.922.3899

LOS ANGELES: 333 South Hope Street ■ 16th Floor ■ Los Angeles, California, USA, 90071-3004 ■ 213.576.1000 ■ Fax: 213-576-1100

NEW YORK: 90 Park Avenue ■ 12th Floor ■ New York, New York, USA, 10016-1387 ■ 212.210.9400 ■ Fax: 212.210.9444

RESEARCH TRIANGLE: 4721 Emperor Blvd. ■ Suite 400 ■ Durham, North Carolina, USA, 27703-85802 ■ 919.862.2200 ■ Fax: 919.862.2260

SILICON VALLEY: 275 Middlefield Road ■ Suite 150 ■ Menlo Park, California, USA, 94025-4004 ■ 650-838-2000 ■ Fax: 650.838.2001

WASHINGTON, DC: The Atlantic Building ■ 950 F Street, NW ■ Washington, DC, USA, 20004-1404 ■ 202.756.3300 ■ Fax: 202.756.3333

VENTURA COUNTY: 2801 Townsgate Road ■ Suite 215 ■ Westlake Village, California, USA, 91361 ■ 805.497.9474 ■ Fax: 805.497.8804