

OFCCP Issues Long-Awaited VEVRAA and Section 503 Final Rules

September 3, 2013

On August 27, 2013, the Office of Federal Contract Compliance Programs ("OFCCP") released long-awaited Final Rules that substantially impact federal contractor compliance obligations under the Vietnam Era Veterans' Readjustment Assistance Act, as amended ("VEVRAA") and Section 503 of the Rehabilitation Act of 1973, as amended ("Section 503"). VEVRAA and Section 503 Final Rules impose significant new reporting, records management, administrative and affirmative action obligations on contractors. Many of the key provisions of the Final Rules diverge significantly from the VEVRAA and Section 503 Notices of Proposed Rulemaking ("NPRM") issued on [April 26, 2011](#) and [December 9, 2011](#), respectively.

Final Rules at a Glance:

VEVRAA (Veterans Regulations)

1. Establishes hiring benchmarks for the first time for protected veterans;
2. Requires that contractors permit OFCCP on-site or off-site access to documents for compliance and focused reviews, and permits OFCCP to extend the temporal scope of compliance evaluations beyond the current plan year;
3. Requires that contractors invite applicants for employment to self-identify, both pre-offer and post-offer, as veterans protected under VEVRAA;
4. Clarifies contractors' employment service delivery systems ("ESDS") obligations.

Section 503

1. Establishes an aspirational seven (7) percent utilization goal per "job group," except for contractors with less than 100 employees, for qualified individuals with disabilities;

2. Requires that contractors invite applicants for employment to self-identify, both pre-offer and post-offer, as individuals with disabilities protected under Section 503;
3. Provides best practices guidance concerning "reasonable accommodations" for qualified applicants and employees with disabilities;
4. Requires that contractors permit OFCCP on-site or off-site access to documents for compliance and focused reviews, and permits OFCCP to extend the temporal scope of compliance evaluations beyond the current plan year.
5. Aligns the definition of "disability" and the other nondiscrimination provisions of Section 503 Regulations with the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA"); and
6. Establishes additional "invitation to self-identify" requirements, including requiring self-identification at the time of hire and every five years.

VEVRAA Final Rule - Notable Provisions

Rescinds 41 CFR Part 60-250

Under 41 CFR Part 60-250, VEVRAA requirements applied to all federal contracts and subcontracts of \$25,000 or more entered into before December 1, 2003. The Final Rule rescinds Part 60-250 in its entirety, consolidating all VEVRAA actions under 41 CFR Part 60-300 ("Part 60-300"). Under Part 60-300, VEVRAA requirements apply to all federal contracts and subcontracts of \$100,000 or more. Veterans previously protected under Part 60-250 will receive Part 60-300 protections and are permitted to file complaints with the OFCCP under section 60-300.61.

Hiring Benchmarks

Section 60-300.45 requires that contractors establish new hiring benchmarks for protected veterans. Although the NPRM proposed annual hiring benchmarks as a percentage of total hires in a given year, the Final Rule permits contractors to set benchmarks based on one of two methods. Contractors may either:

- a. Establish a benchmark equaling the national percentage of veterans in the civilian labor force (currently 8%); or

b. Establish a benchmark based on data from the Bureau of Labor Statistics and Veterans' Employment and Training Service/Employment and Training Administration.

Contractors are required to document the hiring benchmarks that they establish each year. Section 60-300.45(c) of the Final Rule reduced the required retention period of this data to three (3) years from the NPRM's proposed five (5) year period.

Compliance Evaluations

The Final Rule adopted the NPRM's proposed sections 60-300.60(a)(3) and (a)(4) without change. These rules require contractors to permit either on-site or off-site access to documents pursuant to a compliance check or focused review by OFCCP. In addition, as proposed in the NPRM, the Final Rule permits the OFCCP to "extend the temporal scope of . . . desk audit[s] beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part."

Invitation to Self-identify

Section 60-300.42 requires contractors to invite applicants for employment to self-identify as protected veterans at both the pre-offer and post-offer stage of the hiring process. The Final Rule, however, did not incorporate section 60-300.42(d) of the NPRM, which required that contractors affirmatively ask disabled veterans whether they require an accommodation. Rather, the Final Rule retains the existing rule, which suggests that the contractor ask if a disabled veteran applicant requires an accommodation to perform the job for which they are applying.

Employment Service Delivery Systems

Changes to section 60-300.5 clarify that contractors are required to provide job vacancy information to local ESDS or privately run services or exchanges "in any manner and format permitted by the appropriate [ESDS] which will allow that system to provide priority referral of veterans protected by VEVRAA for that job vacancy." (emphasis added). Contractors are not required to submit job vacancy information in the particular format mandated by a local ESDS. However, contractors may not submit information to an ESDS in a format that is unusable to the ESDS (e.g., a contractor may not submit a pdf file to an ESDS that does not have the capability to read pdf files).

Eliminates Proposed Linkage Agreements

The Final Rule also eliminates section 60-300.44(f) of the NPRM which would have required contractors to enter into "linkage agreements" with at least three prescribed veteran employment organizations in sourcing potential veteran applicants. Noting the burden imposed on contractors with multiple establishments and/or establishments in multiple states, OFCCP instead retained section 60-300.44(f)(1)'s requirement that contractors engage in "appropriate outreach and positive recruitment activities . . . that are reasonably designed to effectively recruit protected veterans."

Section 503 Final Rule - Notable Provisions

Utilization Goal

As anticipated, section 60-741.45 of the Final Rule establishes a nationwide seven (7) percent utilization goal for qualified individuals with disabilities. This goal will be applied to each of the employer's job groups, unless the contractor has 100 or fewer employees. If the contractor has less than 100 employees, the goal will be applied to the contractor's entire workforce. The Final Rule requires an annual utilization analysis and reassessment of outreach strategies to determine whether the contractor is meeting its utilization goal. OFCCP maintains that this goal does not constitute a quota, but is merely an aspirational tool, stating in the Section 503 Final Rule Summary and Preamble that "[f]ailing to meet the disability utilization goal, alone, is not a violation of the regulation and it will not lead to a fine, penalty, or sanction."

Contractors who fail to meet this goal, however, should expect heightened scrutiny during audits and compliance proceedings. Section 60-741.45 requires that contractors annually assess their efforts to achieve the seven (7) percent utilization goal in each job group. Contractors must be prepared to show that they have undertaken the required assessment and that, if they are not meeting the goal, they are taking affirmative steps to both identify and remove any impediments to equal employment opportunities.

It should be noted that the final rule eliminated the NPRM's suggested two (2) percent employment sub-goal for individuals with "severe disabilities" as defined in the President's July 2010 Executive Order.

Eliminates Proposed Linkage Agreements

Like the VEVRAA Final Rule, the Section 503 Final Rule eliminated the NPRM's suggested requirement that contractors enter into linkage agreements. Rather, the Final Rule retains section 60-741.44(f)(1)(i), which requires that contractors take "appropriate outreach and positive recruitment activities . . . reasonably designed to effectively recruit qualified individuals with disabilities." The Final Rule requires that contractors document all activities undertaken to comply with section 60-741.44(f) and retain that documentation for a period of three (3) years.

Invitation to Self-identify

Section 60-741.42 requires that contractors invite applicants voluntarily to self-identify as individuals with disabilities at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to self-identify post-offer. The Final Rule also requires that contractors invite current employees to self-identify on a "regular basis." Further, contractors must invite employees to self-identify as individuals with disabilities every five (5) years. OFCCP will post the prescribed language for this five-year request on its website. Contractors must keep all self-identification information confidential and maintain it in accordance with section 60-741.23.

The contractor community had expressed concern that pre-offer invitations to self-identify as individuals with disabilities may violate the Americans with Disabilities Act of 1990 ("ADA"). The OFCCP vigorously disputed this contention in the Section 503 Final Rule Summary and Preamble. Further, to address this concern, OFCCP obtained a letter from EEOC's Office of Legal Counsel affirming OFCCP's position that pre-offer invitations to self-identify do not violate the ADA and its implementing regulations. OFCCP will be posting this letter on its website.

Reasonable Accommodations

OFCCP declined to adopt § 60-741.45 of the NPRM, which required that contractors develop and implement specific written procedures for processing requests for reasonable accommodations. Instead, the Final Rule states, in Appendix B to Part 60-741 that such written procedures are considered by OFCCP a best practice. Appendix B also provides "guidance for contractors on establishing written reasonable accommodation procedures."

Document Production

Much like the VEVRAA Final Rule, the Section 503 Final Rule requires that contractors permit either on-site or off-site access to documents during compliance checks and focused reviews. In addition, section 60-741.60 permits OFCCP to "extend the temporal scope of . . . desk audit[s] beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part."

ADAAA

Section 60-741.2 of the Final Rule revised the definition of "disability" and other nondiscrimination provisions of Section 503 to comport with the standards set forth in the ADAAA. The Final Rule expands the definition of terms such as "major life activities," "major bodily functions," and who is "regarded as" having a disability, increasing the scope of employees protected under Section 503.

Effective Date

The Final Rules will take effect 180 days after their publication in the Federal Register. Contractors are not required to amend affirmative action plans ("AAPs") that are in place on the effective date of the Final Rules. However, contractors must ensure that AAPs prepared after the effective date comply with the Final Rules.

Impact on Contractors

Prior to the effective date, Contractors should undertake a comprehensive review of their policies, procedures and plans to identify the modifications they will need to make to comply with the new regulations. By the effective date, contractors should develop and implement:

- Procedures for collecting and retaining voluntary disclosure information from applicants and employees;
- Procedures for periodically surveying their workforce to obtain disclosure information;
- Forms, procedures and workflows for implementing their obligation to provide accommodations to qualified applicants and individuals with disabilities and reviewing and validating on an annual basis the physical and mental requirements of their positions;

A process for providing job vacancy information to local ESDS or privately run services or exchanges;

- A policy and program for the retention of documents and data required by the regulations; and
- A comprehensive plan for meeting the percentage goals adopted by the new regulations, including plans and programs for recruiting, training, retaining and promoting applicants and employees with qualifying disabilities and qualified veterans.

In addition, when they prepare their next set of affirmative action plans after the effective date of the regulations, contractors will need to include in the plans (1) the additional categories of analytics required by the regulations, including an assessment whether the contractor meets the utilization goals and benchmarks for individuals with disabilities and veterans and (2) descriptions of the affirmative action and compliance policies and programs they have adopted.

Please join us at **12:00 p.m. on September 12** for a comprehensive webinar concerning OFCCP's new regulations. You can RSVP for the webinar as follows:

- Go to: <https://university.learnlive.com/proskaueronlineevents>.
- Log in with your existing user name and password.
- If you do not have a user name and password, please select the "Register for an Account" button to create a new account. You will need to enter the Proskauer Company Code: **9736529**.
- Select the Catalog tab at the top of the page. Select the "View" button to the right of the program you would like to view and select the "Enroll" button in the right corner.
- Any technical issues can be directed to LearnLive Customer Support: support@learnlive.com

If you have any questions in the interim regarding compliance with VEVRAA or Section 503 Final Rules, please contact your Proskauer attorney or any of the attorneys listed herein.

Government Relations & Contract Compliance Practice Group

Group Leaders:

Connie N. Bertram, Partner
Lawrence Z. Lorber, Partner
Katharine H. Parker, Partner
Leslie E. Silverman, Partner

Accessibility & Accommodations Practice Group

Group Leaders:

Carolyn Doppelt Gray, Special Counsel
Joshua A. Stein, Senior Counsel
Allan H. Weitzman, Partner

Special thanks to Associate, Michael J. Graham, for his assistance preparing this alert.