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U.S. DEPARTMENT OF LABOR ISSUES FINAL RULES TO IMPROVE EMPLOYMENT OF PEOPLE WITH DISABILITIES AND VETERANS.

September 24, 2013

The U.S. Department of Labor (“DOL”) on September 24, 2013 published two final rules to improve hiring and employment of veterans and for people with disabilities. These rules will become effective March 24, 2014, and federal contractors will be required to comply with most of the final rule’s requirements by that date. However, some contractors may have additional time to comply with the requirements which relate to affirmative action plans in that contractors with affirmative action plans in place on March 24, 2014 may maintain them until the end of their plan year and delay their compliance with the final rule’s affirmative action plan requirements until the start of their next plan cycle.

I. **Affirmative Action and Nondiscrimination Obligations of Federal Contractors and Subcontractors Regarding Individuals With Disabilities.**

Enacted in 1973, the purpose of section 503 of the Rehabilitation Act, as amended, is twofold. First, Section 503 of the act prohibits employment discrimination on the basis of disability by Federal Government contractors and subcontractors. Second, it requires each covered Federal Government contractor and subcontractor to take affirmative action to employ and advance in employment qualified individuals with disabilities. The nondiscrimination and general affirmative action requirements of Section 503 apply to all Government contractors with contracts or subcontracts in excess of \$10,000 for the purchase, sale, or use of personal property or nonpersonal services (including construction). The requirement to prepare and maintain an affirmative action program apply to those Federal contractors that have a contract or subcontract of \$50,000 or more and 50 or more employees.

The final rule published by the Office of Federal Contract Compliance Programs (“OFCCP”) implements revisions to the current non-discrimination and affirmative action regulations of Section 503. The following major provisions are contained in the Final Rule:

- Establish, for the first time, a 7 percent workforce utilization goal for individuals with disabilities. This goal is not a quota or a ceiling that limits or restricts the employment of individuals with disabilities. Instead, the goal is a management tool that informs decision making and provides real accountability. Failing 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. The final rule permits Federal contractors with a total workforce of 100 or fewer employees to apply the 7 percent goal to their entire workforce, rather than to each job group.



- Require Federal contractors to invite job applicants to voluntarily self-identify as an individual with a disability at the pre-offer stage of the hiring process, in addition to the existing requirement that Federal contractors invite applicants to voluntarily self-identify after receiving a job offer. The purpose of this data collection is stated to be to provide Federal contractors with useful information about the extent to which their outreach and recruitment efforts are effectively reaching people with disabilities.
- Require contractors to invite incumbent employees to voluntarily self-identify on a regular basis. The OFCCP notes that the status of employees may change and a regular invitation to self-identify provides employees a way to self-identify for the first time, or to change their previously reported status. In addition, the OFCCP also notes that providing a regular invitation to employees should contribute to increased self-identification rates and that improving data collection is important to assessing employment practices.
- Require Federal contractors to maintain several quantitative measurements and comparisons for the number of individuals with disabilities who apply for jobs and the number of individuals with disabilities such Federal contractors hire in order to create greater accountability for employment decisions and practices. The OFCCP notes that having this data will enable Federal contractors and the OFCCP to evaluate the effectiveness of such contractors' outreach and recruitment efforts, and examine hiring and selection processes related to individuals with disabilities.
- Require prime contractors to include specific, mandated language in their subcontracts in order to provide knowledge and increase compliance by alerting subcontractors to their responsibilities as Federal contractors.
- Implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 by revising the definition of "disability" and certain nondiscrimination provisions of the implementing regulations.

The OFCCP estimates that for Federal contractors with 50–100 employees that the first-year cost of this rule to a contractor will be approximately \$3,318. And, that the first-year cost of this rule to Federal contractors with 100 to 500 employees will be approximately \$5,197.

II. Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans.

The second final rule published by the OFCCP implements revisions to the current regulations of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act of 2002 ("VEVRAA"). The OFCCP is responsible for enforcement of VEVRAA, which prohibits employment discrimination against protected veterans by covered Federal contractors and subcontractors. VEVRAA also requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment these veterans.

The final rule strengthens several provisions that are intended to aid in recruitment and hiring efforts, such as clarifying the mandatory job listing requirements, requiring data collection pertaining to protected veteran applicants and hires, and establishing hiring benchmarks to assist in measuring the effectiveness of their affirmative action efforts. VEVRAA was initially enacted into law in 1974 and has been amended several times in the intervening years. The purpose of VEVRAA is twofold. First, VEVRAA prohibits employment discrimination against specified categories of veterans by Federal contractors and subcontractors. The universe of protected veterans under VEVRAA includes disabled veterans, veterans who have separated from the military within the past three years (recently separated veterans), veterans who received an Armed Forces service medal while on active duty, and veterans who served in active duty during a war or in a campaign or expedition for which a campaign badge was authorized. The second purpose of VEVRAA requires each covered Federal contractor and subcontractor to take affirmative action to employ and advance in employment each of the above classes of veterans.

The VEVRAA regulations generally apply to (i) Government contracts of \$25,000 or more entered into before December 1, 2003 (the threshold amount for coverage is a single contract of \$25,000 or more, with contracts not being aggregated to reach the coverage threshold); and (ii) Government contracts entered into on or after December 1, 2003 with the threshold amount being a single contract of \$100,000 or more (again, contracts are not aggregated to reach the coverage threshold). Federal contractors and subcontractors that meet the respective coverage threshold and have 50 or more employees must develop an AAP. The regulations also apply to modifications of otherwise covered Federal contracts made on or after December 1, 2003 (e.g. for a contract that was entered into before December 1, 2003, such contract will only be subject to the VEVRAA regulations if it is modified on or after December 1, 2003, and meets the contract dollar threshold of \$100,000 or more).

The following major provisions are contained in the final rule:

- Provide Federal contractors with a quantifiable means to measure their success in recruiting and employing veterans by requiring, for the first time, that Federal contractors establish their own or adopt a predetermined annual hiring benchmark (currently 8 percent based on national labor force data).
- Create greater accountability for employment decisions and practices by requiring that contractors maintain several quantitative measurements and comparisons for the number of veterans who apply for jobs and the number of veterans they hire. Having this data will also assist Federal contractors and the OFCCP in measuring the effectiveness of Federal contractors' outreach and recruitment efforts.
- Provide knowledge and support to veterans seeking jobs by improving the effectiveness of the VEVRAA requirement that Federal contractors list their job openings with the appropriate state employment service agency. Federal contractor job listings must be provided in a format that the state agency can access and use to make the job listings available to job seekers.
- Provide knowledge and increasing compliance by subcontractors with their obligations by requiring prime contractors to include specific, mandated language in their subcontracts alerting subcontractors to their responsibilities as Federal contractors.

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- Create flexibility for Federal contractors when they are establishing formal relationships with organizations that provide recruiting or training services to veterans. Such relationships or “linkage agreements” can be established to meet the Federal contractors’ specific needs, while assuring outreach to veterans seeking employment.
- Clarify the Federal contractor’s mandatory job listing requirements and the relationship between the Federal contractor, its agents, and the state employment services that provide priority referral of protected veterans.

The OFCCP estimates that for Federal contractors with 50–100 employees, that the first year cost of this rule will be approximately \$1536. And that for a Federal contractor with 100–500 employees, that the first year cost of this rule will be approximately \$2,518.

For any questions regarding the implementation of the provisions of these Final Rules and your obligations as a Federal contractor, please contact John R. LaBar and the attorneys at Henry & McCord.

This publication is a service to our clients and friends. It is designed to give only general information on the topic actually covered and is not intended to be a comprehensive summary of recent developments in the law.

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