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PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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# Federal Employment Law Changes for Government Contractors in 2014: What Every Contractor Should Know—Part II

*By Julia E. Judish and John E. Jensen\**

*In 2014, through new Executive Orders, directives to the Department of Labor, and new regulatory action, the Obama Administration used its executive authority to implement changes to employment practices in the government contracting community. In the first part of a two-part article, which appeared in last month's Pratt's Government Contracting Law Report, the authors explained changes in pay equity, and prohibiting discrimination on the basis of sexual orientation and gender identity. This second part of the article focuses on actions expanding employment opportunities for veterans and individuals with disabilities.*

## **EXPANDING EMPLOYMENT OPPORTUNITIES FOR VETERANS AND INDIVIDUALS WITH DISABILITIES**

### **Implementation of New Regulations**

The year 2014 also marked the implementation of regulations issued by the Department of Labor on September 24, 2013, under the Vietnam Era Veterans' Readjustment and Assistance Act, as amended, ("VEVRAA") and Section 503 of the Rehabilitation Act of 1973 ("Section 503"), which prohibit discrimination by covered contractors and subcontractors against and require affirmative action in employment for certain classes of protected veterans and for individuals with disabilities.<sup>1</sup> VEVRAA's affirmative action rules apply to contractors and subcontractors with 50 or more employees and a federal contract of \$100,000 or more and are generally implemented through FAR clause 52.222-35, Equal Opportunity for Veterans and through 41 CFR Part 60-300. Section 503's affirmative action rules apply to contractors and subcontractors with 50 or more employees and a federal contract of \$50,000 and are generally implemented through FAR clause 52.222-36, Affirmative

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<sup>1</sup> See 41 CFR Parts 60-250, 60-300, and 60-741.

Action for Workers with Disabilities and through 41 CFR Part 60-741.

Some of the new regulations went into effect on March 24, 2014, but the most controversial of the requirements—hiring benchmarks for veterans of eight percent of a contractor’s workforce and utilization goals for individuals with disabilities of seven percent for each job group in a contractor’s workforce—became effective date on the start date for each contractor’s next AAP year on or after March 24, 2014. Some contractors with AAP years beginning in January or February may, therefore, have just started to put these new requirements in place for the first time. An interim FAR rule implementing these changes by amending FAR subparts 22.13 and 22.14, as well as FAR clause 52.222-35, Equal Opportunity for Veterans, and FAR clause 52.222-36, Affirmative Action for Workers with Disabilities, became effective on July 25, 2014.<sup>2</sup> The interim FAR rule requires that these FAR clauses be incorporated into covered contracts in full text.<sup>3</sup>

Under the new requirements, on or before the start of the contractors’ new AAP year, the contractor must:

- Invite applicants to voluntarily self-identify protected veteran status at both the pre-offer and post-offer stages;<sup>4</sup>
- Invite applicants to voluntarily self-identify as an individual with a disability, at the pre- and post-offer stages, using the OFCCP-mandated form without any additions or changes;
- Conduct an initial self-identification survey of employees regarding disability status, and establish a schedule for resurveying employees every five years, with at least one reminder in the intervening years;

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<sup>2</sup> FAR 22.13 and 22.14; FAR 52.222-35 and 52.222.36.

<sup>3</sup> FAR 52.222-35 and 52.222.36.

<sup>4</sup> These regulations had required that contractors provide applicants with a post-offer invitation to self-identify as belonging to one or more of the specific categories of protected veteran the contractor is required to report, using a form with language prescribed by the regulations. *See* 41 CFR § 60-300.42(b) and Appendix B to 41 CFR Part 60 300. With the issuance of the new VETS-4212 regulations, the OFCCP has issued FAQs with a more relaxed interpretation of the post-offer invitation to self-identify requirement: “since the new VETS-4212 report no longer requires contractors to provide this information by the individual protected veteran categories, contractors are not required to invite self-identification by category in order to comply with VEVRAA’s post-offer invitation requirement. Rather, contractors need only invite those offered a job to indicate whether they are protected veterans under any of the VEVRAA categories.” According to the OFCCP FAQs, it is still permissible for contractors to ask applicants to voluntarily self-identify the specific category or categories of protected veteran to which they belong, at the post-offer stage, but it is not mandatory to seek that level of detail. *See* [http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA\\_faq.htm#Q38](http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA_faq.htm#Q38).

- Store copies, including electronic copies, of the required self-identification forms according to written policies and procedures, in a secure, confidential location separate from application materials, personnel files, and ADA medical files;
- Develop a procedure for review of the organization's personnel processes that evaluates whether applicants and employees with disabilities have had equal access to the personnel processes;
- Include an EEO policy statement in the AAP that shows top executive support for the AAPs for protected veterans and individuals with disabilities;
- Assess and document on an annual basis the effectiveness of the contractor's outreach and recruitment efforts for protected veterans and individuals with disabilities;
- Ensure that outreach and recruitment efforts are documented and retained for specified periods;
- Either develop written procedures for processing reasonable accommodation requests or ensure that current procedures include records of accommodations made in a manner easily retrievable in the event of an OFCCP compliance review;
- Train employees engaged in key personnel activities in the contractor's affirmative action obligations;
- Conduct data analysis relating to hiring of protected veterans and individuals with disabilities by using the specific data points related to applicants and internal and external hires listed in the regulations, and maintain the data in a separate, confidential file for three years;
- Establish, document and begin applying an annual hiring benchmark for protected veterans for each establishment, using either the national hiring benchmark (eight percent) for veterans or an individually calculated benchmark;
- Conduct an annual workforce assessment and apply the seven percent utilization goal for employment of individuals with disabilities to each job group or to the workforce as a whole for contractors with 100 or fewer employees; and
- Develop action plans for resolving any problems identified in the contractor's utilization of individuals with disabilities.

In addition, all covered contractors and subcontractors were required, as of March 24, 2014, to flow down mandatory new language into all covered

subcontracts or purchase orders executed or amended after March 24, 2014, to post prescribed notices about applicants' and employees' affirmative action and equal employment opportunity rights in conspicuous places and in accessible form, to include a tagline referencing protection for individuals with disabilities and veterans in all job solicitations and advertisements,<sup>5</sup> and to comply with new listing and information requirements with respect to state or local employment delivery systems and union or worker representatives.

### **Updated Scheduling Letter and Itemized Listing**

Providing teeth to these new requirements, on September 30, 2014, the Office of Management and Budget approved a new Scheduling Letter and Itemized Listing of record requests for OFCCP compliance reviews.<sup>6</sup> The new Itemized Listing contains 22 different categories of requested supporting data, rather than the former 11 items, and covers VEVRAA, Section 503, and Executive Order 11246 requirements. Notably, consistent with the Obama Administration's focus on pay equity, the new Itemized Listing imposes heightened data requirements for compensation information. While previously contractors could submit aggregate data by job group or other category, Item 19 of the Itemized Listing requires contractors to provide, in a single file, "employee-level compensation data for all employees (including but not limited to full-time, part-time, contract, per diem or day labor, temporary) as of the date of the workforce analysis in [the] AAP" along with "gender and race/ethnicity information and hire date for each employee as well as job title, EEO-1 Category and job group." For VEVRAA and Section 503, the Itemized Listing requires documentation of outreach and recruitment efforts, copies of the contractor's data analysis, and the results of the contractor's hiring or utilization levels with respect to the veterans' hiring benchmark and utilization goal for individuals with disabilities.

Previously, although contractors maintained AAPs for individuals with disabilities and veterans, those were often boiler-plate documents that received scant attention in comparison with applicant tracking and data analysis efforts

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<sup>5</sup> Effective April 8, 2015, taglines in job advertisements must also list "sexual orientation" and "gender identity" to the list of bases on which discrimination is prohibited, pursuant to the regulations implementing Executive Order 13672, which were discussed in more detail in Part I of this article. The OFCCP has issued guidance discouraging the use of the "LGBT" abbreviation in job advertisement taglines "because it does not accurately reflect that people of all sexual orientations and gender identities are protected by the Final Rule." See [http://www.dol.gov/ofccp/LGBT/LGBT\\_FAQs.html#Q19](http://www.dol.gov/ofccp/LGBT/LGBT_FAQs.html#Q19).

<sup>6</sup> See 79 Fed. Reg. 58807 (September 30, 2014), and [http://www.dol.gov/ofccp/regs/compliance/faqs/SchedulingLetter\\_ItemizedListing\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/faqs/SchedulingLetter_ItemizedListing_508c.pdf).

required for Executive Order 11246 AAPs. In combination, these new Section 503 and VEVRAA requirements and the heightened attention to enforcement of Section 503 and VEVRAA in OFCCP compliance reviews places pressure on contractors to give priority to efforts to hire and retain veterans and individuals with disabilities.

### **VETS-4212 Annual Report**

In one more related change, on September 25, 2014, the Department of Labor issued new regulations rescinding the former VETS-100 regulations, renaming the VETS-100A annual report the Federal Contractor Veterans' Employment Report VETS-4212, and revising the regulations mandating the report to streamline the reporting requirements.<sup>7</sup> Beginning with their 2015 annual report, contractors will report specified information on protected veterans in their workforce in the aggregate, rather than for each category of veterans protected under the statute.

### **CONCLUSION**

President Obama's second term has been marked by an inability to get many of his key legislative priorities through a hostile Congress, but the Obama Administration has found means to implement policies that increase employee protections. These changes correspondingly affect the responsibilities of most government contractors in many significant respects. Contractors should pay specific attention to the details of the rules published—and those still to be published in 2015—by the Department of Labor, and to any corresponding rule changes in the FAR, to ensure compliance with their contracts and federal law.

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<sup>7</sup> See 79 Fed. Reg. 57463 (September 25, 2014).