

Federal Contractor Workforce Issues Webinar

Spotlight on the New Equal Employment Opportunity & Affirmative Action Requirements

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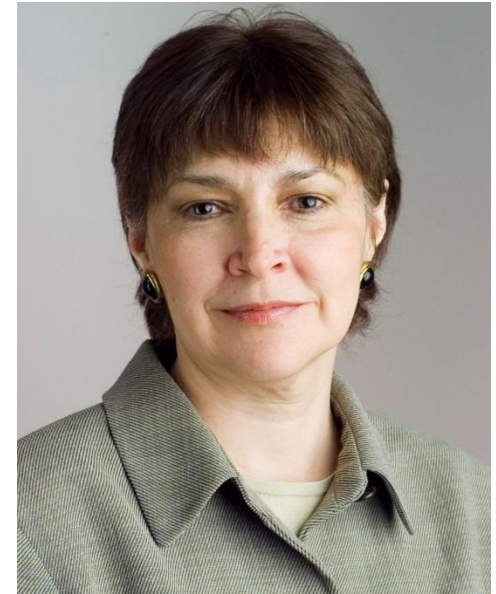
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Workforce Issues in Federal Contracting: Sources of Regulation and Current Initiatives

Barry J. Hurewitz





I'm a government contractor?

- ***Any direct or indirect business for the federal government has regulatory implications***
 - Contract instruments are used when an executive agency acquires property or services for the direct benefit or use of the United States Government (31 USC 6303)
- ***Prime contract:*** Direct contract to provide supplies or services to a federal government customer
- ***Federal Acquisition Regulation System*** applies to
 - Acquisitions by executive agencies
 - With Congressionally appropriated funding



I'm a government subcontractor?

- ***Subcontract:***
 - Agreement with a supplier, distributor, vendor, or firm with a prime contractor or another subcontractor, for performance of a prime contract or higher tier subcontract.
 - For the purchase, sale or use of personal property or nonpersonal services which, in whole or in part, is necessary to the performance of any one or more contracts; or
 - Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.



Special aspects of government contracting

- ***Appropriated funding***
 - Annual budgeting
 - Antideficiency: No obligations in excess or in advance of appropriation
- ***Special rights***
 - Termination without cause
 - Intrusive access to company data
 - Extraneous compliance requirements
- ***Special remedies***
 - Civil and criminal enforcement for contract breaches
 - Administrative federal dispute resolution processes



Selected HR-Related Concerns

Government business brings special personnel-related policies and procedures

- Registration
- Certifications
- Personnel assignment
- Hiring and promotion



Registration

Central, public registration is a prerequisite to getting paid by the government

- System for Award Management replaced Central Contractor Registration, effective 7/29/12

Company name	DUNS
CAGE code	Address
Business start date	Federal debt
Business structure	Bonding levels
Industry codes	Small business status
Points of contact	



Certifications

Contractor personnel must make binding certifications that expose the company to liability

- System for Award Management replaced Online Representations & Certifications Application (ORCA), effective 7/29/12
 - Corporate ownership
 - Small business and disadvantaged status
 - Indictments, convictions and civil judgments against principals
 - EEO/Affirmative Action compliance & reporting



Assignment of Personnel

- ***Key personnel***
 - Are specific individuals required for performance?
 - Are they available?
 - Government or prime contractor may have dismissal & approval rights

- ***Labor category compliance***
 - Assignment of improper skill levels on a cost-reimbursement contract may be breach or fraud
 - Job titles often do not match specified categories



Hiring and promotion

Contractors are subject to special recruiting and advancement requirements

- Online applicant tracking
- eVerify citizenship verification
- “Revolving door” rules on employment of former government officials
- Equal Opportunity/Affirmative Action



OFCCP

Department of Labor Office of Federal Contract Compliance Programs

- Regulates contractors and subcontractors
- Administers EEO and affirmative action
- Combats discrimination
- Promotes diversity

Priorities

- Regulatory reform
- Outreach and education
- Enforcement



OFCCP Regulatory Reform

Current initiatives

- Revision of EEO and affirmative action rules under ***Rehabilitation Act Section 503*** and ***Vietnam Era Veterans' Readjustment Assistance Act***
- Update of ***sex discrimination*** guidelines
 - Current guidelines from 1980s
- Update of ***construction contracting*** affirmative action requirements
 - Current rules based on 1970 data
- Revision of ***Veterans' Employment and Training Service (VETS) reporting***
 - Proposed rule Feb. 2014; comments due 4/25/14
 - Would allow aggregated reporting



OFCCP Outreach & Education

Current initiative

- Improving compliance assistance for contractors and subcontractors
 - Compliance guides
 - Webinars
 - Directives



OFCCP Enforcement

Current initiatives

- “Systemic compensation discrimination” under Executive Order 11246
 - Compliance officers trained in 2013
 - Now rolling out new enforcement emphasis
 - Focus on “cases where agency reviews can have the greatest impact”
- Construction industry
 - Evaluation of “larger” construction companies



Compensation Regulation

Reporting (FAR 52.204-10)

- Prime contractors and first-tier subcontractor reporting of names and comp for top 5 executives.
- Applies if \$25 million annual gross revenues from federal agreements, constituting 80% or more of annual gross revenues, & not listed in SEC filings

Allowability limitations

- \$952,308 executive cap for FY 2012 pay
- June 2013 proposal applies cap to all employees
- HHS prohibits use of appropriated funds for direct salaries in excess of \$179,700



Human Trafficking

Current FAR 52.222-50

- Notify employees of (1) government's zero-tolerance policy & (2) company sanctions for violations
- Report to government on violations & sanctions imposed

2013 defense authorization expands trafficking program

- Prohibits awardee & sub “acts that directly support or advance trafficking in persons”
- New contractor & subcontractor certifications for work >\$500,000 performed outside of the U.S.



New Presidential Policy Initiatives

Contractor minimum wage increase

- Executive Order 2/12/14
- Increase minimum wage to \$10.10 for workers under service & construction contracts & subcontracts
- Effective 1/1/15; applicable to new contracts
- Annual inflation adjustment beginning 1/1/16

FLSA overtime eligibility regulatory update

- Announced 3/12/14; not previously on agenda
- Expand overtime eligibility for workers with executive/administrative/professional responsibilities
- Revisit \$455 weekly pay threshold for white collar exemption



What to do?

Internal information sharing is crucial

- ***Know*** your company's federal contract portfolio
 - Which customer agencies? (agency-specific rules apply)
 - What dollar volumes? (both contract-specific & aggregate)
- ***Identify*** contractual and regulatory obligations
 - Clauses & flowdowns (mandatory vs. negotiable)
 - Regulatory mandates – NOT always in the contract!
- ***Assign*** responsibility to appropriate stakeholders
- ***Develop*** a compliance strategy
- ***Implement*** regular oversight



Serious consequences

Government wields harsh remedies for noncompliance

- False Statements Act
- False Claims Act
- Negative past performance ratings
- Remedial price reductions
- Costly audits and investigations
- Suspension and debarment
- Penalties may be corporate or personal

Section 503 and VEVRAA: Implementing the New Affirmative Action Requirements

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New Rules for Two Laws Governing Federal Contractors:

- Section 503 of the Rehabilitation Act of 1973, as amended (requires covered contractors to take affirmative action to hire, advance, and retain individuals with disabilities; prohibits discrimination based on disability)
- The Vietnam Era Veterans Readjustment Assistance Act of 1974, as amended (requires covered contractors to take affirmative action to hire, advance, and retain protected veterans)



Background on New Regulations

- OFCCP's intention: Significantly increase contractor efforts to recruit and advance individuals with disabilities and protected veterans, and provide means to better measure (and audit) results.
- Proposed rules more burdensome than final rules, but new rules still add significant burden
- Final regulations require contractors to report and analyze progress against efforts and to put action-oriented programs in place to increase representation
- Three-year look back so contractors can measure results of programs (OFCCP can do the same in compliance reviews!)
- Final rules published: September 24, 2013
- Final rules effective: March 24, 2014



Background on New Regulations, Contd.

- Due to significance of changes, OFCCP has allowed “phased in” implementation:
 - Changes in Sub-Parts A, B, D, and E for both regulations are effective *immediately* on March 24, 2014
 - Requirements in Sub-Part C are not effective until the beginning of the contractor’s following plan year
 - Example: For calendar year AAPs, would not be effective until January 2015
 - Example: For a June 1 AAP year, would not be effective until June 1, 2014



For today's session....

- We will be highlighting the key changes to the two regulations.
- Link to the two new rules:
 - Federal Register, Final Rule, Section 503:
<http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf>
 - Federal Register, Final Rule, VEVRAA:
<http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21227.pdf>
- When implementing, we encourage you to review each section to ensure that the full requirements are understood.
- If you have a calendar year AAP or any plan year date before March 24, you have at least nine more months to implement many of the changes.
- OFCCP has said it will not audit contractors on the new regulations within the first year; it considers the first year a “transitional” year.



What changes have to be in place as of March 24, 2014 (regardless of Plan Year schedule)?

- Equal Opportunity Clause (Section 503, VEVRAA)
- Job Posting or Advertisement Tagline (Section 503, VEVRAA)
- Communication of Job Rights to Employees and Applicants (Section 503, VEVRAA)
- Notice to State Employment Service Delivery Systems (VEVRAA only)



Equal Opportunity Clause

- Each contractor must include the specified equal opportunity clause with its detailed obligations in full, or by reference, in all applicable contracts and sub-contracts (including modifications, renewals, or extensions) signed after March 23, 2014
 - **41 C.F.R. 60-741.5(a)** Equal Opportunity Clause – must be included in all contracts, sub-contracts, modifications, renewals, amendments or extensions in excess of \$10,000
 - **41 C.F.R. 60-300.5(a)** Equal Opportunity Clause - must be included in all contracts, sub-contracts, modifications, renewals, amendments or extensions in excess of \$100,000

Equal Opportunity Clause, Contd.

- Per OFCCP guidance, the following consolidated clause incorporating all required references may be used, but must be in **bold** text within the contract:

“This contractor and subcontractor shall abide by the requirements of 41 C.F.R. §§ 60-1.4(a), 60-300.5(a), and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status, or disability.”



EO Job Posting or Advertisement Tagline

- **41 C.F.R. § 60-741.5 (a) 7:** Each 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.**”
- **41 C.F.R. § 60-300.5 (a) 12:** Each 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 without regard to their protected veteran status.**”



EO Job Posting or Advertisement Tagline Contd.

- ***Examples of acceptable minimum taglines:***
 - ***Equal Opportunity Employer/Females/Minorities/Veterans/Disability***
 - ***EOE/M/F/Vet/Disability***
- ***Example of a more descriptive tagline to be used in an employment advertisement:***
 - ***[COMPANY] is an equal employment opportunity employer. All qualified applicants will receive consideration for employment and will not be discriminated against on the basis of gender, race/ethnicity, protected veteran status, disability, or other protected group status.***
 - ***Could also do equal employment opportunity/affirmative action employer***



Notice of Rights to Employees and Applicants

- **41 C.F.R. § § 60-741.5(a) 4 and 60-300.5(a) 9:** Contractors must display the employment rights poster, “EEO is the Law”, to all employees and applicants by ensuring that the poster is accessible and readable on bulletin boards and on the company intranet, as well as to applicants who file applications electronically and to employees who work in remote locations.
- The contractor must “conspicuously store” the poster “with or as part of, the electronic application”. The poster can be included as part of the electronic application or “by displaying a prominent link to the poster, along with a brief explanation of what the link connects to, as part of their electronic application.”



Notice of Rights to Employees/Applicants, Contd.

- If employees work remotely, notice may be posted electronically on the Company's intranet as long as all remote employees have been provided with computers.
- Contractor must ensure that applicants/employees with disabilities be provided with notice in a format that is accessible and understandable to the individual (*e.g.* upon request, providing Braille or large print versions of the notice, or ensuring it is posted at a height that can be read by someone in a wheelchair).



Listing Requirement with the State Employment Service Delivery System (ESDS)

- **VEVRAA only, 41 C.F.R § 60-300.5 (a) 3:** Each contractor must list employment openings with the appropriate employment delivery system at least concurrently with the use of any other external recruitment sources
 - Change: contractors must provide information about each job vacancy in **any manner or format permitted by the appropriate employment service delivery system**
 - If using a third party vendor, determine that vendor is meeting the new requirements and periodically audit vendor to ensure it continues to do so



Notice to State Employment Service Delivery System (ESDS)

- **41 C.F.R. § 60-300.5 (a) 4:** Each contractor must advise the employment service delivery system (ESDS) of the following:
 1. The Company is a federal contractor.
 2. It desires priority referrals from the state of protected veterans for job openings at all locations within the state.
 3. It must provide the name and location of each hiring location within that state and the contact information for the hiring official for each location.
 4. If an external employment agency is used to assist in its hiring, the contractor must provide the ESDS with such agency's contact information.
- ***These disclosures must be made simultaneously with the contractor's first job listing at each location after March 24.***



What Changes Are Required for the Next AAP Plan Year?

- The EO policy statement must indicate the top US executive's support for the affirmative action program.
- New requirements to invite applicants (pre- and post-offer) to self-identify for disability and protected veteran status, along with new self-identification forms.
- Survey of the workforce for disability status; re-survey every 5 years.
- For each AAP location, establishment of utilization goals for individuals with disabilities by job group.
- For each AAP location, the establishment of hiring benchmarks for protected veterans.



Changes Required for Next AAP Plan Year, Contd.

- Data collection and analysis against the utilization goals and hiring benchmarks; written report assessing results.
- Dissemination of affirmative action obligations to all covered sub-contractors.
- Individual responsible for affirmative action program must now be communicated.
- More formalized audit and reporting of these two AAPs, with increase in requirements for reporting and documentation.
- Three year retention of certain records.
- Increased training requirements.
- Increased internal and external dissemination.



Equal Opportunity Policy Statement

- Equal Opportunity policy statements must be updated to indicate support for affirmative action program by top US official (CEO or President).
- Statement must be included in the written AAP, as well as posted on bulletin boards.
- Applicants and employees must be provided with the statement in a form that is accessible and understandable to individuals with disabilities, including disabled veterans.
- **Citations: 41 C.F.R. § § 60-741.44 (a), and 60-300.44 (a)**



Invitation to Self-Identify Disability and Protected Veteran Status – Pre-Offer

- Significant change: covered contractors must invite all qualified applicants to self-identify as to disability status and protected veteran status; can do at same time as soliciting race/ethnicity and gender from applicants. (Previously, inquiry could be made only post-offer.)
- Requires use of specific OFCCP form for disability.
- All disability information obtained from applicants must be kept in a separate, confidential “special data analysis file”.
- Protected veteran status solicited generally (not by category; does not require specific form).
- **Citations: 41 C.F.R. § § 60-741.42(a), 60-300.42(a)**



Invitation to Self-Identify Disability and Protected Veteran Status – Post-Offer

- Contractors must use same OFCCP Form to solicit disability status post-offer.
- Solicitation of protected veteran status by category, as previously done.
- **Citations: § § 41 C.F.R 60-741.42 (b), 60-300.42 (b)**



Workforce Survey to Invite All Employees to Self-Identify Disability Status

- Contractors are required to survey their workforce regarding disability status in the first year of the requirement, and thereafter, to re-survey the workforce every five years.
- Contractors must use same OFCCP Form to solicit disability status.
- During the intervening years, the contractor must at least once remind employees that they may voluntarily update their disability status at any time.
- **Citation: 41 C.F.R. § 60-741.42 (c)**

Utilization Goals for Individuals with Disabilities

- Contractors are required to establish a utilization goal of 7% representation of individuals with disabilities for each job group at each AAP location, unless the employee population is less than 100 (in which case the utilization goal is by establishment).
- **Citation: 41 C.F.R. § 60-741.45**



Data Collection Analysis for Individuals with Disabilities

- Contractors must document the following for applicants and hires on an annual basis, and maintain for three years:
 1. The number of applicants who self-identified as individuals with disabilities pursuant to 60-741.42(a) or who are otherwise known to be individuals with disabilities;
 2. The total number of job openings and total number of jobs filled;
 3. The total number of applicants for all jobs;
 4. The number of applicants with disabilities hired; and
 5. The total number of applicants hired.
- **Citation: 41 C.F.R. § 60-741.44 (k)**



Analyzing Effectiveness

- Contractors must annually analyze utilization of individuals with disabilities in each job group and identify any areas where the goal has not been met.
- Must assess the effectiveness of outreach and recruitment efforts, the results of affirmative action program audit, and any other areas that might affect the success of the affirmative action program.
- Must develop and execute an action-oriented program to correct any identified problem areas.
- **Citation: 41 C.F.R. § 60-741.45(d) and (e)**



Hiring Benchmarks for Protected Veterans

- Contractors are required to establish a hiring benchmark for each AAP location.
- Unlike the utilization goals for individuals with disabilities by job group, the hiring benchmark is an overall benchmark for the location.
- The hiring benchmark can be determined by one of two methods:
 - Equal to the national percentage of veterans in the civilian labor force, published by OFCCP annually – currently 8%; or
 - A calculated benchmark specific to the contractor using key factors as identified in the regulations, 60-300.45 (a)(2).
- **Citation: 41 C.F.R. § 60-300.45**

Data Collection Analysis for Protected Veterans

- Contractors must document the following for applicants and hires on an annual basis and maintain for three years:
 1. The number of applicants who self-identified as protected veterans pursuant to 60-300.42(a) or who are otherwise known as protected veterans;
 2. The total number of job openings and total number of jobs filled;
 3. The total number of applicants for all jobs;
 4. The number of protected veteran applicants hired; and
 5. The total number of applicants hired.
- **Citation: 41 C.F.R. § 60-300.44 (k)**



External Dissemination to Sub-contractors

- Contractors are required to “send written notification of the Company’s affirmative action policy to all sub-contractors, including all sub-contracting vendors and suppliers, requesting appropriate action on their part regarding their affirmative action obligations.”
- **Citation: 41 C.F.R. § § 60-741.44(f)(1)(ii), 60-300.44(f)(1)(ii)**



Responsibility for Implementation

- Contractors must assign an official with responsibility for implementation of the contractor's affirmative action activities. His or her name should appear on all internal and external communications regarding the Company's affirmative action program.
- **Citations: 41 C.F.R. § § 60-741.44(i), 60-300.44(i)**



Training

- “All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor’s affirmative action program are implemented.”
- **Citations: 41 C.F.R. § § 60-741.44(j), 60-300.44(j)**



Audit and Reporting System

- The contractor must design and implement an audit and reporting system to
 - Measure the effectiveness of the affirmative action program;
 - Indicate any need for remedial action;
 - Determine the degree to which objectives have been attained;
 - Determine whether known individuals with disabilities/protected vets have had the opportunity to participate in all company-sponsored education, training, recreational and social activities
 - Measure the contractor's compliance; and
 - **Document actions taken to comply and retain documents as employment records.**

- Citation: § § 41 C.F.R. 60-741.44(h), 60-300.44(h)



Three Year Records Retention Requirement

Certain records from the identified sections of these two affirmative action programs must be maintained for three years from the date of making the record:

- **Section 503 and VEVRAA:**
 - Documentation of all activities undertaken under External Dissemination of Policy, Outreach, and Positive Recruitment (**41 C.F.R. §§ 60-741.44 (f), 60-300.44 (f)**)
 - Data collection analysis (**41 C.F.R. §§ 60-741.44 (k), 60-300.44(k)**)
- **VEVRAA only:**
 - Documentation of yearly hiring benchmark (**41 C.F.R. §60-300.45(c)**)
- **Citation: §§ 41 C.F.R. 60-741.80(b), 60-300.80(b)**



Lessons Learned from Recent Audits

- Hiring and compensation have been, and continue to be key areas of audit focus – areas of highest risk and the most settlements
- Outreach, outreach, outreach! (individuals with disabilities and protected veterans) – targeted area of audits, many technical violations and conciliation agreements resulting
 - *Just listing your jobs with a third party vendor will no longer suffice*
 - Need multi-prong approach – Refer to suggested activities in the regulations
- Ensure your data is as accurate as it can be *before* your initial submission to the OFCCP
 - Applicant logs
 - Self-audit of compensation
 - Appropriate job group configuration
 - Use of 2010 census code matches to job titles
 - Recruitment areas and weights



Lessons Learned from Recent Audits

- Focus on compensation analysis – proactively analyze your compensation before audit
 - Continues to be a key focus of the Obama administration
 - OFCCP now using Directive 307 for compensation reviews
 - Compliance officers now training on the Directive
 - Careful consideration of how compensation data is submitted
 - During audit, if a grouping requested by the OFCCP does not make sense for your compensation system, clearly state why it does not make sense (in writing) and be prepared with detailed explanation and possible Company guidelines, policies, and practices to support your position.



In summary.....

- Know your contracts and their obligations
- Ensure that the organization's leaders understand that an affirmative action program is not a "data processing" exercise once a year; and it just got a whole lot bigger!
- Establish an implementation plan for the new requirements
- Self-Audit your policies, practices, and activities against the requirements BEFORE you receive a notice of compliance review



Questions?

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