Understanding New OFCCP Hiring Regulations

Alexa Santora
Attorney at Law

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What we will cover

- New OFCCP regulations relating to: (a) persons with disabilities and (b) protected veterans
  - 4 parts:
    1. Non-discrimination,
    2. Notice to applicants/employees/uniions/subs,
    3. Affirmative action,
    4. OFCCP evaluations/enforcement/penalties
- Why the regulations are important
- Compliance deadlines
- Tips for compliance
- OFCCP proposed rulemaking on “pay secrecy”

New OFCCP Regulations (9/24/13)

- Prohibits federal contractors and subs from discriminating in employment against individuals with disabilities & protected veterans and requires affirmative action.
Compliance Deadlines

• March 24, 2014
• Additional time to implement affirmative action requirements if contractor already has an affirmative action plan
  – Changes to AAP must occur by next AAP cycle

Why is Compliance Important?

• The Fair Pay and Safe Workplaces EO (7/31/14)
  – Must self-report violations of labor laws (including Rehabilitation Act and VEVRAA) for prior 3 years
  – Violations may:
    ▪ make contractor non-responsible for award
    ▪ cause contractor to be suspended/debarred
• Can result in progress payments being withheld
• May support finding of False Claims Act liability
Persons with Disabilities (41 CFR Part 60-741)

1. Prohibits discrimination
2. Requires notice to applicants, employees, subs/suppliers, and unions
3. Requires affirmative action plans (50+ employees)
4. Allows OFCCP access to determine compliance and assess penalties for noncompliance
Application

• Revised 41 CFR Part 60-741 applies to any Federal contract or subcontract over $10,000
• Contractors and subcontractors must “flow down” requirements to lower tiers
• Affirmative action requirements for companies with 50+ employees
  – Plan must be in effect 120 days after award

What’s New?

• Modified definitions for disability
• 7% utilization goal
• More rigorous data collection
• Requirements to invite persons to self-identify (50+ employees)
• OFCCP records access
Persons with Disabilities
(41 CFR Part 60-741)

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Prohibition on Discrimination

Cannot discriminate against a qualified person with a disability in any matter related to employment

§ 60-741.5 Equal Opportunity for Workers With Disabilities
What is “discrimination”? 

- Disparate treatment  
- Employment “tracks”  
- Hiring/promotion/retention practices that are not job-related and consistent with business necessity that:  
  - Have the effect of discriminating based on disability or  
  - Perpetuate the discrimination of others you control  
- Discrimination against a non-disabled person based on his association with a person with a disability  
- Not making a “reasonable accommodation”

Who is a qualified person? 

- 2 steps:  
  - Does person satisfy prerequisites for the position?  
  - Can person perform “essential functions” with or without a “reasonable accommodation”?  
- Essential function = If you take away the function, does it alter the nature of the job?
What is “related” to employment?

a) Recruitment, advertising, and job application procedures;
b) Hiring, upgrading, promotion, tenure, demotion, transfer, layoff, termination, and rehiring;
c) Rates of pay or any other form of compensation;
d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
e) Leaves of absence, sick leave, or any other leave;
f) Fringe benefits available by virtue of employment;
g) Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities;
h) Activities sponsored by the contractor including social and recreational programs; and
i) Any other term, condition, or privilege of employment.

What is a “disability”?

1. Physical/mental impairment that substantially limits one or more major life activities of an individual
2. Having a record of such impairment or
3. Being regarded as having the impairment
   – Not intended to be a demanding standard
   – Focus is on the discrimination, not the disability
“Major Life Activities”

- Caring for oneself,
- performing manual tasks,
- seeing,
- hearing,
- eating,
- sleeping,
- mobility,
- speaking,
- breathing,
- learning, reading, concentrating, thinking, communicating,
- interacting with others, and
- working.

Other Definitions

- “Substantially limits” is not defined
  - not demanding & not the primary focus
  - Mitigation not considered
    - One exception:
Definitions continued

• “Record of such impairment” means a history of being classified with the impairment or misclassified with the impairment

• “Regarded as”: individual is subjected to action because of an actual or perceived impairment
  – “unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments . . .”

Reasonable Accommodations

• Any mod/adjustment to the application process, workplace conditions, or circumstances related to employment
  – Making existing facilities handicapped accessible
  – “Flex time”
  – Reassignment to a different employment position
  – Modification to equipment or devices
  – Modification of examinations
  – Modification to training materials and applications
  – Provision of qualified readers or interpreters
Reasonable Accommodations Continued

- Balance between practicality of the request/cost/size of employer
  - Undue hardship is a defense

- No person is required to accept an accommodation
  - *But* you are not a qualified person if you *reject* a reasonable accommodation needed to perform an essential function

Reasonable Accommodations & CBEs

- Employer is not required to make a reasonable accommodation that violates CBE seniority rights. *Herr v. City of Chicago*, 479 F. Supp. 2d 834 (N.D.Ill. 2007).
Responsibility for Union Practices

• Can’t contract with a union (i.e., collective bargaining agreement) for the union to violate the regulations.
• “The contractor is not liable for the actions of the other party or parties to the contract which only affect that other party’s employees or applicants.” § 60-741.21
  – A contractor CAN be responsible for a union’s discriminatory practices of the contractor accepts employees from the union.

Persons with Disabilities
(41 CFR Part 60-741)

1. Prohibits discrimination
2. Requires notice to applicants, employees, union, subcontractors
3. Requires affirmative action plans (50+ employees)
4. Allows OFCCP access to determine compliance and assess penalties for noncompliance
Notices to Employees & Applicants

• Must post in conspicuous places notices stating the rights of applicants and employees and the contractor’s obligations under the law
• Must provide accessible versions to persons with disabilities

Notices to Unions

• Must notify each labor organization or representation of workers with which it has a CBA that the contractor is bound by the Rehabilitation Act
• Must request cooperation from the union
• All solicitations or advertisements for employees places by or on behalf of the contractor shall state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability
Notices to Subcontractors & Suppliers

• Must include provisions of 41 CFR 60.741.5 in all subcontracts or purchase orders exceeding $10k either in full text or using specific language in **bold**

Persons with Disabilities (41 CFR Part 60-741)

1. Prohibits discrimination
2. Requires notice to applicants, employees, unions, and subs
3. **Requires affirmative action plans (50+ employees)**
4. Allows OFCCP access to determine compliance and assess penalties for noncompliance
Invitation to Self-Identify

- Pre-offer – must be separate from application for employment
- Post-offer – any time after offer but before start of duties
- Employees – once every 5 years with a reminder in between

Invitations to Self-Identify Continued

- Responses must be kept confidential and separate from other data
Affirmative Action Plan

• Must contain:
  – Policy statement
  – Review of personnel processes
  – Anti-harassment procedures
  – Description of recruitment activities targeted toward persons with disabilities
  – Annual review of recruitment efforts
  – Trainings
  – Data collection analysis

Policy Statement

• President/CEO’s support of the program
• Provide for auditing and reporting
• Assign overall responsibility for implementation
• Provide description of contractor’s responsibilities
• Provide that no person will be harassed or retaliated against for exercising a protected right
• Policy statement must be kept on contractor bulletin boards
Review of Personnel Processes

• Periodic review of job qualifications and personnel processes to ensure that they do not screen out or limit opportunities for persons with disabilities
  – No unnecessary tests
  – Must make reasonable accommodations
    ▪ Must approach persons with disabilities who are experiencing difficulty with performing their jobs, inquire if the difficulty is caused by the disability, and offer a reasonable accommodation as appropriate
• Must document any review and modifications made

Utilization Goal

• 7%
  – For contractors employing 50-100 persons, applies to total workforce
  – For contractors employing more than 100 persons, applies to each discrete job category
  – Must determine how to improve when achievement falls below 7%
Recruitment

- Must notify subs and suppliers of the policy and request “appropriate action”
- Possible recruitment efforts include:
  - Posting with Government agencies or employment networks, career centers, other resources specializing in persons with disabilities
  - Facility tours
  - Internships/work study/career days

Recruitment Under CBES

- “The Union agrees that in the event it fails or is unable to refer applicants for employment to a Contractor at any time in sufficient number of a sufficient type from protected employee groups as may be necessary to enable the Contractor to fully comply with his affirmative action program or to fully comply with any other requirements imposed by contract, or enable the Contractor to fully comply with all Federal regulations rules, directives or orders applicable, then in any such event, the Contractor shall be free to directly recruit from any source and in any manner such number of acceptable applicants as may be necessary to satisfy the Contractor’s need to effect such compliance.”
Annual Assessment

- Document:
  - Evaluation criteria
    - Must include current year and 2 most recent prior years
  - Conclusions reached
  - Modifications made, if any
- Must retain records for 3 years

Trainings & Dissemination

- Must communicate obligations to employees, supervisors, and HR staff
- Must notify unions of the contractor’s policy and “request their cooperation”
Union Cooperation

  – Must send “off the street” applications to union hiring hall for referral back to the contractor
  – Must keep a record of when union doesn’t refer back
  – Must notify OFCCP when union doesn’t refer back
  – Must notify OFCCP of “other information” that union referral process has impeded contractor’s efforts to meet affirmative action obligations
  – Must keep copies of all letters and other evidence
  – CBE & union failure does not excuse contractor’s obligations

Data Collection Analysis

• Following data must be collected and retained for 3 years:
  – Number of applicants who self-identified as individuals with disabilities or are otherwise known to have disabilities
  – Total number of job openings and total number of jobs filled
  – Total number of applicants with disabilities hired
  – Total number of applicants hired
Persons with Disabilities (41 CFR Part 60-741)

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Enforcement & Penalties

- Enforcement
  - OFCCP may conduct a compliance review at any time, including on-site and including talking to employees and reviewing all records
  - Any employee or applicant may file a complaint with OFCCP within 300 days of an alleged violation, which OFCCP must investigate

- Penalties
  - Conciliation agreement specifying any remedial action to be taken (including back pay and seniority) or initiate enforcement proceedings
  - Withholding progress payments
  - Termination
  - Suspension/Debarment
Recordkeeping

• 3 years:
  – Annual assessment
  – Data collection analysis
• 2 years:
  – Reasonable accommodation requests
  – Physical exam results and other test results
  – Job advertisements and postings
  – Applications and resumes
  – Interview notes
  – All other records relating to employment actions
• Failure to maintain records creates a presumption that the records are unfavorable to the contractor

Veterans
(41 CFR Part 60-300)
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(41 CFR Part 60-300)

1. Prohibits discrimination
2. Requires listing of opportunities
3. Requires notice to applicants, employees, subs/suppliers, and unions
4. Requires affirmative action plans (50+ employees)
5. Allows OFCCP access to determine compliance and assess penalties for noncompliance

Application

- Applies to any Federal contract or subcontract over $100,000
- Contractors and subcontractors must “flow down” requirements to lower tiers
- Affirmative action requirements for companies with 50+ employees
- Plan must be in effect 120 days after award
What’s New?

- Replaces Part 60-250 with Part 60-300
- Establishment of annual hiring benchmarks
- More rigorous data collection
- Requirements to invite persons to self-identify
- More detailed requirements for posting job notices
- OFCCP records access

Veterans
(41 CFR Part 60-300)

1. Prohibits discrimination
2. Requires listing of openings
3. Requires notice to applicants, employees, subs/suppliers, and unions
4. Requires affirmative action plans (50+ employees)
5. Allows OFCCP access to determine compliance and assess penalties for noncompliance
Prohibition on Discrimination

Cannot discriminate against a qualified person on the basis of protected veteran status in any matter related to employment

§ 60-300.5 Equal Opportunity for VEVRAA Protected Veterans

Who is a Protected Veteran?

• All prior active duty U.S. military, naval, or air service discharged or released under conditions other than dishonorable who are:
  – Disabled
  – Recently separated (3 years or less)
  – Active duty wartime or campaign badge veterans (includes Iraq/Afghanistan)
  – Armed Forces service metal veterans (includes Haiti, Yugoslavia, Hurricane Katrina/Hurricane Rita)
## Definitions

- “discrimination”, “qualified person”, “related to” employment, and “reasonable accommodation” all carry over from disability requirements

## Veterans

(41 CFR Part 60-300)

1. Prohibits discrimination
2. Requires listing of all openings
3. Requires notice to applicants, employees, subs/suppliers, and unions
4. Requires affirmative action plans (50+ employees)
5. Allows OFCCP access to determine compliance and assess penalties for noncompliance
Listing

- Contractor must immediately list all employment openings which exist at the time of contract execution and which subsequently exist with the “appropriate employment service delivery system where the opening occurs”
  - Local job bank or employment service delivery system
    - Must allow priority referral

Veterans
(41 CFR Part 60-300)

1. Prohibits discrimination
2. Requires listing of all openings
3. Requires notice to applicants, employees, subs/suppliers, and unions
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Notice

• Must provide accessible notice to applicants, employees, subcontractors, and unions
  – Same as disability requirements

Veterans
(41 CFR Part 60-300)

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2. Requires listing of openings
3. Requires notice to applicants, employees, subs/suppliers, and unions
4. Requires affirmative action plans (50+ employees)
5. Allows OFCCP access to determine compliance and assess penalties for noncompliance
Affirmative Action Plans

- Same elements as disability requirements
  - Policy statement
  - Review of personnel processes
  - Anti-harassment procedures
  - Description of recruitment activities targeted toward veterans
  - Annual review of recruitment efforts
  - Trainings
  - Data collection analysis
- Differences:
  - Invite to self-identify may be part of application
  - If self-identifying as a protected veteran, must ask about reasonable accommodations
  - Benchmarks for hiring

Benchmarks for Hiring

- Contractor to set its own hiring benchmarks based on:
  - National % of vets in the civilian labor market (now = 7.2%)
  - State % of vets in the civilian labor market (Illinois = 5.9%)
  - # of vets who were participants in the State’s ESDS system (Illinois = 29,832)
  - Contractor-specific data including:
    - Applicant ratio and hiring ratio for prior year
    - Contractor’s recent assessments of the effectiveness of its outreach efforts
    - Any other factors
- Must be documented and retained for 3 years
Veterans
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3. Requires notice to applicants, employees, subs/suppliers, and unions
4. Requires affirmative action plans (50+ employees)
5. Allows OFCCP access to determine compliance and assess penalties for noncompliance

Enforcement & Penalties

- Carry over from disability regulations
  - OFCCP granted access to all records
  - May conduct on-site or off-site compliance checks
  - Applicants and employees have 300 days to file a complaint, which OFCCP must investigate
  - Penalties include conciliation agreements, withholding of progress payments, termination, suspension/debarrment
Recordkeeping

- Generally, two years
- 3 years for required outreach, annual assessment, data collection analysis, hiring benchmark info
- For contractors with less than 150 employees and less than $150k in a single contract:
  - Recordkeeping is for 1 year
  - Required outreach, annual assessment, data collection, and hiring benchmark is still 3 years

Pay Secrecy
Pay Secrecy

- Proposed rule published on 9/17/2014
- Implements EO 13665
- Would prohibit federal contractors and subcontractors from maintaining “pay secrecy” policies and discriminating based on employees who disclose or inquire about compensation
- Comments due on 12/16/2014

Purpose

- Discourage actual and perceived discrimination in pay
Proposed Revisions (41 CFR Part 60-1)

- Mandates that federal contractors and subs include the nondiscrimination provision in employee handbooks and disseminate information to employee and applicants
- Will apply to all contracts and subcontracts entered into after rule effective date
- “Flow down” requirement

Questions?

Alexa Santora
Attorney at Law
Fox Rothschild LLP
(202) 461-3106 – direct
ASantora@foxrothschild.com
www.foxrothschild.com