

AFFIRMATIVE ACTION UPDATE

NEW 503/VEVRAA FAQs FROM THE OFCCP

The OFCCP has just published a number of new frequently asked questions (FAQs) clarifying some of the requirements in implementing the revised Section 503 (Disabled) and VEVRAA (Veterans) regulations.

NEW FAQs

In regard to the newly published FAQs, for **Section 503**, they clarify the following points:

1. The regs do not require a contractor to select a lesser qualified disabled candidate over a more qualified non-disabled candidate. It is always OK to select the most qualified candidate. However, if there is a qualified disabled candidate in the pool who is not selected, contractors must be prepared to articulate the legitimate, non-discriminatory rationale for not hiring the disabled candidate.
2. Step progressions generally do not qualify as “jobs filled” as there is usually no movement into a new position. On the other hand, if an individual completes an apprenticeship program which is classified as an “Operative” and moves into a Journeyman’s position which is classified as a “Craftworker,” it would be considered a job filled as the Journeyman’s position would be new.
3. Contractors have flexibility in how they invite employees to self-identify as long as the means are reasonable and likely to be effective. This may include giving each employee a self-id form; or posting a notice on the company Intranet with a link to the form; or posting a notice and having copies of the self-id form in the employee lunch and break rooms.
4. Employees who choose not to self-id or do not respond to the invitation should be counted as non-disabled. However, employers may count an employee who does not respond but who the contractor actually knows to have a disability as disabled (e.g. visible disability, known to have diabetes, or other medical conditions due to FMLA or other medical leave).

For **VEVRAA**, the FAQs clarify:

1. If an individual self-ids as a protected veteran at the pre-offer stage but not at the post-offer stage, the contractor may still count them as a protected veteran hire. The reverse should likely be true for new hires who self-id post-offer and not pre-offer, the applicant flow log can be updated to reflect the post-offer declaration.

2. Step progressions generally do not qualify as “jobs filled” as there is usually no movement into a new position. On the other hand, if an individual completes an apprenticeship program which is classified as an “Operative” and moves into a Journeyman’s position which is classified as a “Craftworker,” it would be considered a job filled as the Journeyman’s position would be new.
3. When evaluating the attainment of the hiring benchmark, contractors should use the definition of “hires” in section 60-300.44(k) which includes both external and internal hires that occur through a competitive process (which includes promotions).

Compliance with the new regs will add an additional level of effort and complexity to the already extensive data collection and retention obligations required under the Executive Order.

REVISED 503/VEVRAA IMPLEMENTATION CHECKLIST

Attached is an updated 503/VEVRAA Implementation Checklist for your use in meeting the obligations required under the regulations recently published by the OFCCP. This checklist is more detailed and thorough than the previous version provided in our webinars held earlier this year for the initial roll-out of the new regs.

This checklist provides a comprehensive overview of the actions required for a successful implementation of the new regs. Please do not hesitate to contact us if there are any questions regarding the checklist or if you wish to receive copies of the samples referenced.

DATA COLLECTION ANALYSIS

In understanding the implementation of the new regs, and the impact of the new FAQs, we need to review the revised regulations in Subpart C – Sections 741/300.44(k) requiring the collection of specific information for data analysis. The revised regulations require:

“(k) *Data collection analysis.* The contractor shall document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years:

- (1) The number of applicants who self-identified as individuals with disabilities/protected veterans pursuant to §60-741/300.42(a), or who are otherwise known to be individuals with disabilities/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 applicants with disabilities/protected veteran applicants hired; and
- (5) The total number of applicants hired.”

These data collection requirements create very different obligations for contractors. Let’s look at the four key words/phrases used in the regulations. They are “job openings, jobs filled, hires and applicants.” The question is whether these words and phrases are being used in the same context to which we have become accustomed while complying with the recordkeeping requirements under the Executive Order requiring affirmative action for minorities and females? The short answer is that they are not. Rather, the revised regs create very new and different data collection obligations than the Executive Order.

Let’s look at the terms individually. The OFCCP explains that:

- a) “...job openings refers to the number of individual positions advertised as open in a job vacancy announcement or requisition. For example, if one job vacancy announcement or requisition includes 5 open positions and results in 4 hires, the contractor would document this as 5 job openings and 4 jobs filled.”
- b) “...jobs ‘filled’ refers to all jobs the company filled by any means, be it through a competitive process or non-competitively, e.g., through reassignment or merit promotion. It, therefore, should take into account both new hires into the company and those employees who were placed into new positions via promotions, transfers, and reassignments.” On the other hand, normal job progressions are not considered “jobs filled,” e.g., time-based step progressions, unless it involves a change in position, such as Apprentice to Journeyman.
- c) “...the number of those ‘hired’ refers solely to those applicants (both internal and external to the contractor) who are hired through a competitive process, including promotions.”
- d) “Applicants” appears to be defined by the discussion regarding “hires” where it refers to “...both internal and external to the contractor...” As such, the applicant pool will include external candidates who meet the Internet Applicant definition, as well as internal applicants who have been considered and hired through a competitive process. This seems to imply inclusion of internal candidates who have bid on a position, similar to the expression of interest under the Internet Applicant definition.

This is a brand new definition and obligation that will require contractors to be keeping internal applicant flow logs by opportunity/requisition and job group. Reporting on “jobs filled” will require combining all new/rehires, promotions, transfers, and reassignments into a single aggregate number by job group for analysis.

For example, contractors will now have to be collecting, auditing and retaining for three years information on the following items:

- 1) External Applicant Flow – for competitive positions
- 2) Internal Applicant Flow – for competitive positions (e.g. posted)
- 3) Combined Applicant Flow – external and internal applicants (#1 and #2)
- 4) Offers – for external positions only
- 5) New Hires/Rehires – for external positions only
- 6) Promotions To the Job Group from Another Job Group – competitive and non-competitive
- 7) Promotions Within the Job Group – competitive and non-competitive
- 8) 503/VEVRAA Hires – combine #5; #6 (competitive only); and #7 (competitive only)
- 9) Other Movement Into the Group – transfers from other establishments, reclassifications, etc.
- 10) Jobs Filled – all jobs filled by any means excluding most step progressions – this will include #8 and #9
- 11) Job Openings – All individual positions advertised open – e.g., one requisition for five new Assemblers would be reported as 5 job openings

Items #2, #3, #8, #10 and #11 are new requirements. Contractors should already be collecting items #1, #4, #5, #6, #7 and #9. A revised Summary of Personnel Activity form is currently being developed for use in the near future.

Complying with these new data collection requirements will necessitate a new and more extensive perspective on job openings; who's an applicant; and what constitutes a position filled, as well as what constitutes a "hire." Contractors must also remember that this data must be retained for a period of three years.

APPLICANT POOLS, ADVERSE IMPACT AND \$1 MILLION

On June 12th, the OFCCP announced a \$1 million settlement of a claim of systemic race discrimination in hiring against the Lincoln Electric Company in Cleveland, OH. The Agency alleged that the Company had discriminated against 5,557 African-American applicants for entry-level manufacturing production jobs by using an unvalidated selection process involving the use of various assessment instruments. The settlement also calls for the Company to hire 48 members of the affected class.

The Agency found that the Company's selection process involved a "Turnover Risk Index" that had the effect of screening out African-American applicants at a disparate rate as opposed to non-African-Americans. The selection process involved asking candidates about their willingness to

work rotating shifts as well as questions about drug use and criminal convictions. This was the second time in 11 years that the Company settled a \$1 million claim of unlawful discrimination in entry-level hiring.

An immediate question is whether there were really 5,557 African-American applicants? If we assume that the applicant pool mirrored representation in the greater Cleveland area, African-Americans make up 22.23% of the Operative population (using the 2010 census data). That means that if there were 5,557 African-American candidates, there could have been 19,443 other candidates for a total applicant pool of over 25,000 individuals. There is simply no good scenario under which a contractor would ever want to have an applicant pool of that size.

It's the law of large numbers. With very large pools, the amount of deviation from perfect parity starts to shrink and the likelihood of finding problems with selection decisions increases proportionately. Simply stated, large applicant pools are potentially very bad.

So what are the take-aways from this settlement? There are several:

1. If a contractor has been cited for a violation once before, it should put corrective action in place to avoid repeating the same mistake in the future.
2. Contractors need to be paying attention to the results of their selection processes and if there's adverse impact, looking into why and determining whether the process needs to be changed.
3. If there is adverse impact in the selection process and the contractor is using selection instruments, the process had better be validated.
4. Large applicant pools are problematic. Contractors need to be monitoring their pools and taking steps to ensure that they do not become too large. Data management techniques become important.
5. The OFCCP's "bread and butter" case remains entry-level hiring. Contractors must absolutely remain aware of this fact and make sure that they are not building a case for the OFCCP.

In conclusion, Contractors must be staying on top of their "numbers" and identifying in advance potential issues prior to the OFCCP getting involved.

If there are any questions or comments concerning anything contained above, they can be directed to this office by calling us at 440-564-7987 or sending an email to dbb@dbbrown.com. The discussion of this matter is for the clients and friends of Douglas B. Brown & Associates, LLC and does not represent nor is intended as a substitute for professional legal advice.

VEVRAA and §503 Implementation Checklist

Implement Immediately:

- “EEO is the Law” poster posted in the facility and available in large print/Braille upon request
- Post link to “EEO is the Law” poster on intranet
- Post link to “EEO is the Law” poster on jobs portal for applicants
- Notify unions of AA/non-discrimination obligations, if applicable (see DBB sample)
- Job postings and advertisements contain revised tagline (“Vets/Disabled” – see DBB sample)
- Incorporate the EEO clause in all new and modified contracts/subcontracts/POs (see DBB sample)
- “Reasonable Accommodation for Applying” language on all candidate application websites
- List job openings with state employment service delivery system (SESDDS) in the format requested
- Send notices to all 3rd party recruiters, if any (see DBB sample)
- Notify SESDDS of federal cont. status, request priority referral of vets, provide contact info (sample)
- Create/implement reasonable accommodation process – best practice, not req’d (see DBB sample)

IT Issues to Address Immediately:

- Ensure accessibility of Applicant Tracking System (ATS)/Employee intranet/jobs portal
- Post 503/Vets policy on ATS and Intranet
- Ensure EEO tagline is on all job postings on jobs portal
- Ensure that records in ATS and HRIS are properly recorded and reported

Begin as of new AAP plan year (after March 24, 2014):

- Pre-offer voluntary Self ID as to Disability (OFCCP form required)
- Post-offer voluntary Self ID as to Disability (same OFCCP form required)
- Invite all current employees to voluntarily Self ID as to Disability w/in first year (same OFCCP form)
- Invite all current employees to voluntarily Self ID as to Disability every 5th year thereafter
- Must remind all employees of option to Self ID as to disability at least once between years 1 and 5
- Voluntary VETS Self ID Form pre-offer (one page to identify if protected veteran) (see DBB sample)
- Voluntary VETS Self ID Form used post-offer (more detailed form) (see DBB sample)
- All Self-ID information contained in confidential data analysis file
- Make AAP available to employees/applicants upon request (less data metrics section)
- Reasonable accommodations conversation is offered when requested
- EEO/AA policy statement must indicate CEO/Head of Operation’s support for AAP (see DBB sample)
- Review personnel practices (Appendix C VEVRAA)
- Review mental and physical qualifications for jobs
- Provide reasonable accommodations to physical and mental limitations (see DBB sample)

VEVRAA and §503 Implementation Checklist

- Prevent Harassment of Veterans/Disabled – create policy
- Disseminate EEO/AA policy, conduct outreach and positive recruitment for Vets/Disabled
- Mandatory written notice to all subcontractors, including vendors and suppliers requesting appropriate action (see DBB sample)
- Internal dissemination of policy – employee manual; employer publications; management meetings
- Responsibility for implementation – named official (on communications); provide necessary support staff to implement
- Training of all personnel involved in affirmative action efforts
- Data Collection – retain records for three years
 - Total # of applicants who self-id as disabled and/or protected vets (External **and** internal)
 - Total # of job openings and total jobs filled (External **and** internal)
 - Total # of applicants for all jobs (External **and** internal)
 - Total # of disabled and/or protected vets hired (External **and** internal)
 - Total # of applicants hired (External **and** internal)
- Utilization Goal of 7% disabled in all job groups (unless fewer than 100 employees)
- Hiring Benchmark of 7.2% (or establish own benchmark) for protected Vets (for entire establishment)

IT Issues to Address at new plan year:

- Ensure that ATS and HRIS are capturing/maintaining applicant and employee responses to Self ID for current year plus three years
- Ensure that ATS and HRIS are maintaining confidentiality of the results of Self ID invitations
- Ensure that ATS and HRIS can report the results in a usable format
- Establish a system to identify subcontractors, vendors and suppliers for the purpose of notifying them of VEVRAA/503 AA obligations
- Ensure data metrics retained for current year plus three years

Begin as of second plan year (e.g., 1/1/16 if on a calendar year plan):

- Annual assessment of prior year's outreach efforts – retain three years
- Audit and reporting systems:
 - Measure effectiveness
 - Identify Issues
 - Document and maintain records for 2 years
- Annually evaluate utilization goal progress; identify problem areas; action oriented programs
- Annually evaluate hiring benchmark progress; identify problem areas; action oriented programs
 - Retain records of evaluations for 3 years