

AFFIRMATIVE ACTION UPDATE

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CRITICAL REMINDERS

FOR ALL FEDERAL CONTRACTORS AND SUBCONTRACTORS REGARDING:

- * USE OF THE NEW I-9 FORM
- * UPDATE ON RECORDKEEPING AND REPORTING FOR “JOBS FOR VETERANS ACT”
- * JOB POSTINGS
- * USE OF TEMPORARY AGENCIES TO FILL OPENINGS
- * AFFIRMATIVE ACTION OUTREACH FOR VETERANS AND DISABLED
- * INCLUSION OF THE BECK CLAUSE IN PURCHASE ORDERS AND CONTRACTS

In September 2007 we published a newsletter discussing the above topics and our experiences with OFCCP during recent compliance reviews. We have received questions regarding contractor's obligations as well as continuing to see OFCCP's attention to contractors who are in compliance with the regulations. Because of their critical importance and the amount of attention OFCCP is paying to them, we are publishing a follow-up discussion regarding these topics. **CONTRACTORS MUST BE SURE THEY ARE CURRENTLY IN COMPLIANCE WITH THESE REQUIREMENTS.**

USE OF REVISED I-9 FORM NOW REQUIRED

Effective December 26, 2007 employers are required to use the 2007 revised version of the I-9 form used to verify employment eligibility for new hires. Changes to the I-9 include the removal of five documents from List A of the list of Acceptable Documents. They include: Certificate of U.S. Citizenship (Form N-560 or N-570); Certificate of Naturalization (Form N-550 or N-570); Alien Registration Receipt Card (Form I-151); the unexpired Reentry Permit (Form I-327); and the unexpired Refugee Travel Document (Form I- 571).

Additionally, the most recent version of the Employment Authorization Document (Form I-766) was added to List A of the List of Acceptable Documents on the revised form. The revised list now includes: a U.S. passport (unexpired or expired); a Permanent Resident Card (Form I-551); an unexpired foreign passport with a temporary I-551 stamp; an unexpired Employment Authorization Document that contains a photograph (Form I-766, I-688, I-688A, or I-688B); and an unexpired

foreign passport with an unexpired Arrival-Departure Record (Form I-94) for nonimmigrant aliens authorized to work for a specific employer.

Employers may no longer require the provision of a social security number unless the employer participates in the E-Verify program. Copies of the Form I-9 and the Employer Handbook are available as downloadable PDFs at www.uscis.gov. There are also new guidelines on electronically signing and retaining I-9 forms.

UPDATE ON RECORDKEEPING AND REPORTING FOR “JOBS FOR VETERANS ACT”

Last September we discussed the new regulations from the OFCCP implementing the Jobs for Veterans Act (JVA) which became effective September 7, 2007. The JVA is an amendment to the Vietnam Era Veterans’ Readjustment Assistance Act of 1974 (VEVRAA).

RECORDKEEPING AND REPORTING

The regulations under VEVRAA require contractors to invite applicants and employees to voluntarily self-identify as to their veteran’s status. This information is then used to prepare the annual VETS-100 report. The JVA also has a data collection component regarding the new categories of veterans covered under the Act. Initially, contractors were expected to begin collecting data on the new categories effective September 7, 2007. The expectation was the data would be used in preparing the 2008 VETS-100 reports.

However, on December 28, 2007, the OFCCP announced that until the Veterans Training and Employment Service released a final rule implementing a new VETS-100 report which utilized the JVA categories, it would not cite contractors who were not collecting data on the JVA categories.

While contractors are encouraged to start collecting data on both the VEVRAA and JVA covered categories, until such time as the rule is released, the only requirement is to continue to collect the data currently required under VEVRAA. This means contractors can continue to use their current data collection forms and procedures as long as they are VEVRAA compliant. If a contractor so chooses, they may also collect the JVA data.

The definitions of the categories covered under the JVA are:

Disabled Veteran:

1. A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or
2. A person who was discharged or released from active duty because of a service-connected disability.

Recently Separated Veteran:

Any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service.

Armed Forces Service Medal Veteran:

Any veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces Service Medal was awarded pursuant to Executive Order 12985.

Other Protected Veteran:

A veteran who served on active duty in the U.S. military, ground, naval or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense.

Invitations to self-identify may be made at anytime prior to an applicant beginning employment for all categories that do not ask the applicant to disclose disability status. For Special Disabled Veterans under VEVRAA and Disabled Veterans under the JVA, invitations should be made only after an offer of employment is made. Practically, to facilitate the process, all invitations to self-identify as to veteran's status should be made on a post-offer basis.

A copy of a revised invitation to self-identify under both VEVRAA and the JVA is attached. Contractors choosing not to start collecting JVA data may continue to use their current forms.

OFCCP REGULATIONS REGARDING JOB POSTING WITH STATE EMPLOYMENT SERVICES UNDER THE “JOBS FOR VETERANS ACT”

Effective September 7, 2007 new regulations implementing the Jobs for Veterans Act (JVA) went into effect. In light of current demands on our military, compliance with the Act has become a priority with the OFCCP. The Jobs for Veterans Act was passed in 2002 as an amendment to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).

Under VEVRAA, contractors are required to list all employment openings, with three limited exceptions: (1) executive and top management positions, (2) positions that will be filled from within the contractor's organization, and (3) positions lasting three days or less; with the appropriate local office of the state employment service or with America's Job Bank. Most contractors chose to use America's Job Bank as it allowed for "one-stop" service to meeting this obligation. However, America's Job Bank was shut down at the end of June 2007. The JVA maintains essentially the same job posting requirements as VEVRAA.

With the abolition of America's Job Bank, contractors no longer have access to a public national "one-stop shop" which would allow contractors to meet their job posting obligations. OFCCP has provided the following guidance for meeting the job posting requirement:

“Contractors are to fulfill their job listing requirement by listing job openings with the appropriate employment service delivery system. Contractors may satisfy this requirement by listing job openings with the state workforce agency job bank in the state where the job opening occurs. Contractors also may satisfy the job listing requirement by listing job openings with the appropriate local employment service delivery system where the opening occurs.

The names of the agencies providing these services vary and may include the words ‘Employment Services’, ‘State Workforce Agency’, ‘Employment Security Commission’, ‘Job Service’, ‘Career Center’, ‘Workforce Center’, ‘One-Stop’, ‘Job Center’, or ‘Workforce Development Center’.

A link to the state workforce agency job banks is available at <http://careeronestop.org>. This link will allow contractors to identify those state workforce agency job banks that accept electronically-transmitted job listings.”

What this means is that contractors utilizing public employment service sources have essentially two choices available. The first is for each establishment to list all covered job openings with its local state employment services office. The second is if recruiting is done on a centralized basis, to list the openings for an establishment with the state workforce agency job bank for the state where the facility is located.

There is also an option to use private third party delivery systems to disseminate job openings. Contractors electing to utilize such third party providers remain ultimately responsible for ensuring the jobs are listed as required and documentation of the listing is maintained. Examples of private/fee-based third party referrers are Direct Employers Association and America’s Job Exchange.

The JVA and JVA FAQ stress the need for contractors to maintain documentation of their compliance with the job listing requirements. OFCCP’s recommendations include:

“Such records may include, but are not limited to, copies of emails, other electronic transmissions, facsimiles, or letters to the appropriate employment service delivery system.

A contractor remains responsible for ensuring that its job listings are received by the appropriate employment service delivery system; whether the contractor submits job listings directly to the appropriate employment service delivery system, or uses a third party to deliver the job listings on its behalf.

When using a third party, the contractor must provide documentation that it submitted its job listings to the "for fee" agency or private entity, and that this agency forwarded the job listings to the appropriate employment service delivery system. Documentation regarding the latter effort may include, but is not limited to, the following: an e-mail, fax, or regular mail transmission receipt from the "for fee" agency showing that the job listing had been forwarded to the employment service delivery system, or telephone records documenting communications between the "for fee" agency and the appropriate employment service delivery system.”

USE OF TEMPORARY AGENCIES TO FILL OPENINGS

A fairly common practice by contractors is the use of temporary employees (temps) and then hiring the temps as full-time employees. This practice **does not** relieve the contractor of the obligation to list the opening(s) with the appropriate state employment service. Both VEVRAA and the JVA explicitly state that: “All other employment openings, including those for full-time employment, temporary

employment of more than three days duration, and part-time employment are subject to the mandatory listing requirement.”

This means that when the contractor is ready to convert or hire the temp(s) for full-time employment, the contractor is required to list with the appropriate state employment service. Options for doing so include the following: 1) When ready to hire a temp as a regular employee, the contractor lists the job(s) with the state. While technically correct, it realistically does not provide an opportunity for veterans referred by the state to be considered. 2) When the contractor is ready to bring on temps, the contractor lists the job(s) with the state with instructions for the candidates to go to the temporary agency. 3) When the temporary agency is ready to obtain temps for the contractor, the agency would list the job(s) with the state for opportunities at the contractor. This way the contractor's name would be on the job listing and veterans can be considered on a timely basis.

In terms of which approach makes the most sense, while #1 would be the easiest, it would likely result in veteran referrals from the state not being considered. It is likely that OFCCP would consider this not to be acting in good faith. #2 would give the contractor the greatest credit for meeting its obligations under the Jobs for Veterans and VEVRA and would most likely survive scrutiny by the Agency. While #3 would give the contractor credit for meeting its obligations, should the temporary agency drop the ball and fail to list the opportunities, OFCCP would hold the contractor accountable as the listing obligation is the contractor's and not the temp agency.

Ultimately, it would be safest if when the contractor is ready to bring on temps that the contractor list the jobs with the state with a direction that individuals interested in working for the contractor contact the temporary agency specifically for consideration for placement.

WHO'S AN APPLICANT? IT DEPENDS!

In the above scenario, the question then becomes who would be the applicants listed on the applicant flow log? If the contractor is making hiring selections from the temporaries working at the facility, is it one applicant for one hire? Since the selection is coming from the pool of temporaries working for the contractor, would it be all the temporaries employed at the time of the selection? If the temporary agency is sending temps for the contractor to screen for placement at the contractor's facility, is it all the temps sent to the facility for review? Or, because the temporary agency is acting as the contractor's proxy in obtaining candidates for placement at the facility, is it all the individuals screened by the agency who met the basic qualifications for the temp positions at the facility, whether or not the individuals are forwarded for review?

Whether the call to the state is coming from the contractor or the temporary agency, the fact is that there is an applicant pool for those jobs which the temporary agency is screening for the contractor. The temporary agency is acting as the contractor's agent (proxy) in terms of obtaining, screening and advancing candidates.

While the contractor would obviously prefer to have as small an applicant pool as possible and would also prefer to only include those individuals over whom the contractor has some control and contact for recordkeeping purposes, based on the changes in the JVA, it does not appear that limiting the pool to only those temporaries working at the facility is an option. If the temporary agency received 100

minority candidates and referred none of them to the contractor, then the contractor would still be held accountable for any issues that would come from these practices.

It is likely that if OFCCP was aware that the contractor was hiring from the temporary workforce, it would ask the question, “Who is the contractor considering as an applicant?”. Based on the JVA, if the contractor replied it was the temps working at the facility, OFCCP should find a violation of the regulations and require the contractor to implement procedures to keep records of all individuals screened by the temporary agency who meet the basic qualifications for the position. On the other hand, during a desk audit, OFCCP conducts its initial analysis based on the data submitted by the contractor. If the data shows no adverse impact in hiring, it is unlikely that OFCCP would even inquire as to whether the contractor is using temps and if so, who the contractor is including in the applicant flow.

OFCCP REQUIREMENTS REGARDING AFFIRMATIVE ACTION OUTREACH FOR VETERANS AND THE DISABLED

In addition to requiring the posting of job(s), both VEVRAA and the JVA require contractors to engage in outreach and good faith efforts to provide employment opportunities for veterans. A comparable obligation exists under the Rehabilitation Act regarding the disabled. All too often, contractors mistakenly believe that merely listing job openings with the appropriate job services office satisfies this obligation. It does **not**.

OFCCP specifically recommends the following steps for contractors to undertake in meeting their outreach obligation:

- “Create partnership arrangements with local and national recruiting sources for referral of qualified covered veteran and disabled applicants;
- Establish a relationship with the Local Veterans' Employment Representative or his or her designee;
- Recruit covered student veterans at educational institutions;
- Create partnership arrangements with veterans' service organizations to employ qualified covered veterans;
- Establish relationships with the Veterans Administration Medical Center job placement programs;
- Advertise job openings and recruit qualified covered veterans and the disabled during company career days and/or related activities in the local community;
- Encourage subcontractors to seek qualified covered veterans and the disabled for employment opportunities; and
- Contact the Local Veterans' Employment Representative when new Federal contracts are obtained, or when significant hiring will occur.”

Many of these recommendations can only be undertaken at the local level. **Therefore EEO Officers at individual establishments must identify the opportunities and actions available locally and implement the above recommendations.**

There are organizations at a national level providing contractors with opportunities to reach out to veterans. These include HireVetsFirst, GIJob.net, America's Service Locator, and the Department of Veteran's Affairs Vocational Rehabilitation & Employment Services.

INCLUSION OF BECK CLAUSE IN PURCHASE ORDERS AND CONTRACTS

As of April 28, 2004 government contractors operating under contracts entered into after April 18, 2001 were required to post notices informing employees covered by a "union-security agreement" of their right not to join a union or pay fees to the union that would not be used on activities related to collective bargaining, such as supporting political candidates. As with the affirmative action regulations, covered contractors must also notify their subcontractors and vendors of their obligation to post the notice and a clause to that effect must be included in subcontracts. The entire clause does not have to be included verbatim but may be incorporated by reference.

The posting, referred to as the "Beck Notice," is named after the 1988 Supreme Court decision in *Communications Workers v. Beck* which held that a union may not spend agency fees of objecting members on activities unrelated to collective bargaining, contract administration or grievance adjustment.

The clause does not have to be included in government contracts for purchases below the Simplified Acquisition Threshold, currently \$100,000 or under \$200,000 if the contract is for supplies and services provided to the Department of Homeland Security. The clause also applies for contracts for indefinite purchases unless the contractor has reason to believe the total amount to be ordered in a year would be less than the Simplified Acquisition Threshold. Also, certain contractors or work sites are exempt from the Executive Order. The posting requirement does not apply to:

"Contractor establishments where state law forbids enforcement of union-security clauses ("right-to-work" states)."

Contractors may submit a written application to the DOL for a compliance exemption for facilities that are "separate and distinct" from the activities related to the performance of the contract.

Per the OFCCP:

"The clause can be incorporated by language such as "The contractor agrees to comply with the provisions of 29 CFR part 470."

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