

AFFIRMATIVE ACTION UPDATE

**** NEWS FLASH ****

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PROPOSED REVISIONS TO VETERAN'S AFFIRMATIVE ACTION REGULATIONS

On April 26, 2011, the OFCCP published proposed revisions to the current regulations governing the affirmative action obligations for Veterans. The current regulations were developed in response to The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). The implementing regulations were amended by the Jobs for Veterans Act (JVA) which became effective in June, 2008.

The proposed new regulations substantially revise contractors' and subcontractors' obligations and most likely provide a review of the expected revisions to the regulations regarding affirmative action for the disabled that is expected to be released later this year. In addition, the proposed regulations would expand the power of the OFCCP to obtain records as well as the ability of the Agency to look forward and backwards from the date of a scheduled compliance review. These revisions have the practical effect of changing other OFCCP practices and guidelines without the Agency having to go back and change the other regulations themselves.

In regard to the obligations of contractors and subcontractors (contractors), the proposed changes include:

EXPANDED OUTREACH, LINKAGE AND JOB LISTING REQUIREMENTS

Contractors would be required to establish linkage agreements with the Local Veterans Employment Representative of the job services agency of the state in which they are located. In addition, they would have to list jobs with the job services agency in the manner required by the agency. This means that if a contractor is relying on a third party to deliver job openings to the state job services, the contractor will have to ensure that the 3rd party is listing jobs as required.

Contractors would have to establish a linkage agreement with one of five specifically listed organizations as well as establishing a linkage agreement with one other veterans' resource organization from the OFCCP's National Resource Directory.

Contractors using temporary agencies for staffing purposes must provide the local employment service with the contact information of these organizations. Using a temporary agency does not eliminate the requirement to post job openings with the state employment services agency and conduct local outreach.

INVITATIONS TO SELF-IDENTIFY

The proposed regulations would require contractors to make two invitations to self-identify as to veterans status.

- Pre-Offer – All applicants would be invited to self-identify as a “protected veteran” without disclosing their specific status on a pre-offer basis.
- Post Offer – Individuals receiving an offer would be invited to self-identify as to their particular veteran status (one of the five current veteran’s categories reported on the VETS-100 and VETS-100A reports).

EXPANDED DATA COLLECTION AND RETENTION REQUIREMENTS

Contractors would be required to collect and retain for three years (instead of the two years currently required), the following information:

- The number of priority veteran referrals from the state; the total number of all referrals from the state; and the ratio of priority veteran referrals to the total referrals (referral ratio).
- The total number of jobs filled; the total number of job openings; and the ratio of jobs filled to job openings.
- The number of applicants who self-identified as veterans; the total number of applicants for all jobs; and the ratios of protected veterans to all applicants.
- The number of protected veterans hired; the total number of applicants hired; and the ratio of protected veterans hired to all hires (hiring ratio).

DEVELOPMENT OF HIRING BENCHMARKS

Contractors would be required to establish benchmarks for hiring veterans, similar to the goals established under the AAPs for minorities and females. The benchmarks would be based on:

- The percentage of veterans in the civilian labor force in the state where the contractor is located over the past three years.
- The number of veterans during the past four quarters who participated in the employment service delivery system in the state where the contractor is located.
- Recent assessments of the outreach and recruitment efforts.
- The prior year’s referral, applicant and hiring ratios.
- Other factors including where the contractors are located and the jobs available.

Documentation regarding the determination of the benchmarks must be retained for five years. It should be noted that, there is nothing in the development of the benchmarks that relates to whether veterans who are available for consideration have the requisite skills necessary to perform the jobs in the contractor's establishment.

INTERNAL DISSEMINATION AND TRAINING

Contractors would have to include their affirmative action policy in their policy manuals. They would have to hold annual meetings with all employees to inform them of the policy as well as meet with managers to review the policy and the manager's responsibilities under the policy. Contractors would have to cover the policy in new employee orientation and management training programs. If subject to a collective bargaining agreement, they must meet with union officials and inform them of the policy.

Contractors would also conduct training for personnel making employment decisions covered by the affirmative action program. The training would cover the benefits of employing protected veterans; sensitivity towards applicants and employees who are protected veterans; legal responsibilities regarding protected and disabled veterans including reasonable accommodations and the rights and responsibilities of contractors and protected veterans.

ADDITIONAL REQUIREMENTS

In addition to the above, the regulations would require contractors to comply with the following other requirements:

- They would have to include the Veterans' EEO Clause in its entirety in all contracts and purchase orders instead of incorporating it by reference.
- They would have to annually review and document the physical and mental requirements of all jobs and explain how they are job related and necessary to the performance of the job.
- They would have to document all instances where a protected veteran was considered for employment or promotion and not selected.
- They would have to document all instances where a reasonable accommodation was requested or considered for a disabled veteran or special disabled veteran.
- They would have to consider a protected veteran who expressed interest in a position not only for that position, but also for all positions for which they are qualified.

EXPANSION OF CURRENT AUTHORITY

The new regulations would expand the OFCCP's authority to obtain data. The OFCCP would be able to require contractors to provide records however they are stored or requested. So if the OFCCP wanted applicant data electronically in Excel format instead of a hardcopy flow log, the contractor would have to provide it.

Currently, the OFCCP cannot expand the scope of a compliance review past the date of the receipt of the scheduling letter. The proposed regulations would allow the OFCCP to expand the time-frame of the review past that date if considered necessary to investigate potential violations. This effectively overrules the recent ALJs' decision in *Frito-Lay* that limited the scope of the review. However, it does not appear that this would apply to reviews of EO 11246 AAP for minorities and females, at least not at this point.

SUMMARY

The proposed regulations substantially expand the compliance obligations of contractors in regard to protected veterans. This gives us a hint of what to expect when the revised disabled regulations are published. The proposed regulations broaden the Agency's power to compel the provision of data and the time frame subject to review. Contractors are advised to begin to review their Applicant Tracking Systems (ATS) to determine what would be involved in capturing, retaining and monitoring the above information. They are also advised to begin reviewing current resources to determine how they would undertake these new obligations.

If there are any questions or comments concerning anything contained above, they can be directed to this office at the address shown above, 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, LLC and does not represent nor is intended as a substitute for professional legal advice.