# Construction Bills: Recent Changes to Construction Laws

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**New Veteran and Disabled Individual Affirmative Action Requirements for Federal Contractors**

On September 24, 2013, the US Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) published new rules to the *Federal Register* increasing affirmative action and record-keeping requirements for federal contractors and subcontractors with respect to veterans[1] and individuals with disabilities.[2] These rules became effective March 24, 2014, for contractors that did not yet have an affirmative action program in place. For contractors with existing affirmative action programs the changes take effect with the beginning of the contractor's next plan year.

The new affirmative action rules are embodied in corresponding changes and updates to regulations implementing two principal federal laws. One is the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA),[3] as amended, which prohibits employment discrimination against disabled veterans, recently separated veterans, active-duty wartime or campaign badge veterans, and armed forces service medal veterans. The other is section 503 of the Rehabilitation Act of 1973 (Rehabilitation Act),[4] as amended, which prohibits employment discrimination against individuals with disabilities. Although the new rules vary slightly in their requirements, together they represent parallel obligations for affirmative action by federal construction contractors. The most significant aspects of the new rules are summarized below, along with a discussion of a legal challenge brought by a contractor trade organization.

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***Contract and Contractor Size Thresholds***

Both sets of rules now apply to federal contracts for the sale or use of personal property or nonpersonal services, which includes construction. They provide thresholds for both the size of the contractor's company and the federal contracts to which they apply.

The nondiscrimination and affirmative action regulations for individuals with disabilities under the Rehabilitation Act apply to all government contracts and subcontracts in excess of $10,000.[5] In addition, contractors with 50 or more employees and a contract of $50,000 or more are now required to maintain an affirmative action program for disabled individuals.[6]

The threshold for application of the VEVRAA affirmative action regulations is 50 or more employees and a contract of $100,000 or more.[7] All contractors meeting this threshold are subject to the VEVRAA requirements for implementation of an affirmative action program.

***Affirmative Action Program***

For contractors meeting the applicable thresholds set forth above, the required affirmative action program must contain the elements established under each of the two regulatory frameworks and be implemented within 120 days of commencement of the contract.[8] The two sets of regulations identify nearly identical elements for each affirmative action program.[9]

Included in these elements is a required policy statement identifying, among other things, that the contractor will recruit, hire, train, and promote persons in all job titles and ensure that all other personnel actions are administered without regard to the employee's protected status as a disabled individual/veteran. The policy statement must also state that such applicants and employees will not be subject to harassment, intimidation, threats, coercion, or discrimination because they filed a complaint, assisted in an investigation or other proceeding, opposed unlawful practice under the VEVRAA/Rehabilitation Act or exercised any other right protected thereby and that the contractor will further develop and implement procedures to ensure that its employees are not harassed because of their status as a protected individual.

The contractors' affirmative action program must provide for the review of personnel processes to ensure that they provide for the careful and systematic consideration of applicants from protected classes for hiring and promotion and to avoid stereotyping and limiting access to employment for qualified individuals. Contractors are

 

further required to review physical and mental qualifications to ensure that such qualifications are job-related, are consistent with business necessity, and do not unnecessarily screen out qualified protected applicants. As part of the affirmative action program, contractors must make reasonable accommodation to known physical or mental limitations of qualified applicants, unless such accommodation would pose an unreasonable hardship on its business.

In order to ensure recruitment of protected individuals for employment, contractors must undertake outreach and positive recruitment activities, of which the regulations provide several examples.[10] The extent to which contractors must undertake such efforts is dependent on the circumstances, including the "contractor's size and resources and the extent to which existing employment practices are adequate."[11] Contractors must implement an internal auditing program and on an annual basis review outreach efforts to evaluate their effectiveness in identifying and recruiting qualified protected individuals. If, as part of the evaluation, the contractor determines that its efforts were not effective in recruiting qualified protected individuals, it must implement alternative efforts.

Contractors must make their affirmative action program available, at a minimum, by disseminating the policy internally by including it in policy manuals and providing it to union officials and employee representatives.

### *Affirmative Action Benchmarks*

Both the new VEVRAA and Rehabilitation Act rules implement for the first-time quantitative benchmarks for a contractor's utilization of the protected class of employees (veterans and individuals with disabilities). Although utilizing different terminology for these thresholds, both sets of rules, as well as the commentary to the rules published by OFCCP,[12] make clear that these percentage benchmarks do not represent "quotas" or a ceiling or floor. Such quotas are, in fact, forbidden.[13]

The goal is instead to assign a "benchmark against which the contractor must measure the representation of individuals within each job group in its workforce."[14] However, a contractor's failure to attain the utilization goal, in and of itself, will not constitute a finding by or admission of discrimination in violation of the rules.[15]

The new Rehabilitation Act rules establish a seven percent "workforce utilization goal" for individuals with disabilities within each job group in a contractor's workforce.[16] Such job groups are established under Executive Order 11246, which prohibits federal contractors from discriminating in employment decisions based on race, color, religion, sex, or national origin. For contractors with 100 or fewer employees, the utilization goal is relaxed from application to each job group, to the contractor's entire workforce.

The application of the workforce utilization goal to job groups, in itself, presents a distinctly new challenge for construction contractors to identify and classify job groups. Although, under Executive Order 11246, federal contractors are subject to certain affirmative action obligations, it specifically exempted *construction* contractors from having to apply those participation goals to job groups. Construction contractors were further exempt from obligations to establish written affirmative action programs under Executive Order 11246. As a result, contractors have criticized the new requirements for application of affirmative action benchmarks to job groups for individuals with disabilities, arguing construction employment is project-based, transitory, and seasonal, with workforces that vary widely day-to-day.[17]

The new requirements under VEVRAA similarly implement a utilization benchmark for veteran participants, although it gives contractors two options for selecting its value:

(1) a published value equal to the national percentage of veterans in the civilian labor force as established annually by OFCCP, which for the year 2014 was 7.2 percent, or

(2) a value established by taking into account a combination of certain veteran labor participation data within the state where the contractor is located and the contractor's own hiring data, along with factors relating to the contractor's hiring and recruitment practices.[18]

By allowing selection of a published standard, the first option represents a certain and simple method for determining the applicable benchmark. Although the second option represents a more complex and subjective calculus for determining the applicable benchmark, its intent is to alleviate specific local employment conditions or specific job types from having to meet an inflexible national standard.[19] Whether such a complex calculus will meet that objective without subjecting the process to uncertainty and scrutiny will remain to be seen. Unlike the benchmark for disabled individuals, the benchmark for veterans is applied across the contractor's entire workforce, regardless of the contractor's size.

The benchmarks for both veterans and individuals with disabilities require contractors to document the benchmarks and evaluate their utilization of individuals among each job group or their entire workforce, as applicable to the particular standard. OFCCP expects that the goals are obtainable through a contractor's compliance with all other aspects of the affirmative action requirements.[20]

### *Record Keeping and Data Collection*

The regulations impose new data collection obligations on contractors to annually record the following information[21] and maintain such data for three[22] years:

1. The number of applicants who self-identified, or who are otherwise known to be veterans/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 who are protected veterans or have disabilities that are hired; and
5. The total number of applicants hired.

Although the benchmarks for disabled individual utilization under the Rehabilitation Act rules require evaluation by job group, contractors are not required under the Rehabilitation Act or VEVRAA regulations to identify and evaluate the five data metrics by job group.

***Self-Identification***

One unexpected aspect of the new regulations for both veterans and individuals with disabilities is a requirement that contractors invite job applicants and current employees to "self-identify" as either of the two protected classes or both, in the case of disabled veterans.[23] At the time the applicant applies for a job or is considered for employment, a contractor is required to invite that applicant, either through the application materials or separate from the application, to inform the contractor whether the applicant believes that he or she is an individual with a disability or a veteran. As continued from the previous rules, after an offer of employment is extended to an applicant and before the applicant begins work, the contractor must again invite the applicant to self-identify as an individual with a disability or a veteran.

Separate from the obligations for new employees, a contractor must invite each of its current employees to voluntarily self-identify during the first year that the contractor is subject to the regulations and thereafter at five-year intervals. At least once during the intervening years between invitations, the contractor must remind its employees that they may voluntarily update their status. To invite self-identification, contractors may utilize either a form published by OFCCP or their own forms for inviting applicants to self-identify, provided the contractor's form meets certain requirements.[24]

Although the new requirements represent increased record keeping and compliance burdens, it is most significant that contractors are now required to request that applicants identify as a disabled individual, despite the fact that under the Americans with Disabilities Act (ADA), employers are barred from soliciting information from applicants regarding their disability status. These new regulations establish an exception to the prior ADA prohibition on requesting such information from applicants.

***Inclusion of Equal Opportunity Clause in Subcontracts***

Federal contractors are now required to include an equal opportunity clause in each of their subcontracts that are subject to the regulations, although the clause need only be made a part of the contract by citation to 41 C.F.R. section 60-300.5(a) and 41 C.F.R. section 60-741-5(a), respectively, and inclusion of substantially similar language, in bold text, after the citation for each regulation. For example, the required language for VEVRAA is as follows:

> This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a). This regulation prohibits discrimination against qualified protected veterans, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans.

***Preaward Compliance Evaluations***

Before award of any contract of $10 million or more, the prime contractor and its known first-tier subcontractors with subcontracts of $10 million or more are subject to a compliance evaluation by OFCCP, unless OFCCP has conducted an evaluation and found them to be in compliance within the preceding 24 months.[25] OFCCP has 15 days from notice of the awarding agency to inform of its intention to conduct an evaluation. In such event, OFCCP will be allowed an additional 20 days to provide its conclusions as to clearance.

***Legal Challenge to the Rehabilitation Act Regulations***

In November 2013, Associated Builders & Contractors, Inc. (ABC) brought a lawsuit in the US District Court for the District of Columbia seeking to enjoin the implementation and enforcement of portions of the new Rehabilitation Act regulations.[26] ABC argued that the new data collection, data analysis, and utilization rules were contrary to OFCCP's authority under the Rehabilitation Act, were arbitrary and capricious, and violate the Regulatory Flexibility Act.[27] Three days before the effective date of the new rules, the court issued an opinion on cross-motions for summary judgment defeating all of ABC's arguments and dismissing the action.[28]

The court found that OFCCP had broad authority under the Rehabilitation Act to define the scope of the requirements that the government may require be inserted into contracts, including requirements that contractors "take affirmative-action" with respect to employment of individuals with disabilities. This authority includes the ability to define the legal obligations a contractor has to undertake in hiring, which includes authority to issue benchmarks for contractor affirmative action efforts and the compilation of data to track progress. Rejecting ABC's alternate arguments, the court found that the language of neither the Rehabilitation Act nor the ADA precludes or places limits on the use of benchmarks for workforce diversity or data collection and analysis.

With respect to the obligations under the regulations requiring contractors to request that applicants self-identify at the time of application, ABC argued such data collection exceeded OFCCP's authority because it violated the ADA prohibition of employers from "making inquiries of a job applicant as to whether such applicant is an individual with a disability." The court rejected ABC's argument, finding that the ADA does not govern voluntary disclosures offered or initiated by employees. In addition, the court looked to the legislative history of the ADA requirements, finding that they were intended to permit a covered entity's invitation to applicants to indicate whether, and to what extent, they are disabled when the contractor is taking affirmative action

 

pursuant to the Rehabilitation Act.

ABC further argued that the obligations to collect and analyze data were arbitrary and capricious on the basis that they were unjustified departures from past practice and not tailored to qualified individuals with disabilities. The court rejected these arguments, finding that (a) prior regulations already required contractors to collect data from newly hired employees; (b) collection of data from job applicants provides valuable information regarding the number of individuals with a disability that apply for work with the individual contractor as well as the construction industry as a whole; and (c) prior regulations already required contractors to gather and analyze data, and despite prior exemption of construction contractors to certain rules, OFCCP had a reasoned explanation to include construction contractors in the new rules.

ABC also unsuccessfully challenged the utilization goal as arbitrary and capricious. The court found that the failure of past regulations demonstrated a need for a utilization goal. Despite ABC's argument that construction contractors posed a unique circumstance where work is typically project-based, transitory, and seasonal, OFCCP found that the construction industry was not uniquely unable to comply with the utilization goal.

With regard to the utilization goal itself, the court found that although there was no data available reflecting the number of individuals with disabilities who wish to find construction work, OFCCP's determination using available data and estimations was reasonable and that the utilization goal represented only a benchmark figure toward which government contractors should strive—not a hard and fast quota.

Finally the court rejected the argument that the new rules violated the Regulatory Flexibility Act,[29] which requires agencies to analyze the impact of their regulations on small businesses. In complying with the Regulatory Flexibility Act, OFCCP estimated that to comply with the new Rehabilitation Act regulations, contractors with 50 to 100 employees would expend $3,318 per year, or .02 percent of their average receipts, while contractors with 100 to 500 employees would spend $5,197 per year, or .01 percent of their average receipts. Despite ABC's protestations that OFCCP's analysis incorrectly assumed contractors already had systems in place under Executive Order 11246 to perform the newly required tasks, the court found that contractors did in fact already have an obligation to group employees to meet benchmarks for workforce diversity and therefore should have already had systems in place to categorize its workforce. As a result, the court found that it was reasonable for OFCCP to assume that compliance with the new rules would not require the creation of a much more costly new system.

**Endnotes**

1. 41 C.F.R. § 60-300.
2. 41 C.F.R. § 60-741.
3. 38 U.S.C. § 4212.
4. 29 U.S.C. § 701.
5. 41 C.F.R. § 60-741.1(b).
6. 41 C.F.R. § 60-741.40(b).
7. 41 C.F.R. § 60-300.1(b).
8. 41 C.F.R. § 60-741.40(b)(2); 41 C.F.R. § 60-300.40(b).
9. 41 C.F.R. § 60-741.44; 41 C.F.R. § 60-300.44.
10. 41 C.F.R. § 60-741.44(f)(2); 41 C.F.R. § 60-300.44(f)(2).
11. 41 C.F.R. § 60-741.44(f); 41 C.F.R. § 60-300.44(f).
12. *See* Office of Fed. Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans, 78 Fed. Reg. 58,614, 58,640, 58,708, 58,785 (Sept. 24, 2013).
13. 41 C.F.R. § 60-741.45.
14. *Id.*; 41 C.F.R. §60-300.45.
15. 41 C.F.R. § 60-741.45(g); 41 C.F.R. § 60-300.45(g).
16. Job groups are established under Executive Order 11246, in accordance with either 41 C.F.R. part 60-2 or 41 C.F.R. part 60-4, as appropriate.
17. *See* Associated Builders & Contractors, Inc. v. Shiu, CV 13-1806, 2014 WL 1100779 (D.D.C. Mar. 21, 2014).
18. 41 C.F.R. § 60-300.45. The data and factors to be taken into account by a contractor to determine the applicable benchmark are as follows:
    (i) The average percentage of veterans in the civilian labor force in the State(s) where the contractor is located over the preceding three years, as calculated by the Bureau of Labor Statistics and published on the OFCCP Web site;
    (ii) The number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the State where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP Web site;
    (iii) The applicant ratio and hiring ratio for the previous year, based on the data collected pursuant to § 60-300.44(k);
    (iv) The contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts, as set forth in § 60-300.44(f)(3); and
    (v) Any other factors, including but not limited to the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.
19. Office of Fed. Contract Compliance Programs, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans, 78 Fed. Reg. 58,614, 58,639 (Sept. 24, 2013).
20. *Id.* at 58,708, 58,785.
21. *See* 41 C.F.R. § 60-741.44(k)(1); 41 C.F.R. § 60-300.44(k)(1).
22. Prior regulations required only two years. *See* 41 C.F.R. § 60-741.80; 41 C.F.R. § 60-300.80.
23. 41 C.F.R. § 60-741.42; 41 C.F.R. § 60-300.42.
24. 41 C.F.R. § 60-300.42(c).
25. 41 C.F.R. § 60-741.60(c); 41 C.F.R. § 60-300.60(d).
26. Associated Builders & Contractors, Inc. v. Shiu, CV 13-1806, 2014 WL 1100779 (D.D.C. Mar. 21, 2014).
27. 5 U.S.C. §§ 601–612.
28. Memorandum Opinion, Docket No. 29, Associated Builders & Contractors, Inc. v. Shiu, CV 13-1806, 2014 WL 1100779 (D.D.C. Mar. 21, 2014).
29. 5 U.S.C. §§ 603, 604.

 