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Federal contractors may face new compliance burdens

By Jon A. Geier and Maria A. Audero

On Dec. 9, the Office of Federal Contract Compliance Programs (OFCCP) issued proposed regulations to implement Section 503 of the Rehabilitation Act of 1973, as amended. Section 503 prohibits discrimination by federal contractors against individuals with disabilities and requires them to take affirmative action in the employment of such individuals.

The non-discrimination and affirmative action obligations apply to all federal contractors (and subcontractors) with contracts in excess of \$10,000. The requirement to prepare and maintain an affirmative action program applies only to contractors with both 50 or more employees and contracts of \$50,000 or more. Failure to abide by these requirements can result in substantial sanctions against the contractor, including the withholding of progress payments under the contracts, the termination of contracts, and the loss of eligibility for receiving future contracts.

The thrust behind the proposed regulations is the concern by the Department of Labor that, even after 40 years since the passage of the Rehabilitation Act, there still exists stark disparities facing working-age individuals with disabilities. According to the department, this group suffers a 13 percent unemployment rate — one and one-half times the rate of those without disabilities.

OFCCP Director Patricia A. Shiu commented that the current regulations, requiring only “a good faith effort to recruit and hire people with disabilities,” simply are “not working.” The proposed regulations, she said, would “require real accountability and provide the clearest possible guidance” for complying with the law.

The 60-day comment period for the proposed regulations ends on Feb. 7, 2012.

The proposed regulations represent a sea change in the OFCCP’s approach to

compliance under Section 503. In addition to bringing the regulations into harmony with the Americans with Disabilities Act Amendments Act of 2008, they expand the obligations of contractors in seven primary areas.

A new single, national utilization goal. The most radical new requirement is the establishment of a single, national utilization goal for individuals with disabilities. According to the OFCCP, this is not intended to be used as a quota. Instead, it would represent an equal employment opportunity objective and measurement benchmark.

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The OFCCP preliminarily set the goal at 7 percent across each job code, but invites public comment on this preliminary goal as well as a range of values between 4 percent and 10 percent. In addition, the OFCCP is considering, and seeks comment on, the inclusion of a 2 percent sub-goal for individuals with certain severe disabilities — total deafness, blindness, missing extremities (hand, foot, arm or leg), partial and complete paralysis, epilepsy, severe intellectual disability, psychiatric disability, and dwarfism.

Stronger affirmative action provisions. The proposed regulations detail the specific contents of a contractor’s affirmative action program. Although currently these practices are recommended only, under the proposed regulations, many would be mandated. These include annual reviews of personnel processes to ensure protections against stereotyping and harassments of individuals with disabilities; listing of job openings with “One Stop Career Centers” and linkage agreements with specified local organizations; increased outreach and recruitment efforts; ongoing measurement

and reporting of the effectiveness of the affirmative action program and the need for remedial action; and training of all personnel involved in the recruitment, hiring, and disciplinary processes.

Earlier and more aggressive self-identification requirements. The current rules regarding post-offer, pre-employment solicitation of disability status would remain largely unchanged. However, the proposed regulations would require contractors to solicit job applicants to self-identify as disabled, though seeking this information only as to the existence, not the general nature, type, or limitations of the disability. In addition, contractors would be required to provide their incumbent employees an annual opportunity to self-identify their disabilities. To obtain this information, contractors would survey their applicants and employees using the language and methodology mandated by the OFCCP.

Written procedures for processing requests for reasonable accommodation. The proposed regulations would require those contractors that are obligated to develop an affirmative action program also to develop and implement written procedures for processing requests for reasonable accommodation. These procedures would serve as a “blueprint” for the consistent handling of reasonable accommodation requests and are aimed at ensuring applicants and employees are aware of a contractor’s obligations and how to access them.



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Priority consideration of individuals with disabilities. Another new provision would encourage contractors to voluntarily develop and implement programs to provide priority consideration of individuals with disabilities in recruitment and hiring. The proposed regulations provide a non-exhaustive list of such possible programs, including assigning a weighted value or additional “points” to job applicants who self-identify as being an individual with a disability, developing a job training program focused on the specific needs of individuals with certain disabilities such as traumatic brain injury or developmental disabilities, and utilizing linkage agreements to recruit program trainees.

New notice requirements. The agency proposes substantive modifications to the mandated Equal Opportunity Clause. In contrast to the current rules that require incorporation of the clause by reference into all contracts, the proposed regulations would require its lengthy, verbatim recitation in each contract. Intending to draw increased attention to a contractor’s equal employment obligations, the proposed regulations also would require modification of the equal opportunity notice with language that recognizes affirmative action for disabled individuals, electronic postings, modification of recruitment postings

and Internet applications, display larger print or Braille to assist visually disabled individuals, and notification to recruitment sources.

Increased data collection and retention obligations. Consistent with the proposed amendments to regulations governing affirmative action plans for veterans, the OFCCP seeks to alter dramatically how contractors prepare affirmative action plans for individuals with disabilities. Currently, such plans contain only narrative descriptions of outreach, recruitment, and hiring of individuals with disabilities.

The proposed regulations would add quantitative analyses to these plans, drastically changing the scope of plans for individuals with disabilities. The agency will demand more rigor in affirmative action plans, such that the plans would not be a mere a paperwork exercise, but rather would contain quantifiable measurements of the contractor’s affirmative action efforts.

Miscellaneous proposals. There are numerous miscellaneous changes in the proposed regulations, including pre-award compliance evaluations under certain circumstances, additional outreach efforts at schools and work study programs, and increased internal dissemination of its affirmative action policies.

Secretary of Labor Hilda L. Solis heralded the proposed regulations as “one of the most significant advances in protecting the civil rights of workers with disabilities since the passage of the Americans with Disabilities Act.” She noted that, if adopted, they “will help federal contractors better fulfill their legal responsibility to hire qualified workers with disabilities.”

Putting aside the policy implications, contractors will face significant new challenges in achieving compliance. The record-keeping and documentation obligations will require modifications to applicant tracking systems. The documentation of referrals from parties to linkage agreements may require additional headcount, as well as possible new technology. And, in order to ensure these policies and procedures are carried out properly, there will be a need for increased management training.

Given the expansion of the definition of who will be considered to be an individual with a disability, more and more employees will be protected under these new rules. The likely result will be in a sharp increase in the burdens of the interactive process and the number and scope of the reasonable accommodations that will be necessary, and a concomitant increase in the likelihood that the OFCCP will find discrimination.