



Affirmative Action and Compliance

Keeping Up with the OFCCP

2015 - The Year of Transition

By now, all covered contractors should be in their transitional affirmative action program under the revised “Section 503” disability regulations and “Section 4212” veterans regulations. The “transitional” year was part of the OFCCP’s “phased in implementation approach” to give contractors adequate time to come into full compliance with the new requirements.

In a related development, beginning last October, the OFCCP began using a revised scheduling letter and itemized listing. The revised scheduling letter and itemized listing almost doubles the number of itemized requests for information—specifically to verify compliance with the new 503/4212 obligations. While contractors should be prepared to demonstrate full compliance with some of the new regulations, they should be able to provide substantial reasons for the delay of any for which they are still not in full compliance. Please also keep in mind that all previous 503/4212 requirements that were not affected by the revisions will continue to be enforced in full.

New requirements that should be fully implemented now include:

- ✓ Notification to all state employment delivery systems of company contractor status, expressing desire for priority veteran referrals, and contact information
- ✓ Notification to Labor Organizations
- ✓ “EEO is the Law” accessible for remote employees
- ✓ Integrate link to “EEO is the Law” poster in online application system
- ✓ Preparation to provide “EEO is the Law” to applicants/employees in alternative format if requested as an accommodation.
- ✓ Update taglines in job postings and advertisements to include reference to disability and veterans status
- ✓ Update Equal Opportunity clause references in covered subcontracts and purchase orders.
- ✓ Change “other protected veteran” to “active duty wartime or campaign badge veteran” in all public facing material
- ✓ Ensure process is in place for online applicants to request accommodation when applying

Phased-in items that the OFCCP likely expects to be fully implemented now include:

- ✓ AAP Policy Statement with senior most executive support for AAP and the policy available in alternate format if requested as an accommodation
- ✓ Notification to subcontractors and vendors of company status as a federal contractor requesting appropriate action on their part
- ✓ Notification to Union of AAP policy
- ✓ Availability of AAP policy to all employees

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2015 - The Year of Transition *(cont'd)*

Phased-in items that should NOT result in a violation if not yet implemented include:

- ✓ Veterans Self-Identification Form (post offer/pre-employment) updated to replace "other protected veteran" language.
- ✓ Disability Identification Form CC305. Remember this form is required for all three required disability self-identification invitations (i.e., pre-offer, post offer/pre-employment and the 5 year resurvey). If you have not successfully implemented the CC305 into all of these stages, make sure you can explain the difficulty and have identified solutions if asked by the OFCCP.
- ✓ 5 year Disability Survey
- ✓ Disability Utilization Analysis. If you choose to delay your first disability utilization survey until after the completion of the first employee survey, be prepared to explain your reasoning to the OFCCP.
- ✓ Data Metrics
- ✓ Assessment of Outreach and Recruiting Efforts
- ✓ Veteran Hiring Benchmark
- ✓ Audit and Reporting System

There is still a large amount of uncertainty among contractors regarding what compliance is supposed to look like under the OFCCP's revised 503/4212 regulations, much less how far along a company should be in their transitional AAP year. With many of these items having found their way onto the new scheduling letter, contractors should take care when preparing audit submissions that require items that may either be in their infancy stages or not yet developed.

Private Sector Veterans Preference Laws

The number of states with Veterans Preference Laws has grown from 2 to 21 since 2012. Private sector employers in the following states are now permitted to adopt veterans' preference policies. In most of the states, these preferences are voluntary, the discharge must have been under honorable conditions, spousal preferences are provided and use of these laws provide safe harbor from state EEO Law. Most of the laws are similar with the respect to their scope, application, and eligibility requirements. The states are Washington, Minnesota, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Massachusetts, Michigan, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Carolina, Virginia and Utah. In addition, similar bills are pending in the state legislatures of Alabama, Alaska, California, Illinois, Kansas, New Hampshire, New York and Texas.

For more information, go to:
<http://www.fedshirevets.gov/job/vetpref/index.aspx>

One-to-One Hiring Risks

Recruitment and hiring violations routinely represent the majority of OFCCP violations cited each year. Last year, for example, the OFCCP collected more than \$11 million in back pay from federal contractors, with the vast majority of that amount coming from hiring cases.

In recent contractor discussions, it is becoming evident that OFCCP compliance officers are alleging violations of OFCCP regulations by the mere submission of a desk audit that shows any evidence of one-to-one hiring. While these one-to-one hiring situations can indicate a possible compliance violation, nothing in OFCCP's regulations actually prohibits the practice. Simply stated, as a legal matter there is no requirement that federal contractors have more than one applicant for any given position. Given that the OFCCP does not regulate selection practices, they do have a significant amount of authority over recruitment practices. There are 2 important ways in which one to one hiring scenarios can suggest to the OFCCP that a contractor has violated OFCCP regulations.

OFCCP regulations require contractors to engage in an appropriate level of good faith efforts to attract qualified candidates to the positions and to post positions with the state or local employment service. The OFCCP typically will view one-to-one hiring situations as evidence that the contractor has failed at either of those requirements.

There are only three allowed exceptions to the mandatory job posting rule:

- Executive and senior management employment openings
- Positions that will be filled from within the contractor's organization; and
- Positions lasting 3 days or less

One-to-One Hiring Risks (cont'd)

Otherwise, the rule explicitly applies to all full-and part-time positions, including temporary employment lasting more than three days. There is NO exception to this rule where contractors have already identified the candidate. From a compliance perspective, unless the position meets one of the three exceptions, it must be posted. Situations where one-to-one hiring becomes the rule and not the exception can be problematic. The OFCCP may view this as a contractor's failure to engage in good faith efforts and outreach to attract qualified candidates.

The risks of one-to-one hiring are particularly evident when there are a series of positions filled in a job group with placement goals that were set in a previous year. The OFCCP could use this as evidence that the company failed to engage in the appropriate level of outreach. Additionally, where one-to-one hiring is widespread, the OFCCP could allege that the company failed to engage in outreach to recruit veterans and persons with disabilities under the OFCCP's revised 503/4212 regulations. A contractor's obligation to engage in outreach to veterans and persons with disabilities is ongoing, regardless of percentage placement goals established for women and minorities in the prior year.

New OFCCP Sexual Orientation and Gender Identity Protections

On April 8th, Executive Order ("EO") 11246, as amended by Executive Order 13762, went into effect. This EO prohibits federal contractors from discriminating against employees on the basis of sexual orientation or gender identity. In order to help you understand your requirements as a federal contractor under these new regulations, we have highlighted the key points.

Your Responsibilities As A Federal Contractor

Under the new regulations, federal contractors must update their EO Clause to include gender identity and sexual orientation on job advertisements and EEO policies. Contractors must post the updated "EEO is the Law" poster when available (a date has not yet been announced as to when the new poster will be released).

Incorporating New EEO Language

- The EO Clause may need to be updated to include gender identity and sexual orientation depending on the following:
 - If the subcontracts/POs incorporate the EO Clause by reference **OR** references EO 11246 without specifying protections, no update is required
 - If your subcontracts/POs explains the protections under the EO Clause or EO 11246 and lists the protected groups, you must update to include specific additional protections
- Federal contractors do not need to reference gender identity or sexual orientation unless the current tagline lists the protected groups. Examples follow below:
 - **Not Acceptable:**
 - EOE- M/F/D/V
 - EOE-Minorities/Females/Dis/Vets
 - LGBT (does not represent entire protected class)



- **Acceptable:**
EOE/AA including Veterans and Disabled

OR

Company is an equal opportunity /affirmative action employer. All qualified applicants will receive consideration for employment without regard to sex, gender identity, sexual orientation, race, color, religion, national origin, disability, protected veteran status, age or any other characteristic protected by law.

New OFCCP Sexual Orientation and Gender Identity Protections *(cont'd)*

Dual Filing with the EEOC

The OFCCP clarified that any complaints alleging sexual orientation or gender identity discrimination are considered “dual-filed” with the EEOC. This means that the OFCCP will stand in the shoes of the EEOC when investigating the Title VII component of the complaint. While Title VII does not overtly protect against gender identity and sexual orientation discrimination, the EEOC has taken the position that these classifications are protected under Title VII and will pursue cases on behalf of these individuals.

As a consequence of the dual-filing process, if the OFCCP does not find cause or does not dispose of a case within 180 days, an employee can request a Notice of Right to Sue from the OFCCP to bring a private cause of action against the employer. This is significant as EO 11246 does not provide for a private cause of action. The OFCCP clarified, however, that it does not intend to pursue the compensatory and punitive damages available under Title VII (which are not available under the EO).

Contractors with Religious Exemptions are Not Exempt

All federal contractors are required to comply with the new protections. This means that even those contractors who have been granted certain religious exemptions under EO 11246 may not discriminate based upon sexual orientation or gender identity.

Restroom Access Policies

Federal contractors are required to permit employees to use restrooms based upon their gender identity. This means that if an employee identifies as a female (even though identified as male at birth), the employer must permit that employee to use the female restroom if the employee wishes to do so.

Domestic Partners & Benefits

The federal contractor must provide the same benefits to same-sex spouses as non-same-sex spouses. While federal contractors are not required to provide benefits to civil unions or domestic partnership, if a contractor provides heterosexual domestic partners with benefits, it must provide homosexual domestic partners with the same benefits.

Other

While not required, it is recommended to include sexual orientation and gender identity in anti-discrimination documents such as handbooks.

Contractors are not required to collect any data regarding sexual orientation or gender identity; conduct outreach or training; or set placement goals based on sexual orientation or gender identity. It should be noted that if contractors elect to invite applicants and/or employees to voluntarily disclose sexual orientation and gender identity, the OFCCP has stated that the collected data could be requested during an OFCCP audit or investigation of a LGBT complaint.

More Information

The OFCCP has created a directory of organizations for employers seeking resources and guidance on issues related to creating an inclusive workplace for individuals with regard to sexual orientation and gender identity. To access this directory go to: www.dol.gov/ofccp/LGBT/LGBT_resources.html

CEMENT ALERT: The OFCCP recently issued a directive requiring employers to accept and investigate complaints based on sexual orientation and gender identity discrimination.



The USCIS (US Customs and Immigrations Services) have posted on its website a free on-demand **E-Verify training webinar for employers**. Since legislation has been introduced to require all employers to use E-Verify, we thought this information would be beneficial. The webinar is available at: <http://www.uscis.gov/e-verify/e-verify-webinar-demand>

Who Is a “Protected Veteran” for Purposes of OFCCP’s Veterans Self-ID Requirement

Occasionally, we have clients inquire about different types of federal service and whether or not they qualify for “protected veteran” status for purposes of self-identification under the OFCCP’s revised regulations implementing Section 4212 of VEVRAA. Among the most common categories that raise questions are: service in the U.S. Coast Guard, public health service, reserves or National Guard.

While there is no direct answer contained in the OFCCP regulations, we can examine how the key term “veteran” is defined under federal law. While the OFCCP requires job seekers to self-identify their status as protected veterans at two stages of the hiring process: (i) at the pre offer stage, and (ii) after a conditional job offer has been made, Section 4212 does not treat all veterans equally. Over time, for a number of different reasons, Congress has established specific categories of veterans who come within the scope of Section 4212. Today, these categories are (i) disabled veterans, (ii) Campaign badge veterans, (iii) Armed Forces service medal veterans, and (iv) recently separated veterans.

Disabled Veteran: (i) 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 (ii) 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: a 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.

Active Duty Wartime or Campaign Badge Veteran: a veteran who served 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.

The OFCCP’s Section 4212 regulations define a veteran as “a person who served in the active military, naval or air service of the United States, and who was discharged or released there from under conditions other than dishonorable.”

Other than Armed Forces

While full-time duty in the Armed Forces (United States Army, Navy, Marine Corps and Coast Guard) obviously meets the definition of veteran, it also included service in the reserve components of the Armed Forces assuming such service was full-time. Individuals who serve on full-time duty as a commissioned officer of the Regular or Reserve Corps of the Public Health Service as well as the National Oceanic and Atmospheric Administration are included. Cadets of the US Military Academy, Air Force or Coast Guard Academy and midshipmen at the US Naval Academy may meet the definition of veterans.

Reserve Components and National Guard

To determine whether or not those who serve in the reserves or the National Guard may be considered veterans under federal law, we must determine if the service is **full-time**. Next we must determine the type of service. The service must be **federal active duty military service**. This service is different from “active-duty for training” or inactive duty training. So to summarize, an individual who served in the National Guard but was never called to federal active duty service would not meet the requirement. Additionally, National Guard activated by a state (for example for local emergency like flood or fire) would also not meet this requirement.

“Protected Veteran” *(cont'd)*

Veteran Status Conferred if Disabled While Training

Even if someone who served in the reserves or National Guard did not ever serve on full-time active duty, he or she may still be considered to be a veteran if disabled under certain circumstances. According to the statutory definitions, an individual who served on active duty for training who dies or is disabled from a disease or injury incurred or aggravated in the line of duty may be considered on “active military, naval or air service” and consequentially qualify as a veteran. Additionally, an individual serving on inactive duty training may qualify as a veteran if he or she died or was disabled from disease or injury incurred or aggravated in the line of duty.

Released or Discharged “Other than Dishonorably”

Lastly, in order to meet the federal definition of a veteran, the individual must be discharged or released from service “under conditions other than dishonorable”. While it is clear that those discharged “dishonorably” would not qualify as veterans, there is some question regarding individuals with a bad conduct discharge or a discharge under other than “honorable” conditions and if they would meet the definition for Section 4212 purposes.

It is important to note that the OFCCP acknowledges that self-identification of protected veteran status is subject to some inaccuracy. Our intent is to assist our clients in being responsive to questions of applicants attempting to complete the self-identification requirements. Additionally, we encourage you to express your support for all forms of military service, even if that service doesn't technically qualify as protected under Section 4212.

Best Practices in Audit Submittals

The OFCCP's ACE directive, which officially took effect on January 1, 2011, replaced the former “Active Case Management (ACM) process that had been in effect at the OFCCP during the Bush administration. The ACE directive moved away from the enforcement approach under ACM where many OFCCP audits were closed after an abbreviated desk audit if no indicators of systemic discrimination were present, to a comprehensive approach providing for full desk audits. Under the ACE process, “full desk audits” are conducted in all compliance evaluations, regardless of indicators of discrimination. This includes a comprehensive analysis of each audited establishment's affirmative action programs for women, minorities, persons with disabilities and covered veterans, all of which are accompanied by detailed (Requests For Information) RFI's.

A comprehensive analysis includes an analysis of the contractor's three written AAPs (EO 11246 (M & F), VEVRRA (Veterans), & 503 (Disabled) and the supporting documentation (this includes the impact ratio analysis, compensation analysis, assessment of the reasonableness and acceptability of the plan. Under ACE, many RFI's are not necessarily tailored to a contractor's AAP or the specific circumstances of the audit. Consequently, the question often arises about what information the OFCCP can request, in what time frame, format, etc.

Aside from the 30-day window for the initial desk audit submission, the compliance officer has no basis to demand that supplemental request be satisfied within a certain period of time. Time and care should be taken to ensure that any information provided to the OFCCP is accurate and complete. Additionally, make certain that there is a clear understanding of how the data reflects your company. E. K. Ward & Associates assists our clients in providing complete and accurate data to the OFCCP, rather than hastily providing an incomplete submission simply because the CO has proposed an arbitrary deadline.

BE AUDIT READY! Fear of being audited keeping you awake at night? Sleep easier at night by reviewing the latest OFCCP Scheduling Letter and Itemized Listing to ensure that you can produce all of the requested items. To review the Scheduling Letter and Itemized Listing, go to: http://www.reginfo.gov/public/do/PRView?ref_nbr=201104-1250-001&icID=13735

Or let us do a mock audit for you. Contact us at 716.626.1188 or <http://www.ekward.com/contact/> for more information.

Disclaimer: This document is meant only as a guide based on practical recommendations for AAP compliance. The information is not intended to be, nor does it constitute legal advice. It is recommended that your Affirmative Action Plan compliance procedures and all employment policies, procedures and practices be reviewed by your in-house counsel or other legal counsel with qualifications background and experience in AAP compliance.