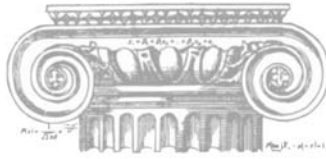


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## **Client Alert: OFCCP Proposed Rule on Veterans' Affirmative Action**

On April 26, 2011, the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP"), issued a Notice of Proposed Rulemaking ("NPRM") announcing contemplated changes to the affirmative action requirements of the Vietnam Era Veterans Readjustment Assistance Act of 1974 ("VEVRAA"). The proposal would greatly expand regulatory duties imposed by 41 C.F.R. §§ 60-250 and 60-300, which implement the affirmative action requirements of VEVRAA (38 U.S.C. § 4212). If the proposal is adopted in its current form, contractors will face substantial added compliance burdens.

As an example, the new regulations would require contractors, for the first time, to establish annual statistical hiring benchmarks for veterans. Contractors would develop these benchmarks based on the percentage of veterans in the civilian labor force for the relevant state, the number of veterans who participate in the state's employment service delivery system, and other potentially relevant factors.

Contractors also would be required to collect and retain new forms of supporting data that would be used to monitor performance under these benchmarks. This would be accomplished through annual comparisons of actual

hiring patterns to the benchmark percentages that have been established. The proposed comparison has significant parallels to the current annual "in-depth analysis" of hiring by gender and race. The new data collection and monitoring requirements would raise VEVRAA compliance to a level of importance that is similar the current emphasis on affirmative action obligations for women and members of racial minorities.

This Alert seeks to familiarize you with the proposed changes. A more detailed description of the most important aspects can be found in the appendix. Highlights include the following:

### ***Data Collection Responsibilities***

Contractors already collect data regarding current employees who fall within the various protected veterans categories. This information is reported on the annual VETS-100 or VETS-100A reports. The proposed regulation would extend data collection obligations to the pre-employment stage. If adopted, contractors would need to begin tracking (1) the number of protected veterans referred to them by state employment services; (2) the number of protected veterans who apply for positions; and

(3) the number of protected veterans who are hired.

### ***Veteran Self-identification***

Current regulations require contractors to invite individuals to self-identify as protected veterans “after making an offer of employment to a job applicant and before the applicant begins his or her employment duties.” 41 C.F.R. §§ 60-250.42(a), 60-300.42(a). Pre-offer inquiries are permitted under certain circumstances but are not required. The proposed regulation changes this to a two-stage self-identification process occurring in both pre-offer and post-offer stages. Prior to an offer of employment, the contractor would invite all applicants to self-identify as “protected veterans.” After the offer of employment, a second invitation would be extended to self-identify as a member of one or more specific covered veteran classifications.

### ***Hiring Benchmarks***

As noted above, contractors would be obligated to establish percentage hiring benchmarks for veterans. No such analysis is required under current regulations. The percentage of veterans in the state’s civilian labor force and the number of veterans who participate in the state’s employment service delivery system would have to be considered. The contractor also would be permitted to take into account other factors that may affect the availability of qualified protected veterans, such as the nature or location of the job opening.

### ***Specific Outreach and Recruitment Mandates***

Current regulations allow discretion for contractors to choose from an array of permissible actions to satisfy their outreach and recruitment obligations for covered veterans. The proposed regulation now would require contractors to engage in at least the following three specific outreach and recruitment activities: (1) linkage agreements and ongoing relationships with the Local Veterans’ Employment Representative at

the closest local employment service office; (2) linkage agreements with at least one organization chosen from a list of sources for veterans outreach and recruitment; and (3) consultation with the Employer Resources section of the National Resource Directory jointly maintained by the Departments of Labor, Defense, and Veterans Affairs to provide resources for veterans employment. Additional outreach and recruitment measures also would need to be considered as appropriate to the situation.

### ***Monitoring***

Contractors would have to conduct formal effectiveness evaluations of their veterans outreach and recruitment efforts on an annual basis. Current regulations also include provisions requiring periodic internal auditing and reporting to “[m]easure the effectiveness of the contractor’s affirmative action program” for veterans, 41 C.F.R. §§ 60-250.59(h)(1)(ii), 60-300.59(h)(1)(ii). The absence of pre-employment data collection requirements, however, precludes any meaningful quantitative assessment efforts. According to the OFCCP, the new regulation’s data collection requirements are intended to provide “a quantifiable measure for gauging . . . success in recruiting and employing protected veterans.” Frequently Asked Questions, NPRM Highlights, answer to question 5. Contractors will be expressly obligated to analyze the newly collected pre-employment data as part of their systematic annual effectiveness analyses.

### ***Conclusion***

The NPRM is the latest initiative in the OFCCP’s recent emphasis on affirmative action requirements pertaining to veterans. If adopted, these proposed changes may place significant burdens on your organization’s compliance personnel. A lack of attention to the newly imposed obligations could leave you facing a list of alleged violations and a demand for a conciliation agreement. We hope you will take this opportunity to evaluate the impact the proposed rule will have on your organization.

We also encourage you to submit comments regarding the proposed changes. Comments can be submitted by mail, by fax, or electronically through <http://www.regulations.gov>. Detailed instructions for comment submission can be found at <http://www.dol.gov/ofccp/OFCCPNews/LatestNews.htm>. We would be pleased to answer any questions you may have or to assist you in preparing comments. The 60-day public comment period ends on June 27, 2011.

This Alert identifies the key substantive changes proposed by the OFCCP in its NPRM, but it does not attempt to identify every new obligation. Your specific situation may raise unique issues that are not covered in this summary. If you have any questions, either about these issues or any other affirmative action compliance matter, please call (703) 803-8800 to discuss your situation with Dean Sparlin or Brandon Moon of Sparlin Law Office, PLLC.

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# APPENDIX

- **Coverage**

The OFCCP hopes to consolidate all VEVRAA obligations under 41 C.F.R. § 60-300, which currently applies to contracts of more than \$100,000 entered into or modified since December 1, 2003. Contracts of \$25,000 or more entered into prior to December 1, 2003, if not modified since that time, are currently covered under 41 C.F.R. § 60-250. If the OFCCP determines, based on responses to the NPRM, that the parallel structure of 41 C.F.R. § 60-250 is no longer needed due to the passage of time, it will rescind 41 C.F.R. § 60-250. If not, it will develop a new parallel structure for 41 C.F.R. § 60-250, which will impose similar requirements but also will respect distinctions in pre-2003 law such as coverage requirements and protected veteran categories.

- **Expanded Data Collection Responsibilities**

The new proposal requires that contractors maintain several quantitative measurements and comparisons regarding protected veterans who have been referred by state employment services, have applied for positions with the contractor, or have been hired by the contractor. (See proposed revision of 41 C.F.R § 60-300.44(k).) Currently, contractors are not required to maintain data regarding the number of protected veterans who are referred for or apply for jobs. The proposed regulations provide for the collection of referral data (see § 60-300.5, paragraph 5 of the EO clause) as well as applicant data. Hiring data already is maintained for purposes of completing the annual VETS-100A report. That requirement also is carried over into the new proposal.

Specific categories of information that would have to be documented and updated annually include the following: (1) for referral data, the total number of referrals, the number of priority referrals of protected veterans, and the “referral ratio” of referred protected veterans to total referrals; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known protected veterans, and the “applicant ratio” of known protected veteran applicants to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known protected veterans hired, and the “hiring ratio” of known protected veteran hires to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the “job fill ratio” of job openings to job openings filled. The proposed regulation requires the contractor to collect these measurements on an annual basis and to maintain records of them for five years.

- **Veteran Self-identification**

The proposed rule implements significant, substantive changes to the contractor's responsibilities and the process through which applicants are invited to self-identify as a veteran. (See proposed revision of 41 C.F.R § 60-300.42.) Currently, the VEVRAA regulations require contractors to invite applicants who are disabled veterans to self-identify only after making an offer of employment. Two exceptions are provided under which a contractor is allowed, but not required, to invite disabled veterans to self-identify prior to making a job offer: (1) when the invitation is made while the contractor is actually undertaking affirmative action for disabled veterans at the pre-offer stage; or (2) when the invitation is made pursuant to a federal, state or local law requiring affirmative action for disabled veterans. In all other situations, the

current regulation requires contractors to invite applicants to self-identify post-offer, “before they begin [their] employment duties.”

The proposed change requires contractors to invite all applicants to self-identify as “protected veterans” prior to the offer of employment. This pre-offer invitation would not seek the specific protected classification of protected veteran (disabled veteran, recently separated veteran, active duty wartime or campaign badge veteran, or Armed Forces service medal veteran). The pre-offer invitation would be voluntary and not require protected veteran applicants to disclose their status as protected veterans if they choose not to. This new pre-offer self-identification step also would include the requirement that the contractor maintain the pre-offer self-identification data and supply it to the OFCCP upon request.

In addition to the pre-employment self-identification provisions, the proposed rule requires the contractor to invite individuals, after the offer of employment is extended, to self-identify as a member of one or more of the four classifications of protected veterans. This post-offer identification will enable the contractor to capture refined data pertaining to each classification of protected veterans, as set forth in the VETS-100A form that the contractor is required to maintain and submit. As is currently the case, the post-offer self-identification as a disabled veteran would not require applicants to disclose the specific nature of their disability.

- ***Hiring Benchmarks***

The proposed regulation would require contractors to establish annual hiring benchmarks, expressed as the percentage of total hires who are protected veterans. (See proposed revision of 41 C.F.R § 60-300.45.) These hiring benchmarks would be established using existing data on veteran availability. The contractor also would be allowed to take into account other factors unique to its establishment that may affect the availability determination.

The proposed rule would require the contractor to consult a number of different sources of information in establishing hiring benchmarks. These sources, which the OFCCP promises to make readily available, include: (1) the percentage of veterans in the civilian labor force, which is tabulated by BLS and will be published on OFCCP's web site; (2) the number of veterans who were participants in the state employment service in the State where the contractor's establishment is, which also will be published on OFCCP's Web site; (3) the referral ratio, applicant ratio, and hiring ratios; (4) the contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts; and (5) any other factors, including but not limited to the nature and location of the contractor's job openings, which would tend to affect the availability of qualified protected veterans. The contractor would be required to consider and document each of these factors, but would be given discretion to weigh the various factors in a manner that is reasonable in light of the contractor's unique circumstances.

- ***Specific Outreach and Recruitment Mandates***

The proposal requires contractors to use specific outreach and recruitment methods to increase employment opportunities for protected veterans. (See proposed revision of 41 C.F.R § 60-300.44(f)). Currently, VEVRAA includes a number of suggested outreach and recruitment efforts but does not require any specific approach in satisfying the general outreach obligation. (See 41 C.F.R. § 60-300.44(f)(1).) The proposed rule, on the other hand, requires contractors to engage in three specified outreach and recruitment methods.

First, contractors must enter into linkage agreements and establish ongoing relationships with the Local Veterans' Employment Representative in the local employment service office nearest the contractor's establishment. Contractors and subcontractors already must send their job listings to the Local Veterans' Employment Representative in the local or state employment service office for listing and priority referral of protected veterans, but this would require more specific outreach efforts involving these organizations.

Second, the contractor would be required to enter into a linkage agreement with at least one of several other listed organizations and agencies for purposes of recruitment and developing training opportunities.

Third, the proposed rule would require that contractors consult the Employer Resources section of the National Resource Directory, a partnership with an online collaboration ([http://www.nationalresourcedirectory.gov/employment/job\\_services\\_and\\_employment\\_resources](http://www.nationalresourcedirectory.gov/employment/job_services_and_employment_resources)) among the Departments of Labor, Defense, and Veterans Affairs. The National Resource Directory is a government web site that provides prospective employers of veterans access to veterans' service organizations, existing job banks of veterans seeking employment, and other resources at the national, state and local levels. The proposed rule requires each contractor to select any organization on the National Resource Directory for outreach and recruitment purposes. The contractor would be required to establish a linkage agreement with at least one of the veterans' service organizations listed on the site to facilitate referral of qualified protected veterans, as well as other related advice and technical assistance.

In subcontracting situations, the proposed rule also requires that the prime contractor send written notification of company policy related to affirmative action efforts to its subcontractors, including subcontracting vendors and suppliers, requesting appropriate action by the each subcontractor and publicizing the contractor's commitment to affirmative action on behalf of protected veterans.

- ***Monitoring***

The proposed rule requires contractors, on an annual basis, to review their outreach and recruitment efforts and evaluate their effectiveness in identifying and recruiting qualified protected veterans, and to document this review. (See proposed revision of 41 C.F.R. § 60-300.44(f)(3).) The criteria used in this review must be specifically identified and documented. At a minimum, these criteria must include all of the data the contractor has collected pursuant to the new requirements described above under "Expanded Data Collection Obligations." The data must cover not only the current year but also the two preceding years. Should a contractor determine that its efforts were not effective, the proposed rule would require the contractor to identify and implement one or more initiatives to address the situation.

The proposed rule also mandates certain specific steps that the contractor must take in the review of its personnel processes. (See proposed revision of 41 C.F.R § 60-300.44(b).) Current regulations require contractors to review their personnel processes "periodically" and recommend a series of steps contractors can take in the review of its personnel processes. The proposed rule requires that a contractor must review these processes on at least an annual basis. Additionally, under the proposed rule, steps that were formerly suggested now will be required as part of the personnel process review. Specifically, the contractor must:

(1) identify the vacancies and training programs for which protected veteran applicants and employees were considered; (2) provide a statement of reasons explaining the circumstances

for rejecting protected veterans for vacancies and training programs and a description of considered accommodations; and (3) describe the nature and type of accommodations for special disabled veterans who were selected for hire, promotion, or training programs.

- ***EO Clause Modifications Affecting Job Listings and Referrals***

The proposed rule imposes added substantive obligations relating to job listings and referrals through revised equal opportunity (“EO”) clause language that must be included in all covered government contracts and subcontracts. (See proposed revision of 41 C.F.R § 60-300.5.) Currently, the mandatory job listing requirement of the EO clause directs that the contractor list all employment openings for the duration of the contract with an “appropriate employment service delivery system.” The proposed regulation clarifies that, for any contractor that utilizes a privately-run job service or exchange to comply with its mandatory listing obligation, the information must subsequently be provided to the appropriate employment service “in the manner that the employment service requires.”

Additionally, the proposed regulations require each contractor to provide the state employment service with the following additional information: (1) its status as a federal contractor; (2) the contact information for the contractor hiring official at each location in the state; and (3) its request for priority referrals of protected veterans for job openings at all its locations within the state. This is in addition to the obligation under current regulations to provide the name and location of each of the contractor's hiring locations. All of this information must be updated on an annual basis.

The proposed regulation adds a new paragraph to the EO clause stating the requirement that the contractor maintain records, on an annual basis, of the total number of referrals it receives from state employment services, the number of priority referrals of protected veterans it receives, and the ratio of protected veteran referrals to total referrals.

The proposed regulation also adds a new paragraph to the EO clause affirming the contractor's obligation to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of veterans protected under Section 4212.

Finally, in an attempt to mitigate instances where subcontractors are unaware of their EO responsibilities, the proposed regulation requires the EO clause to state that the entire EO clause be included verbatim in federal contracts.

- ***Communication and Training***

The proposed rule requires contractors to develop internal procedures to communicate with employees regarding their obligation to engage in affirmative action efforts. (See proposed revision of 41 C.F.R § 60-300.44(g)-(j).) The statute currently contains several suggested methods by which the contractor may communicate its obligations internally. The proposed rule would require contractors to: (1) include their affirmative action policies in their policy manuals; (2) inform all applicants and employees of their affirmative action obligations; (3) conduct meetings with executive, management, and supervisory personnel to explain the intent of the policy and responsibility for its implementation; and (4) discuss the policy in orientation and management training programs. In addition, if the contractor is a party to a collective bargaining agreement, the proposed rule would require the contractor to meet with union officials and representatives to inform them about the policy and seek their cooperation.

Other suggested elements in the current rule remain in the proposed rule as additional dissemination efforts that a contractor may undertake.

In addition to the general communication requirement, the proposed rule requires contractors to train individuals who implement personnel decisions pursuant to their affirmative action programs. Specific topics to be covered in the training include the benefits of employing protected veterans, appropriate sensitivity toward protected veteran recruits, applicants, and employees, and the legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically. The latter topic includes reasonable accommodation for qualified disabled veterans and the related rights and responsibilities of the contractor and protected veterans. The proposed regulation would require contractors to record which of its personnel receive this training, when they receive it, and the identity of the individuals who administer the training.

For more information, please call (703) 803-8800 to discuss your situation with Dean Sparlin or Brandon Moon of Sparlin Law Office, PLLC. Mr. Sparlin and Mr. Moon also can be reached by email at [dsparlin@sparlinlaw.com](mailto:dsparlin@sparlinlaw.com) and [bmoon@sparlinlaw.com](mailto:bmoon@sparlinlaw.com), respectively.

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