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Unpacking OFCCPs Final Rules for Veterans and Individuals with Disabilities

October 3, 2013

On August 27, 2013, OFCCP released final rules with significant new requirements for U.S. Government Contractors related to employment of veterans under the Vietnam Era Veterans' Readjustment Assistance Act ("Veterans Rule") and to employment of individuals with disabilities under Section 503 of the Rehabilitation Act ("Disability Rule") (collectively the "Final Rules"). This Alert discusses the various new and significant affirmative action, recordkeeping, and other compliance measures required by the Final Rules and provides practical guidance on the actions federal contractors and subcontractors can take to comply.

Who must comply

The thresholds for coverage under the new Veterans and Disability Rule are the same:

Disability Rule: The Disability Rule applies to federal contractors and covered subcontractors with a contract of $10,000 or more. The affirmative action plan requirements, including the creation of affirmative action plans and solicitation of disability information, apply to contractors and covered subcontractors with a contract of $50,000 or more and 50 or more employees.

Veterans Rule: The Veterans Rule applies to federal contractors and covered subcontractors with a contract of $100,000 or more. Contractors and covered subcontractors with a contract of $100,000 or more and 50 or more employees must comply with the affirmative action plan requirements.

When to comply

There are two compliance dates under the Final Rules:

Non-Affirmative Action Plan Requirements: Contractors will be required to comply with all aspects of the Final Rules on **March 24, 2014** except for the affirmative action plan requirements under Subpart C.

Affirmative Action Plan Requirements: Contractors will be required to implement the affirmative action plan requirements under Subpart C of the Final Rules into their affirmative action plans ("AAPs") by their next AAP year after March 24, 2014. For instance, if a contractor has an AAP that starts on January 1, the contractor would not have to update its AAP until January 2015. On the other hand, a contractor with a June 1 effective date for its AAP would have to implement the new affirmative action plan requirements by June 1, 2014.

Significant new compliance obligations

Hiring benchmarks and goals

One of the most controversial and significant aspects of the Final Rules is the establishment of annual hiring benchmarks for veterans and goals for individuals with disabilities.

Disability Rule Goal: The Disability Rule establishes an annual seven percent utilization goal for employment of individuals with disabilities. Contractors are required to evaluate the seven percent utilization goal at the job group level for each of their AAPs. If a contractor has less than 100 employees, however, the contractor can conduct a single utilization analysis for its entire workforce. Contractors who establish placement goals because their current workforce is under the seven percent utilization goal must identify problem areas and develop action-oriented programs to address the under representation of individuals with disabilities in their workforce.

Similar to the action-oriented program under Executive Order 11246 ("EO 11246") for females and minorities, contractors' action-oriented programs for individuals with disabilities may include a number of actions designed to try to attain the 7 percent goal, such as using different outreach and recruitment efforts than the contractor has used in the past and modifying personnel processes (i.e., removing a pre-employment test) that may reduce opportunities for qualified individuals with disabilities. OFCCP will periodically review and update the seven percent utilization goal.

Veterans Rule Benchmark: Under the Veterans Rule, contractors can use one of two methods to establish a benchmark for employment of veterans: (1) use the benchmark equal to the national percentage of veterans in the civilian workforce (currently eight percent), which OFCCP will update annually; or (2) develop a benchmark using five separate factors, some of which will rely on data to be made available on OFCCP's website. Unlike the Disability Rule, contractors have the option of applying these benchmarks at the job group level, but they must apply the benchmark to each of their AAPs. Contractors must also implement action-oriented programs if there are any areas where the current number of veterans in their current workforce is under the benchmark for veterans.

How to Analyze Hiring Goals and Benchmarks: The analysis under the Final Rules will be similar to the utilization analyses that contractors conduct for females and minorities under EO 11246. The Final Rules are silent on the type of statistical tests contractors can employ to analyze whether they have met the benchmark or utilization goal, but it appears that OFCCP is expecting contractors to employ an "any difference" rule rather than an 80 percent rule or the commonly used two standard deviation test.

Not a Quota, but Outreach Required: Similar to goals under EO 11246 for females and minorities, the benchmark for veterans and the utilization goal for the disabled are not quotas. Failure to meet them will not be considered a violation of the Final Rules. In fact, in several recent webinars, OFCCP has made it clear that they do not anticipate that contractors will meet the benchmark or utilization goal in the first year after the Final Rules go into effect. However, OFCCP has advised that contractors must undertake positive outreach and recruitment efforts to reach any areas where there is underutilization of veterans and individuals with disabilities in their workforce and must document those efforts.

Record Retention: Contractors will be required to maintain all analyses of the goals and benchmarks for *three years*.

Outreach and recruitment efforts

Contractors will now be required for the first time to conduct annual outreach and recruitment assessments for veterans and individuals with disabilities. These assessments must evaluate the effectiveness of the outreach and recruitment efforts of the previous twelve months for each AAP.

Annual Written Report Required: At the end of the assessment, the contractor must create a written report that becomes a part of its AAP. Although there is no mandatory format for this written report, the report must include: (1) the criteria used to evaluate the effectiveness of each outreach and recruitment effort used by the contractor; and (2) provide the contractor's conclusion on the effectiveness of the program. In addition, the criteria in the report must include an assessment of the annual hiring metrics data discussed below for the current year and the two previous years.

Action-Items Flowing from the Report: If the contractor determines that the totality of its outreach efforts was not effective, then it must implement alternative or additional outreach efforts to increase the numbers of veterans and individuals with disabilities in its workforce. As under the prior rules, the Final Rules allow contractors flexibility to determine which outreach and recruitment efforts they want to implement.

Record Retention: The report must be retained for *three years*.

OFCCP's Review of Report: OFCCP has expressed its intention to thoroughly review these outreach assessments during audits to determine if they are "reasonable." Given the amount of discretion OFCCP will have when reviewing these assessments, however, contractors should have thorough and well-documented assessment plans that at a minimum ensure that they are (1) not relying on the same ineffective measures; and (2) include some of OFCCP's suggested outreach efforts, such as establishing relationships with local veterans and disability groups.

Annual hiring metrics

The Final Rules will require contractors to conduct assessments of certain hiring metrics for veterans and individuals with disabilities.

Metrics to Collect and Analyze: Contractors will be required to collect, retain, and analyze the following data for each of their AAPs on an annual basis:

- The number of applicants who self-identified as veterans or individuals with disabilities;
- The total number of job openings and the total number of jobs filled;
- The total number of applicants for all jobs;
- The number of veterans or individuals with disabilities hired; and
- The total number of applicants hired.

How to Analyze the Hiring Metrics: The Final Rules do not provide any guidance on how to conduct the hiring metrics analysis, but contractors can conduct these analyses using the following method:

- **Applicant ratio:** Number of protected veteran applicants (10) / total applicants (100) = 10%;
- **Hiring Ratio:** Number of protected veterans hired (5) / total hires (50) = 10%;
- **Job Fill Ratio:** Number of job openings filled (50) / total number of openings (100) = 50 %.
- The Final Rules do not require contractors to conduct the hiring metrics analysis at the job group level, so contractors are presumably allowed to conduct these hiring metrics for their entire workforce in each AAP. Contractors are expected to use this data in connection with the written outreach assessment report discussed above.

Record Retention: Contractors must collect and retain this data for *three years*.

New voluntary self-identification procedures

Under the previous rules, contractors were required to invite applicants to voluntarily self-identify as protected veterans and individuals with disabilities *after* they were offered a position but before they started employment with the contractor. It was also illegal for contractors to request applicants to self-identify their disability status *prior* to receiving an offer of employment because it was considered a discriminatory question.

The Final Rules change this to now require contractors for the first time to invite applicants to voluntarily self-identify as protected veterans or individuals with disabilities *at both the pre-offer and post-offer stages*. OFCCP's rationale for making this change was to enable contractors to track the number of applicants who are individuals with disabilities and protected veterans so they could assess the effectiveness of their outreach and recruitment efforts.

Contractors will be required to adhere to the following very specific requirements and procedures when soliciting this demographic information:

Pre-Offer – Disability Rule: Contractors must implement very specific processes when soliciting disability information at the pre-offer stage, including:

- **Mandatory Form:** Contractors are mandated to use a form supplied by OFCCP to invite applicants to self-identify as individuals with disabilities. This form has not been published by OFCCP yet.
- **Solicit Simultaneous with Race and Gender:** The invitation must be provided to each applicant when the applicant applies or is considered for employment (contractors can provide this at the same time as when they solicit demographic information for females and minorities under EO 11246).
- **Not Part of Application:** The invitation must be separate from the application, but may be included in the contractor's application materials;
- **Visual Self-Identification Permitted:** If individuals with disabilities opt not to self-identify their disabled status, a contractor can use visual identification to complete the information if the contractor either observes the disability (e.g., the individual is in a wheelchair) or the applicant makes it clear during the process that they are disabled (e.g., the applicant requests an accommodation for completing the application or during the interview). Contractors should not guess about disability status or

assume that an applicant is disabled just because he "looks sickly."

Pre-Offer – Veterans Rule: Contractors are required to adhere to the following requirements when soliciting veteran information at the pre-offer stage:

- **No Mandatory Form:** Unlike the Disability Rule, the Veterans Rule does not require contractors to use a mandatory form to invite applicants to self-identify themselves as protected veterans at the pre-offer stage. Contractors who develop their own forms, however, must include certain statements to applicants, including that the form is voluntary, the information supplied will be kept confidential, and completion of the form will not subject the applicant to any adverse treatment.
- **Only Ask Protected Veteran Status:** Contractors can only ask an applicant if he or she is a "protected veteran" and not ask them to disclose the particular category of protected veteran.
- **Solicit Simultaneous with Race and Gender:** Contractors can invite applicants to self-identify at the same time as they ask applicants to identify race and gender under EO 11246.

Post-Offer Invitation: Contractors must continue to invite applicants to self-identify their veteran or disabled status after they are offered employment but before their first day of work. As with the pre-offer invitation, contractors will be required to use OFCCP's invitation for disability information, but they can use their own form that meets certain requirements to invite protected veterans to self-identify their veteran status. At the post-offer stage, contractors must offer applicants to identify themselves in one of the four categories of protected veterans.

Updated Categories of Protected Veterans: In the Veterans Rule, OFCCP replaced the "Other Protected Veterans" category with "Active-Duty Wartime or Campaign Badge Veteran" to make the definition more descriptive and avoid the confusion that the "Other Protected Veteran" category includes every veteran that is not in one of the other three protected veteran categories (i.e., "Disabled Veteran", "Armed Forces Service Medal Veteran", or "Recently Separated Veteran"). As a result, contractors will need to update their post-offer voluntary self-identification form for veterans to include the new category.

Invitation to Current Employees to Self-Identify Disability Status: For the first time, contractors will be required to invite their current employees to self-identify as individuals with disabilities once every five years. Contractors must offer the self-identification to current employees for the first time within the first year after the effective date of the Disability Rule. At least once during the five-year period in between the invitations to current employees, contractors must remind employees that they may voluntarily update their disability status at any time.

Internet applicant rule/review basic qualifications

Final Rules Harmonized with Internet Applicant Rule: The Internet Applicant Rule ("IAR") was adopted by OFCCP in 2005 to provide clear guidelines to contractors on who is considered an applicant for recordkeeping purposes under EO 11246. Although the contractor community pleaded with OFCCP to adopt the IAR in the Final Rules, the Final Rules do not mention the IAR. However, OFCCP claims that the Final Rules are "harmonized" with the IAR, such that recordkeeping requirements for applicants will be treated the same under the Final Rules as for females and minorities under EO 11246.

Review Basic Qualifications: OFCCP has cautioned contractors on their use of basic qualifications under the IAR to screen candidates. Basic qualifications are the minimal qualifications for a position that contractors advertise to potential applicants that the contractor has established in advance of the job posting. Basic qualifications must be (1) non-comparative (e.g., three years experience versus top five candidates with most experience); (2) objective (e.g., "Bachelor's degree in accounting" versus "excellent bookkeeping skills"); and (3) relevant to the performance of the particular position.

OFCCP emphasized in the Final Rules that it is unlawful for contractors to use "basic qualifications" that screen out or tend to screen out protected veterans or individuals with disabilities unless the basic qualifications are job-related for the position in question and consistent with business necessity. In addition, basic qualifications cannot be used to screen out applicants if they are not related to an essential function of the position or could be satisfied with a reasonable accommodation. OFCCP has indicated that it will vigorously review contractors' established basic qualifications during audits to ensure they do not unlawfully screen out candidates.

New posting requirements

The Final Rules have certain mandatory formats, language, and procedures contractors must use when posting

notices and job advertisements and when reporting job openings with the appropriate state employment service delivery system ("ESDS").

New Tag Line Language for Job Advertisements: Contractors are currently required to include in all job postings that they are an "equal opportunity employer" for females and minorities, which is known as the "tagline". The Final Rules now require that contractors indicate in their tagline for job advertisements that they are an equal opportunity employer of individuals with disabilities and protected veterans. Contractors can satisfy this requirement by including the following statement: "We are an equal opportunity employer and all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, national origin, disability status, protected veteran status, or any other characteristic protected by law."

Postings with ESDS: Before the Final Rules, contractors were required to post external job openings (except for senior management and temporary positions lasting less than three days) with the appropriate ESDS in the state where the position was being filled. The Final Rules retain those same requirements and add several procedural obligations for contractors when coordinating with the ESDS. The new requirements include:

- **Use Format Required by ESDS:** Contractors must provide job listings in the format and manner required by the ESDS (e.g., fax, e-mail, etc.). This means that multi-state contractors will have to understand the format and manner in which each state ESDS expects to receive the job postings.
- **Mandatory Information for Postings with ESDS:** Contractors will be required to provide the appropriate ESDS with the following information: (1) the locations and names of each establishment in the state where the ESDS is located; (2) the contact information for the official responsible for each establishment in the state where the position is being posted; (3) verification that the contractor is a federal contractor (e.g., including "VEVRAA Federal Contractor" on the job posting); and (4) request the ESDS send the contractor priority referrals of protected veterans. The contractor official can be any manager who can certify the information in the job listings and receive priority referrals from ESDS, including an HR manager or someone in senior management. This information must be provided concurrently with the first job listing posted with each ESDS after the effective date of the Final Rules. Any changes to this information must be provided to the ESDS with the first job posted with the ESDS after the change.
- **Third-Party Vendors Still Permitted:** Contractors can continue to use third-party vendors to assist them with these posting requirements, but contractors will remain ultimately responsible for ensuring compliance with the Veterans Rule.

Mandatory Dissemination of AAP Policy: The Final Rules mandate contractors take certain actions to implement and disseminate their AAP, which was previously only encouraged by OFCCP. These include:

- Contractors with a collective bargaining agreement must notify union officials or employee representatives of their AAP policy and request cooperation; and
- Contractors must include their AAP policies in their employee handbooks or otherwise make the policies available to employees.

Electronic Posting of Notices and Posters: Contractors were already required to post notices and posters in conspicuous places notifying employees and applicants of their rights and the contractor's affirmative action obligations. The Final Rules now allow contractors to satisfy these posting obligations by posting the notices electronically for employees who work remotely or from home. The electronic notice must be sent by e-mail to the employees, posted on the contractor's intranet site, or made available in other formats for disabled employees/applicants, such as making the notices available in Braille or large print. Contractors must have "actual knowledge" that the employee received the notice (e.g., required them to certify receipt or verified their access to the posting) or provide these workers with a computer or access to computers. Contractors will still be required to post paper notices at their establishments.

Notice on Availability of AAP: The Final Rules retain the requirement for contractors to post a notice informing applicants and employees that their AAPs for veterans and individuals with disabilities are available for inspection. The Final Rules, however, exempt contractors from making the hiring benchmarks, utilization analysis, and annual hiring metrics available for inspection. Contractors should make sure to keep these analyses and metrics confidential and only make them available to the appropriate contractor personnel or OFCCP when requested during an audit.

Mandatory flow-down language

Until these Final Rules, contractors were permitted to flow-down the obligations under the Veterans and Disability Rule in their covered subcontracts and purchase orders by reference to the regulatory equal opportunity clauses for veterans and individuals with disabilities. Under the Final Rules, contractors can still cite to the equal opportunity clauses by reference, but must now use the following mandatory language and include it in bold text in their subcontracts and purchase orders:

Veterans Rule: "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."

Disability Rule: "This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities."

Increased recordkeeping requirements

The Final Rules impose a three year recordkeeping requirement for the AAP requirements, which include:

- Hiring benchmarks and utilization goal analyses;
- Hiring metrics analyses; and
- Self-identification records for veterans and individuals with disabilities.

Significant changes for OFCCP audits

OFCCP also implemented some significant changes relating to its audit process and procedures, including:

New Pre-Award Procedure: The Final Rules add a new pre-award compliance review procedure whereby contractors awarded a contract of $10 million or more are subject to compliance evaluation by OFCCP, at OFCCP's option, before the contract is awarded unless OFCCP conducted a compliance evaluation of the contractor within the 24 months preceding the award.

Expanded Temporal Scope of Audit: The Final Rules codified the decision of *OFCCP v. Frito-Lay, Inc.,* ARB Case No. 10-132 (May 8, 2012), by stating that OFCCP may request documents and data from contractors past the date on the scheduling letter if OFCCP "deems it necessary to carry out its investigation of potential violations …."

Expanded Off-Site Review of Data: The Final Rules permit OFCCP to review contractor data and documents either on-site or off-site during compliance checks and focused reviews.

Required Format of Data: Contractors will now be required to provide records and other information during audits "in any of the formats in which they are maintained" by the contractor at OFCCP's preference.

Areas of caution

There are several areas under the Final Rules where contractors need to exercise caution.

Impact of Veteran Preference on Females: Because the vast majority of veterans are males, contractors' active outreach and recruitment efforts to veterans may result in under utilization or disparate impact on females in their workforce in violation of EO 11246. OFCCP has warned that contractors cannot use the hiring benchmark under the Veterans Rule as defense to employment discrimination or adverse impact against females because contractors are not required to meet the Veterans Rule hiring benchmark. As a result, contractors should be mindful of this issue and should keep a close eye on their female applicant pools when undertaking outreach and recruitment efforts for veterans.

Pre-Offer Self Identification for the Disabled: Contractors should not implement the new pre-offer self-identification requirements for individuals with disabilities until after the effective date of the Final Rules. It would

be unlawful for an employer to solicit this information without the legal requirement under the Disability Rule in place. In that same vein, contractors should stop soliciting this information if they lose their status as a covered contractor.

Which Veterans Benchmark to Select: Contractors will have the option of using the hiring benchmark set by OFCCP (currently eight percent) or setting their own benchmark using several factors. Although setting a unique benchmark is attractive and probably would be more precise, contractors should strongly consider using OFCCP's benchmark to avoid the administrative burden of creating their own metric and potentially facing additional scrutiny during audits. At this point, it is unclear how OFCCP will assess contractors' creation of a unique benchmark, and it is entirely possible that OFCCP would challenge any benchmark that is not at or close to OFCCP's proposed benchmark.

Documentation is Key: Contractors can count on OFCCP vigorously investigating and enforcing these Final Rules during audits. As a result, it will be critical for contractors to document all of their outreach efforts, including who they talk to, when, contact information, correspondence, etc., and be prepared to provide this information during an audit.

Steps for compliance

The process for full compliance with these rules by the effective date will take time and involve a number of resources and key stakeholders both inside and outside of the contractor's organization. As a result, contractors should consider taking the following actions immediately:

- Meeting with key decision-makers to advise them of the Final Rules (e.g., Senior Management, Legal Department, IT, etc.) and inform them of the financial resources and time commitments needed to implement these changes;
- Contacting the contractor's vendors for its human resource information system ("HRIS") and applicant tracking system ("ATS") to ensure they are establishing measures to comply with these rules;
- Meeting with internal IT departments to make sure they have the bandwidth to accommodate these changes; and
- Creating an itemized plan, timetable, and budget for compliance.

Actions to take by the effective date of rule

- Implement new processes for sending information to ESDS to ensure that the information is provided to ESDS in the format they permit or identify reputable vendors to comply with this requirement.
- Update subcontracts and purchase orders with new mandatory flow down language.
- Insert the new EEO tagline in all job advertisements.
- Implement processes for ensuring any notices that are posted electronically are compliant and accessible to remote workers.
- Update harassment and anti-discrimination policies to include individuals with disabilities and protected veterans if not already done.
- Review and update basic qualifications to ensure they are job-related and consistent with a business necessity and do not cause any disparate impact on individuals with disabilities or protected veterans.
- Update record retention policies to ensure affirmative action records relating to veterans and individuals with disabilities are kept for three years or more.

Actions to take for first AAP cycle after the effective date

- Update invitations to self-identify for veterans and implement new process for using OFCCP self-identification form for individuals with disabilities.
- Train personnel involved in personnel decisions, including recruiting, screening, promotion, reasonable accommodations, on the affirmative action requirements for veterans and individuals with disabilities and document all personnel who attend training.
- Develop effective outreach and recruitment sources for veterans and individuals with disabilities.
- Review accommodation policies and procedures in light of Final Rules.
- Train recruiters on the process for conducting visual identifications of individuals with disabilities.
- Create a process for inviting current employees to self-identify as disabled applicants every five years, including the interim

survey in the intervening five years.
- Develop written reports analyzing outreach and recruitment efforts and conclusions of those efforts to be completed in conjunction with each affirmative action plan.
- Implement process for analyzing hiring benchmarks for veterans and utilization goals for individuals with disabilities in each affirmative action plan and design effective audit and reporting systems for taking remedial action if there are areas of underutilization.

If you would like to discuss these issues further or have questions about this *Alert,* please contact one of the attorneys listed above.

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Key Contacts

Wendy Brenner **Palo Alto**	**brennerwj@cooley.com** **+1 650 843 5371**
Leslie Cancel San Francisco	lcancel@cooley.com +1 415 693 2175
Joshua Mates San Francisco	jmates@cooley.com +1 415 693 2084
Michael Sheetz Boston	msheetz@cooley.com +1 617 937 2330

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