

Affirmative action:
New rules for veterans/disabilities

VIGILANT[®]
counsel for employers



Who We Are



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At Vigilant, we counsel companies on complex employment issues, including affirmative action, across the Northwest and California

The information presented here is not intended to be legal advice. Karen is a member of the Oregon State Bar.

Agenda

- Applicability
- Self-ID
- Data collection analysis
- Benchmarks and goals
- Job postings
- Electronic posters
- Communication to subcontractors
- Other changes
- Review
- Recommendations
- Vigilant assistance
- Questions



Applicability

- Affirmative action for disabilities/vets
- Relevant laws
- Effective date of regulations
- Enforcement

Affirmative action for disabilities/vets

- Basic: \$10,000 (disabilities)/\$100,000 (veterans)
- Written AAP (Subpart C): 50 employees and
- Contract or subcontract with federal government (construction or supply/service):
 - Contract worth \$50,000 or more (\$100,000 for vets, signed/modified on/after 12/1/2003)
 - For purchase, sale, or use of personal property or nonpersonal services (including construction and fund depository), but not federally assisted contracts

Relevant laws

- Executive Order 11246 (race/gender) – no changes – different rules for construction versus supply/service
- Section 503 of Rehabilitation Act (disabilities)
- Vietnam Era Veterans’ Readjustment Assistance Act (VEVRAA) (veterans)

Effective date of regulations

- March XX, 2014 (180 days after publication in Federal Register)
- Grandfathering for some requirements (Subpart C of regulations), which includes written AAP
- If your AAP is already in place upon effective date, then you may comply with Subpart C upon your next plan year


Enforcement

- Office of Federal Contract Compliance Programs (OFCCP)
- Enforcement:
 - Audits (random, pre-award for \$10+ million, or complaint-based)
 - Back pay & other “make whole” remedies
 - Order to hire, promote, reinstate...
 - Periodic reporting
 - Debarment

Expectations

“Being a federal contractor is a privilege, not a right, and with that privilege comes a legal obligation to comply with affirmative action requirements and anti-discrimination laws.”

- Patricia Shiu, DOL web chat, 7/12/11



Self-Identification

- Definition of “disability”
- Pre-offer self-ID
- Post-offer self-ID
- General principles

Definition of “disability”

- What is a disability for purposes of invitation to self-identify?
 - Impairment that substantially limits a major life activity (ignoring positive effects of mitigating measures other than ordinary eyeglasses or contact lenses); or
 - Record of such impairment

Definition of “disability,” cont.

- Caution: “Regarded as having an impairment”
- Doesn’t have to be substantially limiting
- Protected from discrimination unless impairment is both transitory AND minor
- No entitlement to reasonable accommodation

Pre-offer self-ID for disabilities

- Invitation must be given pre-offer
- Americans with Disabilities Act (ADA)?!
- OFCCP will provide mandatory form/language
 - Likely yes/no (not type of disability)
- Employer may designate if:
 - Disability is obvious; or
 - Employer knows of disability (e.g., verbal disclosure)

Pre-offer self-ID for veterans

- Invitation must be given pre-offer
- Optional form provided by OFCCP
 - Protected veteran? Yes/no
 - Don't ask what category

Pre-offer self-ID: general principles

- May occur at same time as pre-offer inquiry for race/ethnicity and gender
- Keep separate from application (shield decision-maker)

Post-offer self-ID for disabilities


- Survey current employees during the first year you're subject to the new regulations
- Survey again every 5 years
- Reminder at least once in between surveys
- OFCCP will provide mandatory form/language
 - Likely yes/no (not type of disability)
- Option to designate if obvious or disclosed
- Rationale for periodic surveys

Post-offer self-ID for veterans

- Optional form provided by OFCCP
- Ask which category:
 - Disabled veteran
 - Recently separated veteran
 - Active wartime or campaign badge veteran
 - Armed Forces Service Medal veteran

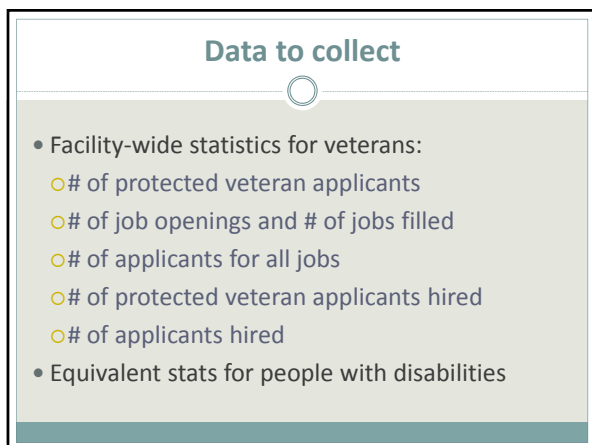
All self-ID: general principles

- Optional for applicant or employee to answer
- Grandfathering: Self-ID is part of Subpart C
- Question: Is one master form (race/ethnicity and gender, as well as veteran and disability status) okay?



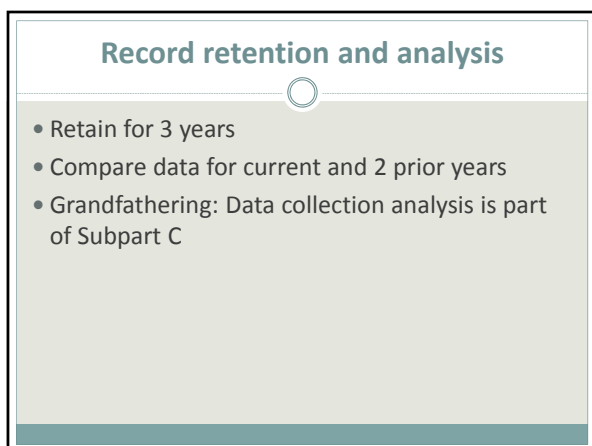
Data collection analysis

- Data to collect
- Record retention and analysis




Data to collect

- Facility-wide statistics for veterans:
 - # of protected veteran applicants
 - # of job openings and # of jobs filled
 - # of applicants for all jobs
 - # of protected veteran applicants hired
 - # of applicants hired
- Equivalent stats for people with disabilities



Record retention and analysis

- Retain for 3 years
- Compare data for current and 2 prior years
- Grandfathering: Data collection analysis is part of Subpart C



Benchmarks and goals

- Hiring benchmark for veterans
- Utilization goal for disabilities
- General principles

Hiring benchmark for veterans

- What does “hiring benchmark” mean?
 - Not specifically defined (“quantifiable method by which the contractor can measure its progress toward achieving equal employment opportunity for protected veterans”)
 - Our assessment: Compare to % of new hires that are veterans

Hiring benchmark for veterans, cont.

- Two options for selecting hiring benchmark:
 - Use OFCCP figure based on national percentage of veterans in civilian labor force (currently 8%)
 - Establish custom benchmark based on other available data

Hiring benchmark for veterans, cont.

- Facility-wide
- Must assess effectiveness of outreach efforts
- If efforts weren't effective, then must identify and implement alternative efforts
- Document and retain record of hiring benchmark and assessment of outreach efforts for 3 years

Utilization goal for disabilities

- What does "utilization goal" mean?
 - "The purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of individuals within [the workforce].... The utilization goal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part."

Utilization goal for disabilities, cont.

- What does "utilization goal" mean?
 - Compare to employee roster on plan date (snapshot: compare utilization goal to actual % of your employees with disabilities)
 - Note this is different from annual percentage placement goal under EO 11246 plan, which measures placements into job groups

Utilization goal for disabilities, cont.

- OFCCP will set national goal (currently 7%)
- Applies to each job group established for purposes of EO 11246
 - Exception: Contractors with 100 or fewer employees may apply the goal for the entire workforce

Utilization goal for disabilities, cont.

- Investigate possible problem areas: If job group is underutilized, must determine “whether and where impediments to equal employment opportunity exist”
 - Assess personnel processes, effectiveness of outreach/recruitment, results of your AAP audit, and any other relevant areas
- If problem area is identified, develop action-oriented programs to correct it

Benchmarks/goals: general principles

- Annually review external outreach and recruitment efforts
 - Consider data collection analysis
 - Consider hiring benchmark (veterans)
 - Consider utilization goal (disabilities)
 - Retain documentation for 3 years

Benchmarks/goals: general principles, cont.

- Benchmarks/goals are not quotas
- Grandfathering: Benchmarks/goals are part of Subpart C



Job postings

- Language in job ads
- Posting jobs with the state

Language in job ads

- “Equal opportunity employer” not good enough
- Job postings must say qualified applicants will receive consideration for employment without regard to their disability or protected veteran status
- No grandfathering option!

Posting jobs with the state

- Must notify relevant state employment office:
 - You are a federal contractor and you want priority referrals of protected veterans
 - Name/location of each hiring location in state
 - Contact information for the official responsible for hiring at each location
 - Contact information for external job search organization (if applicable)

Posting jobs with the state, cont.

- Required under veterans' rules
- Must provide job posting in format acceptable to relevant state employment office
- No grandfathering option!



Electronic posters

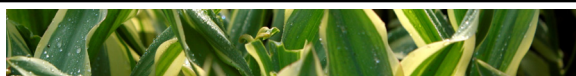
- Posters for applicants
- Posters for employees

Posters for applicants

- Already required to display posters where applicants as well as employees can see them (“EEO is the Law” and, if applicable, posters for Service Contracts Act or construction projects)
- If you use an electronic application process, you must use an electronic poster
 - “Conspicuously stored with, or as part of, the electronic application”
- No grandfathering option!

Posters for employees

- Already required to display physical poster
- For employees who don’t physically work at a company facility, you may provide posters electronically if you provide computers or actually know employees can access posters
- May post on intranet (must be conspicuous) or send by email



Communication to subcontractors

- Equal opportunity clause
- Policy notice to subcontractors

Equal opportunity clause: disabilities

- May incorporate by reference, but only if:
 - Cite to 41 CFR 60-741.5(a),
 - Followed by bold text: **“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.”**

Equal opportunity clause: veterans

- May incorporate by reference, but only if:
 - Cite to 41 CFR 60-300.5(a),
 - Followed by bold text: **“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.”**

Equal opportunity clause: general principles

- Still must incorporate in each purchase order or subcontract related to the federal contract
- No grandfathering option!

Policy notice to subcontractors

- Must send written notice of company policy related to your affirmative action efforts to all subcontractors requesting appropriate action on their part
 - Includes vendors and suppliers
 - Presumably annual notice
- Grandfathering: Policy notice to subcontractors is part of Subpart C
- Note: Internal policy dissemination still required



Other changes

- Access to AAP
- Audit authority
- Proposals dropped

Access to AAP

- Still must post location and hours during which any employee or applicant may inspect written AAPs for veterans and people with disabilities
- Okay to exclude data metrics from those AAPs

Audit authority

- Clarification of OFCCP's position
- Temporal scope of audits
 - Looking backward: Normally OFCCP looks at past 1 or 2 years before scheduling letter
 - Looking forward: No time limit
- Upon request, must provide OFCCP info on format of records, and let them choose
- OFCCP may analyze records off-site or on-site

Proposals dropped

- Linkage agreements with outreach organizations
- Tracking how many veterans and people with disabilities were referred by each organization
- Inclusion of entire EO clauses in subcontracts (Vets: 12 paragraphs. Disabilities: 7 paragraphs)
- Sub-goal for specific targeted disabilities
- Detailed topics to cover in required training
- 5-year record-keeping requirement



Review

- March 2014 deadline
- Grandfathering options

March 2014 deadline

- Language in job ads
- Posting jobs with the state
- Electronic posters for applicants if you use electronic application process
- Equal opportunity clauses

Grandfathering options

- Invitation to self-identify
- Data collection analysis
- Hiring benchmark for veterans
- Utilization goal for people with disabilities
- Policy notice to subcontractors



Recommendations

- Assessment and planning
- OFCCP website resources

Assessment and planning

- Plan now for March 2014 changes
- Determine whether grandfathering is an option
 - If no, gear up for all changes
 - If yes, phased compliance? Or upon plan date?
- Wait for release of disability self-ID form before significant planning for self-ID changes
- Don't implement new self-ID before March 2014
- Submit budget request for changes

OFCCP website resources

- www.dol.gov/ofccp/VEVRAARule
- www.dol.gov/ofccp/503Rule



Vigilant assistance

- Compliance with new rules for AAP clients
- How we help with your AAP

Compliance with new rules for AAP clients

- We will be reviewing and updating:
 - Plan language
 - Model forms and policies
 - Excel spreadsheet
- Follow-up newsletter articles
- Reminders of approaching changes
- Personal check-in to see what help is needed

How we help with your AAP

Affirmative action services for companies with covered federal contracts.

Vigilant offers the following:

- **Written AAP** including all required analyses and reports
- **Affirmative action counsel** throughout the year, included in annual fee
- **Audit assistance** including negotiation with the agency
- **Relevant news and resources** including regular updates and alerts through our newsletter along with access to legal guides, model forms and model policies
- **Significant discount for members on AAPs**



Questions?

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