

Are You Ready for Your Next Audit?

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THIS ARTICLE WAS PUBLISHED IN THE AEROSPACE & DEFENSE, EMPLOYMENT AND GOVERNMENT CONTRACTS SECTIONS OF *LAW360* UNDER THE TITLE “READY FOR A DOL AUDIT? 6 QUESTIONS FOR GOV’T CONTRACTORS” ([HTTP://WWW.LAW360.COM/ARTICLES/525930/READY-FOR-A-DOL-AUDIT-6-QUESTIONS-FOR-GOV-T-CONTRACTORS](http://www.law360.com/articles/525930/ready-for-a-dol-audit-6-questions-for-gov-t-contractors)) ON APRIL 8, 2014. © COPYRIGHT 2014, PORTFOLIO MEDIA, INC., PUBLISHER OF *LAW360*.

By now, federal contractors should have taken a hard look at their current Affirmative Action Plan (AAP) policies, procedures and documentation to ensure compliance with the new requirements. Under the Office of Federal Contract Compliance Programs’ (OFCCP) Final Rule, effective March 27, 2014, contractors are required to gather data and set hiring goals for individuals with disabilities and protected veterans. Some of the other rules, however, will not become effective until contractors update their annual AAP. To be confident that your company is ready for a future Department of Labor audit, these are a few of the issues you need to understand.

1. Have you made the required changes to your EO clauses in contracts and subcontracts?

Contractors are required to state in employment solicitations and other advertisements, among other things, that they are equal employment opportunity employers of individuals with disabilities and protected veterans. Contractors may combine the required equal opportunity (EO) clauses into a single “incorporation by reference” clause, provided that the clause is set in bold text and the prescribed content of the veteran and disability EO “incorporation by reference” clauses are preserved. The OFCCP provided an example of the combined EO clause:

This contractor and subcontractor shall abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.

Contractors also are permitted to incorporate the EO clause into subcontracts by reference.

2. What is your utilization goal and are you doing what you need to do to meet it?

The new regulations include the utilization goal of 7 percent to give contractors a means to measure their success in outreach and recruitment of individuals with disabilities and a hiring benchmark of 8 percent for protected veterans in their workforce. Employers will need to know how many individuals with disabilities and protected veterans currently are in their workforce and in what job groups or EEO-1 job categories.

When the percentage of individuals with disabilities in one or more job groups is less than the utilization goal, the contractor must take steps to determine whether and where impediments to equal employment exist. This process includes the employer’s assessment of its existing personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its affirmative action program audit, and any other areas that might affect the success of the affirmative action program. After conducting this assessment, the contractor must develop programs to correct any identified problem areas.

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Failure to meet the utilization goal will not automatically lead to any form of sanction. The regulations specifically provide that the disability goal is not to be used as a quota or a ceiling that limits or restricts the employment of individuals with disabilities. A contractor's determination that it failed to meet the disability goal does not constitute either a finding or admission of discrimination in violation of the regulation.

3. Have you invited applicants and employees to self-identify?

The new regulations require contractors to invite applicants to self-identify as an individual with a disability and/or protected veteran at the pre-offer stage, in addition to the existing post-offer self-identification requirement. OFCCP has developed a specific required form for contractors to use to invite applicants to self-identify as individuals with a disability. The form (http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary_Self-Identification_of_Disability_CC-305_SD_Edit1.24.14.pdf) is posted on the OFCCP Web site.

OFCCP added a pre-offer invitation requirement so that contractors will track the number of individuals with disabilities and protected veterans who apply for jobs, and use this information to assess the effectiveness of their outreach and recruitment efforts. The pre-offer invitation to self-identify may be included in the contractors' application materials for a position, but the invitation must be separate from the application. Contractors are required to invite applicants to self-identify as an individual with a disability and/or a protected veteran at the same time that the contractor collects demographic data regarding race, gender, and ethnicity from applicants.

The Internet Applicant Rule allows contractors to screen out individuals whom they believe do not meet the basic qualifications for the position prior to collecting demographic data regarding race, gender, and ethnicity. In order to harmonize the pre-offer invitation to self-identify requirement with Internet Applicant Rule recordkeeping provisions, OFCCP permits contractors to invite applicants to self-identify *after* they meet the Internet Applicant Rule requirements, including the basic qualification screen.

In addition to inviting applicants to self-identify at the pre-offer and post-offer stage, contractors must also regularly ask their current employees to voluntarily self-identify as an individual with a disability using the self-identification form at least once every five years. In addition, contractors must remind their

employees that they may voluntarily update their disability status at any time. The OFCCP emphasized that contractors may not compel or coerce individuals to self-identify, and that contractors must keep all self-identification information confidential.

Through the invitation and reminder to employees to voluntarily self-identify, contractors can capture data on employees who become disabled while employed, as well as those with existing disabilities who may feel more comfortable self-identifying once they have been employed for some time.

4. Have you made the necessary changes to meet the new data collection requirements?

The data collection requirements in the Final Rule require contractors to document the "total number of job openings and the total number of jobs filled." The total number of job openings refers to the number of individual positions advertised as open in a job vacancy announcement or requisition. Jobs "filled" refers to jobs that the company fills by any means, including, for example, through a competitive process, reassignment or promotion.

5. Have you stored the "EEO is the Law" poster electronically?

It is likely that the "EEO is the Law" poster (<http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf>) will be revised in light of the new regulations. However, contractors should continue to use the existing poster until the new poster is available. The revised regulations require that the poster be made available in a "form that is accessible and understandable" to individuals with disabilities and disabled veterans, such as Braille and large-print versions, or as an audio recording. However, contractors need only make the poster available in that format when an applicant or employee requests it, or when the contractor knows that the applicant or employee is unable to read the poster otherwise. The contractor also has an obligation to "conspicuously store" the EEO poster with an electronic application. This can be accomplished by displaying a prominent link to the poster, along with a brief explanation of what the link connects to, as part of the electronic application.

6. What must you do if you are preparing your first Affirmative Action Plan after the effective date of the new requirements?

Within 120 days of the commencement of a contract, contractors must maintain an affirmative action program at each establishment, which includes, among other things, the following elements:

- **Invitation to Self-Identify:** As set forth above, the company must extend an invitation for applicants to inform it whether the applicant is an individual with a disability and/or protected veteran, both before and after an offer of employment is made.
- **Policy Statement:** A contractor must include an equal employment opportunity policy statement in its affirmative action program and post it on company bulletin boards.
- **Review of Processes:** The company must ensure that its personnel processes provide for careful, thorough and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies and training opportunities, that they have policies in place to ensure that individuals with disabilities are not harassed, and that their recruitment efforts are reasonably designed to recruit qualified individuals with disabilities.
- **Job Qualification Standards:** The contractor must provide and adhere to a schedule for the review of all physical and mental job qualification standards to ensure that, to the extent that the qualifications screen out qualified individuals with disabilities, they are job-related and consistent with business necessity.

- **Audit System:** The contractor must design and implement an audit and reporting system.
- **Snapshot:** The contractor must take a snapshot of the disability composition of its workforce, results of the utilization analysis and application of the goal, and a discussion of any problem areas identified and the actions planned to address them.

The OFCCP recognizes that the first AAP will be a transitional one for contractors and will not assess violations, so long as the contractor can demonstrate that it acted reasonably, in light of its particular circumstances.

These new requirements represent significant changes to the ways contractors gather statistical information, analyze hiring decisions and store data. Working with experienced outside counsel and third-party vendors, contractors should be able to comply without much difficulty and avoid problems at the next AAP audit.

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