

OFCCP's Updated Compliance Manual and New Rules Signal Increased Burdens for Federal Contractors

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PRACTICES Labor and Employment, Affirmative Action and OFCCP Compliance

Although summer has come to an end, the OFCCP's efforts to enforce and increase federal contractors' affirmative action and equal employment opportunity obligations have not. On August 23, 2013, the OFCCP released an updated version of its Federal Contractor Compliance Manual ("FCCM"). Just four days later, on August 27, 2013, the OFCCP issued the highly-anticipated final rules concerning Section 503 of the Rehabilitation Act ("Section 503") and the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA").

Updated FCCM Reflects OFCCP's Current Approach to Compliance Evaluations

The FCCM provides OFCCP compliance officers with a procedural framework for executing contractor compliance evaluations and complaint investigations. In 2010, OFCCP Director Patricia A. Shiu identified updating the FCCM as one of her priorities, since the last version of the FCCM was published in the 1980s.

A DOL spokesperson calls the revised FCCM a "significant overhaul," which is no surprise, given the OFCCP's increasingly aggressive approach to compliance evaluations. Although the 500-page document mimics the structure of the previous version, the new version incorporates many of the processes and procedures that have become standard under the Obama Administration. For example, the FCCM allows compliance officers to request additional employment data from contractors at the desk audit stage. As contractors who have undergone a desk audit within the last one to two years know, this lengthens the duration and burden of desk audits. Regardless of the outcome of the desk audit, the revised FCCM encourages compliance officers to conduct onsite reviews during which they pursue different areas of investigation unrelated to the findings of the desk audit. Additionally, the manual gives the compliance officer guidance on handling continuing violations and remedies for identified discrimination.

Although the FCCM is the director's internal guidance to her compliance officers and does not carry the weight of law, it signifies the OFCCP's intent to continue conducting more demanding and expansive reviews of contractors' affirmative action practices. Any contractor notified or anticipating an audit by OFCCP should become familiar with the revised FCCM or consult counsel familiar with it.

Final Rules Regarding Veterans and Disabled Individuals Increase Contractor Obligations

In contrast to the FCCM, the OFCCP's final rules regarding Section 503 and VEVRAA are binding. First proposed in 2011, the rules impose significant new obligations on federal contractors when it comes to hiring and employing veterans and disabled employees. The following changes are some of the "highlights" of the final rule identified by the OFCCP:

- **Hiring Benchmarks** - For the first time, the rules provide specific metrics to measure contractors' progress in hiring veterans and disabled employees. The VEVRAA rule requires

contractors to establish an annual hiring benchmark, either based on the national percentage of veterans in the workforce (currently 8 percent), or based on the best available data and factors unique to their businesses. The Section 503 rule establishes a 7 percent utilization goal for the employment of individuals with disabilities. These benchmarks are not quotas, so the failure to meet either goal will not result in a violation or an inference of discrimination. However, contractors who fail to meet the goal are expected to examine whether any impediments to equal opportunity exist and design and implement action-oriented programs to minimize identified impediments.

- Additional Self-Identification Procedures - The new rules obligate contractors to invite job candidates to self-identify as disabled or as veterans both before and after the offer phase of the hiring process. Additionally, contractors must offer employees the opportunity to self-identify as disabled every five years. Both of these practices are intended to increase reporting. Contractors must maintain these self-identification forms in confidential data files, separate from employees' personnel and medical files, so they can be easily provided to a compliance officer during an audit.
- Increased Data Collection Requirements - Contractors are required for the first time to document and update annually several quantitative comparisons analyzing the number of veterans and individuals with disabilities they hire. This data must be kept for at least three years. Contractors also must review their external outreach and recruiting efforts annually and, if necessary, identify ways to make their efforts more effective. These records are also required to be kept for three years.
- Mandatory Inclusion of Equal Opportunity Clauses - Both new rules require that specific language be used when contractors incorporate equal opportunity clauses by reference in their contracts with subcontractors in order to alert subcontractors of their responsibility to comply with the new veteran and disability rules.

The final rules will be published shortly in the Federal Register and will take effect 180 days later. Although contractors do not have to comply with the new rules until the spring of 2014, contractors should start preparing now since the rules require substantial changes to, among other things, employment policies, data collection procedures, recordkeeping processes, and contract language. Additionally, managers and employees involved in recruiting and hiring need to be trained on compliance requirements, and extra personnel may be needed to take on the responsibility of ensuring compliance. In the words of the OFFCP, "being a federal contractor is a privilege," and as contractors grappling with the increased burdens outlined in the updated FCCM and imposed by the new rules know, it comes at a price.

For more information, please contact the Haynes Boone attorney with whom you work or any of the following attorneys in the firm's [Labor and Employment](#) Practice Group: