

Affirmative Action Requirements

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FEDERAL LAWS REQUIRING AFFIRMATIVE ACTION

- Executive Order 11246
 - Prohibits federal contractors and subcontractors from discriminating against applicants and employees on the basis of race, color, religion, sex, or national origin in employment.
 - Requires contractors and subcontractors to implement affirmative action plans to increase minority and female participation in the workplace.
- **The Rehabilitation Act** prohibits federal contractors from discriminating against people with mental and physical disabilities and requires affirmative action to employ and advance in employment people with disabilities.
- **Vietnam Era Veterans' Readjustment Assistance Act and the Jobs for Veterans Act (VEVRAA)** provides protections for certain veterans and requires affirmative action to employ and advance "protected veterans."

WHO IS A GOVERNMENT CONTRACTOR?

- Executive Order 11246 and the Rehabilitation Act apply to:
 - Companies doing business with the federal government under contracts or subcontracts that exceed \$10,000.
 - Contractors and subcontractors with 50 or more employees and federal contracts worth \$50,000 or more are required to prepare and maintain written affirmative action plans.
- VEVRAA applies to
 - Contractors who have federal contracts or subcontracts of \$50,000 or more that were entered into before Dec. 1, 2003.
 - Contractors who have federal contracts or subcontracts of \$100,000 or more that were entered into after Dec. 1, 2003.

COVERAGE ISSUES

- If one of the employer's facilities is a federal contractor then all of the employer's facilities must comply with the affirmative action requirements.
- Businesses or organizations that do not independently hold government contracts/subcontracts may still be covered under the laws enforced by OFCCP if they are considered a "single entity" with a related business or organization that holds such contracts.
- Hospitals that accept Medicaid and Medicare payments are not considered government contractors and do not have to comply with the affirmative action requirements.
- Hospitals are deemed federal contractors if they: (1) have contractual relationships to provide health care to federal employees; (2) provide healthcare services to active or retired military under TRICARE; or (3) are teaching hospitals doing research for a university that has a contract with the federal government.

OBLIGATIONS

- Equal Opportunity Clause
- Nondiscrimination
- Notices
- Advertising
- Information and Reports
- Facilities
- Membership Fees

EQUAL OPPORTUNITY CLAUSE

- Contracts and subcontracts must contain an equal opportunity clause stating the employer's duties under Executive Order 11246, the Rehabilitation Act and VEVRAA.
- Government contracts and subcontracts can incorporate by reference the equal opportunity clause in contracts.

WRITTEN AFFIRMATIVE ACTION PLANS

- Must have a written affirmative action plan for each one of the employer's establishments with 50+ employees.
 - All employees must be included in the plan(s).
- Must develop the written AAP within 120 days from the commencement of a contract.
- The contractor must update the AAP annually.

WHAT IS IN A WRITTEN AAP UNDER E.O. 11246?

- Organizational Profile
- Job Group Analysis
- Placement of Incumbents in Job Groups
- Availability Analysis
- Comparing Incumbency to Availability
- Placement Goals
- Designate An Affirmative Action Officer
- Identification of Problem Areas
- Action-Oriented Programs
- Periodic Internal Audits

RECORD RETENTION REQUIREMENTS

- A contractor must maintain any personnel or employment record for a period of not less than two years from the date of the making of the record or the personnel action involved, whichever occurs later.
- Contractors who have fewer than 150 employees or do not have a government contract of at least \$150,000 must keep any personnel or employment record for a minimum of one year from the date of the making of the record or the personnel action involved, whichever occurs later.
- Maintain the written AAP for the current and previous year.
- For any personnel record required to be maintained, the contractor must be able to identify the gender, race, and ethnicity of each employee and where possible the same information or Internet Applications.
- Adverse impact evaluations.
- Failure to preserve.

EFFECTIVE DATE FOR CHANGES TO 503 AND VEVRA

- The effective date for new regulations is March 24, 2014.
- Contractors whose existing AAPs predate March 24, 2014 may wait to comply with the new regulations until their standard AAP review and update cycle.
- Must comply with other requirements on the effective date.

CHANGES TO REHABILITATION ACT

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CHANGES TO THE REHABILITATION REGULATIONS

- The words “disability,” “major life activity,” “major bodily function,” “regarded as,” and “substantially limits” are defined to be consistent with the ADAAA definitions of those words.
- The new regulations contain an “aspirational goal” that 7% of the contractor’s work force have disabilities. Failure to meet the goal will not lead to a fine, penalty or sanction.
- Contractors’ job solicitations and advertisements must state that the contractor is an equal opportunity employer of individuals with disabilities.

SELF-IDENTIFICATION REQUIREMENTS

- Contractors are required to invite applicants to self-identify at the pre-offer stage in addition to the post-offer self identification requirement.
- Employers must regularly invite current employees to voluntarily self-identify.
- The self-identification form is located at:
http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary%20Self-Identification%20of%20Disability%20CC-305%20Final_QA_508c.pdf

EEO CLAUSE AND NOTICE

- Employers may incorporate the EEO Clause into contracts and subcontracts by reference. But must include the following sentence in bold, “**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.**”
- Employers must post the EEO Notice and can post it electronically if certain requirements are met. You can obtain a copy of the notice at <http://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf>

OUTREACH AND RECRUITMENT

- Requires outreach and recruitment.
- Requires documentation of activities and annual written assessment of the effectiveness of each of its activities.
- If totality of efforts not effective, must identify and implement alternative efforts.
- Requires that contactors must provide records and other information “in any of the formats in which they are maintained, as selected by OFCCP.”
- Confirms OFCCP’s commitment to treat records provided by contractors as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act.
- Retain these records for 3 years.

CHANGES TO THE REHABILITATION REGULATIONS

- Contractors have new data collection and analysis requirements.
- Employers must document the actions taken to design and implement an audit and reporting system.
- Contractors must document all outreach and recruitment activities and retain the documentation for three years.

CHANGES TO VEVRAA

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DEFINITIONS

- Defines “protected veteran” as any veteran protected by VEVRAA.
- Replaces “other protected veteran” with “active duty wartime or campaign badge veteran.”

EEO CLAUSE

- Promise not to discriminate against “protected veterans.”
- List job openings with an employment service delivery system.
- Post a notice.
- The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to their protected veteran status.

INCORPORATING THE EEO CLAUSE BY REFERENCE

The contractor must incorporate the EEO Clause in contracts:

“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.”

SELF IDENTIFICATION REQUIREMENTS

- Final rule eliminates the separate inquiry regarding disabled veteran status.
 - Pre-offer: invitation to self-identify as a protected vet.
 - Post-offer: invitation to self-identify specific veteran category(ies) that the contractor is required to report on VETS 100.
- You may find the model invitations attached to this presentation.

ELEMENTS OF VEVRAA AAP

- Requires Outreach And Recruitment
- Data Collection Analysis
- Contractor must set an annual hiring benchmarks

COMPLIANCE EVALUATIONS

- Adds a pre-award compliance review procedure.
- Clarifies that OFCCP may need to examine information after the date of the scheduling letter.
- States that OFCCP may request that documents be provided either on-site or off-site during compliance checks and that focused reviews may be conducted both on-site and off-site

RECORDKEEPING

- Three year recordkeeping requirement:
 - External outreach and recruitment efforts
 - Data collection analysis
 - Criteria and conclusions regarding contractor established hiring benchmarks
- Access to records

APPENDIX A

Guidelines on Contractors Duty to Provide Reasonable Accommodation

Contains minor changes to update the guidelines and conform them to changes made in the Final Rules.

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