What CHROs Need to Know About OFCCP’s Final Affirmative Action Rule For Individuals with Disabilities

On August 27, 2013, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) posted a final rule on its website that fundamentally alters the affirmative action requirements established in Section 503 of the Rehabilitation Act for qualified individuals with disabilities. Among other things, the final rule will, for the first time, set a goal that seven percent of every job group in a federal contractors’ workforce be persons with disabilities. It also requires contractors to implement procedures for self-identification by applicants and employees as to whether they have a disability and allows contractors to make that determination themselves in the case of “obvious” or “known” disabilities. In addition, the final rule details significant new actions contractors must take involving the assessment of their recruitment efforts and how well they are meeting the utilization goal, data collection, record-keeping and policy dissemination.

Federal Contractor Affirmative Action and Non-Discrimination Requirements Generally

Companies that enter into contracts and subcontracts with the federal government are subject to a number of special equal employment opportunity and affirmative action requirements. Federal contractors’ nondiscrimination and affirmative action obligations are established by two laws and an Executive Order:

- Executive Order 11246 (race, gender, religion, and national origin);
- Section 503 of the Rehabilitation Act of 1973, as amended (individuals with disabilities); and
- Section 4212 of the Vietnam Era Veterans’ Readjustment Assistance Act of 1974, as amended (protected veterans), and the implementing regulations.

The federal contractors’ obligations are enforced by the OFCCP. The failure to comply with agency’s regulations may result in various remedies for the affected persons with disabilities and additional affirmative action obligation requirements for the contractor. OFCCP generally attempts to remedy compliance violations through conciliation agreements with contractors, or failing to reach an agreement, through legal sanctions on the contractor that may include withholding progress payments, termination of current federal contracts, and debarment from eligibility to enter future federal contracts.

Current Rules Governing Compliance With Section 503 Generally

Coverage The nondiscrimination requirements and general affirmative action requirements of Section 503 apply to all employers with federal government contracts or subcontracts in excess of $10,000 for the purchase, sale, or use of personal property or nonpersonal services (including construction). However, the requirement to prepare and maintain an affirmative action program, and the specific affirmative action requirements apply to those service and supply contractors that have a contract or subcontract of $50,000 or more and 50 or more employees. Once an employer is covered, the requirements generally apply to all of its operations, not just those performing work on federal contracts.
General Requirements of Current Rules  Federal contractors and subcontractors covered by Section 503 are currently required to:

- Employ nondiscriminatory employment practices (as is also required generally of all employers under the Americans with Disabilities Act, or ADA);
- Provide reasonable accommodations to the known physical and mental limitations of otherwise qualified job applicants and employees with disabilities (also an ADA requirement);
- After a job offer is extended but before employment begins, invite job applicants to voluntarily and confidentially self-identify as to whether or not they have a disability in order to benefit from any affirmative action programs covered contractors may have;
- Develop and maintain a written affirmative action program (AAP) that includes:
  - Developing an equal employment opportunity policy statement;
  - Reviewing personnel processes;
  - Conducting periodic reviews of physical and mental job qualifications;
  - Developing and implementing procedures to prevent harassment;
  - Disseminating the contractor’s EEO policy externally and performing outreach and positive recruitment;
  - Disseminating the EEO policy internally;
  - Designing and implementing an audit and reporting system;
  - Designating a management official to direct and assume responsibility for ensuring the implementation of the affirmative action program; and
  - Training personnel to ensure that EEO and affirmative action program commitments are implemented.
- Maintain certain personnel and employment records pertaining to compliance with Section 503 for two years.

Numerical Goals Not in Current Rules The current regulations do not require numerical goals for persons with disabilities. Instead, the focus is on taking good-faith affirmative action to establish a workplace free from barriers to equal employment opportunities, and to recruit, train, and promote qualified individuals with disabilities. There is no apparent legal authority under Section 503 of the Rehabilitation Act that permits the federal government to set numerical employment requirements. Moreover, affirmative action requirements which operate as a quota are generally unlawful and subject to the highest level of judicial scrutiny.

Overview of Final Section 503 Rule

On August 27, 2013, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) posted a final rule on its website that fundamentally alters the affirmative action requirements established in Section 503 of the Rehabilitation Act for qualified individuals with disabilities. Without providing any evidence of discrimination, the final regulatory changes will, for the first time, set a goal that seven percent of every job group in a contractors’ workforce be persons with disabilities. It also requires contractors to implement procedures for self-identification by applicants and employees as to whether they have a disability and allows contractors to make that...
determination themselves in the case of “obvious” or “known” disabilities. In addition, the final rule details significant new actions contractors must take involving the assessment of their recruitment efforts and how well they are meeting the utilization goal, data collection, record-keeping and policy dissemination. The final rule also implements the new definition of disability under the ADA Amendments Act of 2008 (ADAAA) and the Equal Employment Opportunity Commission’s (EEOC) recent regulations under the ADAAA.

Effective Date  The final rule becomes effective on 180 days after publication in the Federal Register, which is expected to be around September 13, 2013. However, full compliance with the requirements of the final rule by current contractors is phased-in over time. That is current contractors with written affirmative action programs (AAP) in place on the effective date of the final rule may maintain that AAP for the duration of their AAP year. Such contractors are not required to comply with the final rule’s utilization goal nor the self-identification requirements until the start of their next 12-month AAP review and updating cycle.

Rationale for the Final Rule  The U.S. Department of Labor describes the final rule as “an important means by which the Government can contribute to reducing the employment disparity between those with and without disabilities.” The final rule is intended to provide contractors with the tools needed to evaluate their affirmative action obligations and correct any “deficiencies in their employment practices.”

Percentage of Workforce Utilization Goal  The final rule establishes, for the first time, a federally mandated utilization goal of seven percent for individuals with disabilities for each job group in the contractor’s workforce. In a webinar shortly after the final rule was posted online, OFCCP officials said the seven percent goal for each job group does not apply by establishment; rather the goal applies for each job group in the contractor’s entire workforce.

Under the final rule, contractors must use the same job groups that they use for race and gender under the Executive Order 11246 affirmative action requirements. They are also required to conduct an annual utilization analysis to evaluate the representation of individuals with disabilities in each job group relative to the seven percent goal. If the utilization goal is not met in one or more job groups, the contractor must develop and execute action-oriented programs to attain the goal including alternative or additional affirmative action efforts listed in the final rule.

OFCCP Asserts “Goal is Not a Quota”  The OFCCP states in the preamble to the final rule that the seven percent goal “is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups.” Quotas are expressly forbidden.” Instead, the goal is a management tool that informs decision-making and provides real accountability.”

Enforcement of the Goal  In the preamble to the final rule, OFCCP recognizes that for some job groups in some locations availability of qualified individuals with disabilities may be less than seven percent. OFCCP states that failure to meet the goal will not, in and of itself, result in a violation or finding of discrimination. It will only require contractors to conduct an assessment to determine whether and where impediments to equal employment opportunity exist. Only if a problem or barrier is identified, must the contractor develop and execute an action-oriented program to address the problem. If no impediments are identified, no corrective action is required. Although OFCCP states it will look at the totality of the contractor’s affirmative action efforts to determine whether it is in compliance, the agency’s audit and conciliation process allows OFCCP to second-guess the effectiveness and reasonableness of a contractor’s outreach efforts if the goal is not met.
Utilization Analysis Under the final rule, contractors are required to annually evaluate the representation of individuals with disabilities in each job group within the contractor’s workforce. When the percentage of individuals with disabilities in one or more job groups is less than seven percent, contractors must take steps to determine whether and where impediments to equal employment opportunity exist. When making this determination, contractors must assess its 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.

As noted above, if a problem or barrier is identified, must the contractor develop and execute an action-oriented program to address the problem. If no impediments are identified, then no corrective action is required. These action-oriented programs may include the modification of personnel processes to ensure equal employment opportunity for individuals with disabilities, alternative or additional outreach and recruitment efforts from among those listed in the final rule, and/or other actions designed to correct the identified problem areas and attain the seven percent goal.

Invitations to Self-Identify as Disabled

The final rule includes new self-identification requirement with regard to both job applicants and current employees.

Job Applicants The final rule requires contractors to invite each job applicant to voluntarily self-identify as an individual with a disability. Contractors must provide each job applicant an OFCCP prescribed invitation that is separate from the application prior to an offer of employment (pre-offer), and again at the post-offer/pre-employment stage of the hiring process.

Existing Employees The final rule also requires contractors to invite each of their employees to voluntarily self-identify as an individual with a disability. The invitation must be extended the first year the contractor becomes subject to the final rule and at five year intervals, thereafter, using an OFCCP prescribed invitation. At least once during the intervening years between the invitations, contractors must remind their employees they may voluntarily update their disability status. Contractors may not compel or coerce an individual to self-identify as an individual with a disability.

Internet Applicant Rule Applies The preamble to the final rule provides guidance on how contractors may invite Internet applicants to self-identify as an individual with a disability in a manner that is consistent with OFCCP’s Internet Applicant rule. Under the final rule, contractors can invite applicants to self-identify as an individual with a disability at the same time the contractor solicits demographic data on applicants under the Executive Order 112146 Internet Applicant Rule. For Internet applicants this generally will be after the contractor has determined the individual has been screened for basic qualifications and meets the other requirements for being an Internet applicant. Therefore, the final rule does not require contractors to change their existing systems for screening Internet applicants so long as those systems comply with existing law.

“Known” and “Obvious” Disabilities The preamble to the final rule regulations states that contractors are allowed to identify an individual as having a disability if the individual does not voluntarily self-identify when: 1) the disability is obvious (e.g., someone is blind or missing a limb), or 2) the disability is known to the contractor (e.g., an individual says that he or she has a disability or requests reasonable accommodation for a disability). The preamble further states that contractors may not guess or speculate when identifying an individual as having a disability. Nor may they assume that an individual has a disability because he or she “looks sickly” or behaves in an unusual way. It is not clear in the final rule if an employer can identify someone as having a disability if that person checks “no” on their self-identification form.
**Not In Conflict With The ADA** The preamble states OFCCP believes that concerns regarding the possibility of a conflict with the Americans with Disabilities Act (ADA) or related guidance are based on an incorrect reading of the ADA and its regulations. To assuage any remaining doubt on the issue, OFCCP obtained a letter from Employment Opportunity Commission’s Office of Legal Counsel affirming that the pre-offer invitation to self-identify as an individual with a disability required is permissible under the ADA and its implementing regulations. The letter is posted on OFCCP’s website.

**Self-Identification Data Confidential** Contractors must keep all information on self-identification confidential and shall maintain it in a data analysis file rather than in the medical files of individual employees.

**Prescribed Form and Elusive Definition of Disability** OFCCP’s prescribed self-identification form is not yet available, but will be posted on OFCCP’s website. The Equal Employment Opportunity Commission will be asked for input on the final form. For the past several decades, Congress, the courts, federal agencies, employers and employees have all struggled with establishing a precise definition of “disability,” which, even after Congress further refined the definition in 2008, has been the subject of extensive litigation. It remains to be seen if applicants and employees will know for certain whether they have a qualifying “disability” within the strict legal definition, simply by reading OFCCP’s prescribed self-identification form.

**Reasonable Accommodation Obligations**

Under the ADA, current OFCCP regulations, and the final rule, contractors are required to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. Indeed, federal contractors who comply with the ADA’s reasonable accommodation requirements are generally compliant with all but the reporting and record-keeping provisions of Section 503.11

Applicants with disabilities must be provided a reasonable accommodation with respect to the application process. As noted above, contractors may, under very limited circumstances, invite applicants to self-identify prior to making a job offer, and once a job offer has been extended and before the applicants begin their employment duties contractors must invite applicants to indicate whether they may have a disability and wish to benefit under the contractor’s affirmative action program.

Employees with disabilities who request an accommodation must be provided a reasonable accommodation that permits the employee to perform the essential functions of their job. Examples of reasonable accommodations include modifications to work schedules, work stations, and work processes without jeopardizing the safety of the employee or others. As noted above, reasonable accommodation requests can be rejected if they impose an “undue hardship” on the employer. If no reasonable accommodation can be found that permits the employee to perform the essential functions of his or her job, the EEOC regulations state that a transfer to another job for which the employee is qualified must be considered as a last resort.

Contractors may not reduce the amount of compensation offered to an individual with a disability because of the actual or anticipated cost of a reasonable accommodation the individual needs or may request.
Although a contractor is not expected to accommodate disabilities of which it is unaware, a contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees of whose disability the contractor has actual knowledge. Contractors are also not required to provide reasonable accommodation to an individual who satisfies only the “regarded as having such an impairment” prong of the ADA definition of disability.

**Electronic or Online Job Application Systems** The final rule states a contractor’s reasonable accommodation obligation extends to the use of electronic or online job application systems. If a contractor uses such a system, it must provide necessary reasonable accommodation to ensure that an otherwise qualified individual with a disability who is not able to fully utilize that system is nonetheless provided with equal opportunity to apply and be considered for all jobs. Although not required by the final rule, it is a best practice for the contractor to make its online job application system accessible and compatible with assistive technologies used by individuals with disabilities.

**Personnel Processes** Under the final rule, contractors must ensure that its personnel processes do not stereotype individuals with disabilities in a manner that limits their access to all jobs for which they are qualified. In addition, contractors must ensure that applicants and employees with disabilities have equal access to its personnel processes, including those implemented through information and communication technologies. Contractors are required to provide necessary reasonable accommodation to ensure applicants and employees with disabilities receive equal opportunity in the operation of personnel processes. Contractor are also “encouraged” to make its information and communication technologies accessible, even absent a specific request for reasonable accommodation.

**Written Reasonable Accommodation Procedures** Although the final rule makes clear that contractors are not required to develop or use written reasonable accommodation procedures, the development and use of written procedures for processing requests for reasonable accommodation is a best practice that may assist the contractor in meeting its reasonable accommodation obligations. A new Appendix B of the final rule provides guidance to contractors that choose to develop and use written reasonable accommodation procedures.

**Affirmative Action Programs**

**Current Requirements** As with other protected classes, federal contractors and subcontractors are required to prepare written affirmative action programs (AAPs) for individuals with disabilities. Although the prescribed AAPs for persons with disabilities and veterans may be developed separately, many contractors combine the AAPs because of their similar elements. Currently, contractors and subcontractors are required to:

- Develop and post an equal employment opportunity policy statement;
- Periodically review their personnel processes to ensure the processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available;
- Periodically review their physical and mental job qualifications;
- Make reasonable accommodations to the known physical and mental limitations of otherwise qualified individuals or veterans with disabilities;
- Develop and implement procedures to prevent harassment;
- Disseminate the contractor’s EEO policy externally and perform outreach and positive recruitment;
• Disseminate the EEO policy internally;
• Design and implement an audit and reporting system;
• Designate a management official to direct and assume the responsibility for ensuring the implementation of their affirmative action program; and
• Train their personnel to ensure that EEO and affirmative action program commitments are implemented.

**New Data Collection Requirements** Under the final rule, contractors are required to document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three years:

- The number of applicants who self-identified as individuals with disabilities, or who are otherwise known to be individuals with disabilities;
- The total number of job openings and total number of jobs filled;
- The total number of applicants for all jobs;
- The number of applicants with disabilities hired; and
- The total number of applicants hired.

**Document Actions Taken in the AAP Audit and Reporting Process** The final rule requires contractors to document the actions taken the audit and reporting systems they use to measure the effectiveness of their affirmative action programs, and to retain these documents for two years. Under the current and final rules, contractors are required to measure the effectiveness of their affirmative action programs, indicate any need for remedial action, determine the degree to which the contractor’s objectives have been attained, determine whether known individuals with disabilities have had the opportunity to participate in all company sponsored educational, training, recreational, and social activities, and measure the contractor's compliance with the affirmative action program's specific obligations.

**Assessment of External Outreach and Recruitment Efforts** Under the final rule, contractors are required, on an annual basis, to review the outreach and recruitment efforts they have taken over the previous twelve months, and to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities. Contractors must document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor’s conclusion as to whether each effort was effective. Among these criteria shall be the new data collection requirements listed above for the current year and the two most recent previous years. Contractors must retain these documents for three years.

The contractor’s conclusion as to the effectiveness of its outreach efforts must be reasonable as determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified individuals with disabilities, it must identify and implement alternative affirmative action efforts that are recommended in the final rule.

**Dissemination of Affirmative Action Policy to All Subcontractors** Contractors must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part. OFCCP believes it is crucial to the effective implementation and enforcement of the regulations that subcontractors are aware of their section 503 affirmative action obligations.
CODIFICATION OF ENFORCEMENT MEASURES

Although the final rule does not substantially change the enforcement rules for individuals with disabilities, it does update the regulatory text to codify OFCCP's current enforcement strategies. For example, OFCCP routinely expands the number of years involved in any desk audit beyond the number set forth in the scheduling letter (typically one year look back) if OFCCP deems it necessary to carry out its investigation of potential violations. The current regulations do not explicitly authorize more expansive audits; the final rule makes this change. Further, the final rule also adds regulatory language that codifies OFCCP's current practice of including additional quantifiable benchmarks for a contractor's outreach, recruitment, hiring, or other employment activities in any conciliation agreement. The current regulations do not explicitly authorize these additional benchmarks in the agency's conciliation agreements.

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3 The required AAPs for individuals with disabilities and disabled veterans may be developed separately or combined. In practice today, many contractors prepare a combined, single veterans and Section 503 AAP because the elements that must be included in each are similar.


5 Federal contractors are required to establish affirmative action plan (AAP) job groups and compare their employment of minorities and women within those job groups to the availability of minorities and women who are "available" for employment. Job groups are jobs that are grouped based on three factors: 1) similar wages; 2) similar job duties and responsibilities; and 3) similar opportunities for training, promotion, transfer, and other employment benefits. Each job title that a contractor has must be placed into a job group.

In determining which jobs to gather together for job groups, contractors are to consider the following: 1) the Dictionary of Occupational Titles, position descriptions, and/or a collective bargaining agreement may be helpful in determining which jobs have similar content; 2) salaried and hourly jobs are generally not grouped together; 3) overtime exempt and non-exempt jobs are generally not grouped together; and 4) employees covered under different unions are generally not grouped together.

Smaller contractors (contractors with fewer than 150 employees), however, may formulate their AAP job groups according to EEO-1 job categories used by the Equal Employment Opportunity Commission.

Contractors with sufficiently large numbers of employees in the EEO-1 job categories may have job groups consisting of subgroups of those categories. For example, the officials and managers category may be subdivided into job groups entitled “Upper Management,” “Middle Management,” and “First-Line Supervisors;” or the professionals category may be subdivided into job disciplines such as “Engineers” and “Accountants.” However, AAP job groups generally do not contain jobs from more than one EEO-1 job category.

There are 10 EEO-1 job categories: Executive/Senior Level Officials and Managers; First/Mid Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers (skilled); Operatives (semi-skilled); Laborers and Helpers (unskilled); and Service Workers.

7 Ibid, pg 5.

8 Ibid, pg 19.

9 Ibid, pg 7.

10 Ibid, pg 42.

11 Under 41 C.F.R. 60-741.80, federal contractors and subcontractors are required to keep “records relating to requests for reasonable accommodation” for a period two years, unless the contractor has fewer than 150 employees or has a contract of less than $150,000 in which case the record retention period is one year.

12 For example, final section 60-741.44(f)(2)(ii) lists several “suggested outreach efforts” that OFCCP could require a contractor to perform as part of any conciliation agreement, including formal briefing sessions with representatives from recruiting sources, participation in work-study programs for students, trainees, or interns with disabilities, and making individuals with disabilities available for participation in career days, youth motivation programs, and related activities in their communities.