

## Client Alert

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# New Affirmative Action Requirements for Federal Contractors and Subcontractors Regarding Veterans and People with Disabilities

By **Tina Reynolds** and **Robert Nichols**

On September 24, 2013, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) issued final rules imposing new affirmative action and non-discrimination obligations on government contractors. The new rules set non-binding "hiring goals" for two categories of individuals — veterans and persons with disabilities. In addition, the regulations mandate specific types of information-gathering and recordkeeping, provide examples of programs that companies can use to increase the hiring of veterans and individuals with disabilities, and require the flow-down of specific language to government subcontractors concerning their equal opportunity employment responsibilities.

The new regulations take effect on March 24, 2014, but contractors and subcontractors should take steps now to ensure compliance.

The new regulations, codified at 41 C.F.R. §§ 60-300 and 60-741, set out standards for compliance with the Vietnam War Era Veterans' Readjustment Assistance Act of 1974 (as amended by the Jobs for Veterans Act of 2002), which prohibits discrimination against veterans and requires federal contractors to take steps to employ veterans; and Section 503 of the Rehabilitation Act of 1973, which prohibits discrimination against the disabled and also requires federal contractors to take affirmative steps to hire the disabled.

### NEW HIRING GOALS

Under the new regulations, contractors will be measured against a benchmark "goal" for hiring veterans and people with disabilities. The Department of Labor has set a 7% goal of hiring persons with disabilities within each established job group.<sup>1</sup> Contractors with 100 or fewer employees are to measure compliance across their entire workforce rather than by job group. It is noteworthy that the 7% benchmark is explicitly "not a . . . quota," so a company that does not meet its goal cannot be penalized for that reason alone.

With respect to veteran hiring, contractors now must set annually a goal for hiring veterans that equals the national percentage of veterans in the labor force (currently approximately 8%), or, if appropriate, another value reflecting the contractor's special circumstances. For example, a contractor whose employees must have a highly specialized type of training not present in the veteran community might be able to justify a lower benchmark, as

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<sup>1</sup> Job groups are categories of jobs grouped together based on similar wages, similar job duties, and similar opportunities for training, promotion, transfer, and other employment benefits. Federal contractors with more than 150 employees should already have established affirmative action job groups under Executive Order 11246.

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would a contractor located in an area with a very low veteran population. Companies that choose their own benchmarks must document the reasons for this choice and maintain related records for at least three years.

## NEW RECORDKEEPING REQUIREMENTS

The new regulations also require contractors to offer additional opportunities for job applicants and employees to self-identify as a veteran or disabled person. Specifically:

- Each applicant must be invited to self-identify as a covered veteran or person with a disability before a hiring decision is made (e.g., with the “application materials for the position”);
- Each applicant receiving an offer must be invited to self-identify as a covered veteran or person with a disability after an offer is extended but before the applicant begins working; and
- In the first year and at least once every five years thereafter, contractors must invite each employee to identify as an individual with a disability. Contractors must also regularly remind employees that they may update their disability status at any time.

Contractors must retain records of these disclosures. All information must be kept confidential and provided to OFCCP when requested.

## REQUIRED CHANGES TO AFFIRMATIVE ACTION POLICIES

Although most government contractors are already required to have an affirmative action policy and program, the revisions update their required content. The program’s policy statement must now indicate the top U.S. executive’s support for the affirmative action program, and contractors must annually review the prior year’s outreach and recruitment efforts to hire veterans and people with disabilities, and to “make necessary modifications” to affirmative action processes if their efforts are not effective in reaching the target goals. The new regulations also offer an expanded list of examples of actions contractors can take to recruit veterans and people with disabilities — for example, enlisting the support of a local American Job Center, local disability groups or centers for independent living. Contractors must document their efforts at outreach and recruitment of veterans and people with disabilities, and retain these records for at least three years.

## FLOW-DOWN OF REQUIREMENTS TO SUBCONTRACTORS

Under the new regulations, federal prime contractors are required to flow-down equal opportunity clauses in their subcontracts, obliging subcontractors to comply with the new affirmative action and non-discrimination obligations toward veterans and people with disabilities.

## RECOMMENDED STEPS FOR CONTRACTOR COMPLIANCE

While these new requirements do not significantly change the substance of contractors’ affirmative action obligations, they do impose additional procedural requirements, and require changes to hiring and recordkeeping processes.

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In order to comply with the new OFCCP regulations, contractors should take these steps within the next six months:

- Choose a goal for employment of veterans (8% is the default);
- Revise pre-offer self-identification forms to include veteran and disability statuses;
- Provide all employees the opportunity to identify as disabled;
- Ensure your affirmative action program policy statement indicates the company's top U.S. officer's support for the program;
- Add references to 40 C.F.R. §§ 60-300.5 and 60-741.5 to subcontract templates, and inform subcontractors of their new affirmative action and non-discrimination obligations;
- Prepare a process for annual reviews of the effectiveness of affirmative action outreach efforts; and
- Ensure the revised affirmative action program and related decisions are documented, with records retained for at least three years.

## Contact:

### Tina Reynolds

(703) 760-7701

[treynolds@mofo.com](mailto:treynolds@mofo.com)

### Robert Nichols

(202) 887-6954

[rnichols@mofo.com](mailto:rnichols@mofo.com)

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