

# EMPLOYMENT LAW COMMENTARY

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## **SOME THOUGHTS ON THE NEW OFCCP DATA COLLECTION REGULATIONS FOR VETERANS AND INDIVIDUALS WITH DISABILITIES THAT TAKE EFFECT MARCH 24, 2014**

By [Nancy J. Purvis](#)

If You Have to Ask . . .

Most of us understand that employers should not ask for personal information from employees (or applicants for employment) if that information would be illegal to use in making employment decisions and is not job-related. Indeed, years ago, with the publication in October 2005 of the Final Rule, "Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes," the U.S. Department of Labor eliminated visual identification as the preferred method of obtaining the race (and gender) information required for affirmative action programs (AAPs) and EEO 1 reporting. But recent regulatory changes will, curiously, require multiple solicitations of disability and veteran information from applicants and employees.

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## New Rules

As discussed in our [Client Alert](#) of October 3, 2013, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has issued final rules imposing a multiplicity of new affirmative action obligations on government contractors that become effective March 24, 2014. The new rules will revise the regulations governing equal employment opportunity for veterans under the Vietnam Era Veterans Readjustment Assistance Act of 1974 (VEVRAA), and for individuals with disabilities under the Rehabilitation Act of 1973. This Commentary discusses the new requirements to collect disability and veteran information from applicants and employees.

## A Goal and a Benchmark

The new utilization goal for the disabled (7 percent for each job group) and the hiring benchmark for veterans (the default benchmark is 8 percent of total hires) have received a lot of publicity. However, some HR managers are more concerned about the dramatically increased recordkeeping obligations that will be required for technical compliance and to measure progress against the 7 percent goal for individuals with disabilities and the 8 percent benchmark for veterans.

## The New (But Not Improved) Invitations to Self-Identify

The new regulations change the spirit of the Invitations to Self-Identify, as defined in the old regulations. The current requirement to extend "Invitations to Self-Identify" as disabled or as a covered veteran is designed to aid the process of reasonable accommodation to the disabilities of disabled veterans and of other individuals with disabilities. Because their purposes are similar, many contractors meet both requirements by using the same form for both disability and veteran status. This efficiency will no longer be compliant. Under the new regulations, contractors will be required to use the form posted on OFCCP's website for inviting individuals with disabilities to identify themselves. The form does not include an option for directing the employee or applicant to the manager who can help him/her if he/she needs a reasonable accommodation. The new form is about collecting data for the new AAP metrics. The required form is posted at:

[http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary\\_Self-Identification\\_of\\_Disability\\_CC-305\\_SD\\_Edit1.24.14.pdf](http://www.dol.gov/ofccp/regs/compliance/sec503/Voluntary_Self-Identification_of_Disability_CC-305_SD_Edit1.24.14.pdf)

Appendix B to the new regulations for veterans provides suggested language for soliciting veteran status from applicants and employees. For applicants (pre-offer) the

contractor will only ask if the applicant is protected by VEVRAA. For new employees (post-offer) the contractor will ask for specific veteran status (disabled, recently separated, active wartime or campaign badge, armed forces service medal, or protected veteran who prefers not to designate his or her classification).

Most contractors will find they need to use more forms for collecting EEO data, including the following:

1. Solicitation of gender and race/ethnicity information from applicants
2. Solicitation of gender and race/ethnicity information from employees
3. Pre-offer invitation to identify as a covered veteran
4. Post-offer invitation to identify as a covered veteran
5. "Voluntary Self-Identification of Disability"

Although there is only one form for inviting individuals to self-identify their disability status (applicants and employees), the invitation must be extended in three ways: pre-offer, post-offer and to employees. Employees must be invited to self-identify during the first year of the new requirements (i.e., by March 24, 2015) and at five-year intervals thereafter.

## What Should Contractors Do Now?

In addition to the 7 percent utilization goal for individuals with disabilities and the 8 percent benchmark for the hiring of veterans, the new regulations effectively require an analysis of how the hiring of veterans and the disabled compares to applicant flow. Although the new regulations take effect March 24, 2014, OFCCP is allowing contractors to phase in compliance with the new requirements. However, some contractors may prefer to begin collecting disability and veteran status sooner rather than later. Employers who think that the availability of veterans and the disabled for their positions is less than 8 percent for veterans and/or less than 7 percent for the disabled may want to start collecting applicant flow data as soon as possible in order to be able to use the applicant-flow information to explain hiring and utilization rates that are lower than OFCCP has suggested. Further, the new regulations provide contractors with the option of calculating their own availability rate for veterans (but not for individuals with disabilities). One of the required factors in this alternative approach is the contractor's own applicant flow.

# Meet Paul McKenzie, Beijing Employment & Labor Partner



## 1. What is the best thing about your job?

Using my legal and practical knowledge to help clients understand and work within a challenging and uncertain regulatory framework in China.

## 2. What are the hot topics in employment law in China at the moment?

Last July, China's Ministry of Human Resources and Social Security promulgated new regulations that place a variety of restrictions on labor dispatch arrangements. Supplementary rules come into effect on March 1, 2014, which further limit when these arrangements can be used and also seek to enhance labor law protections applicable to the workers. 2014 will likely see a steep drop in the use of these arrangements. The last few years have witnessed a unionization push by the All-China Federation of Trade Unions. We expect that push to continue in 2014. Other topics to watch include data privacy, enforcement of post-termination non-competes, and ownership of IP developments.

## 3. What are the key employment law challenges foreign companies face in China?

China's labor contract system requires a major shift of mindset and practices, particularly for clients who are accustomed to an "at will" employment law regime. Another challenge is local interpretation of national labor law rules, given significant differences in interpretation by labor authorities in different localities. Protecting trade secrets in a labor market typified by high staff turnover and an underdeveloped court system is difficult.

## 4. What do you do when you are not practicing law?

On days like today, with PM2.5 particulate pollution in Beijing that is literally off the scales, I probably ought to lie on the floor covered in damp towels. On good days, I like to visit historical sites in and around the city.

## Conclusion

The coming year will be a busy one for managers who are responsible for their employers' affirmative action programs. Redesign and implementation of the protocols for collecting EEO data from employees and applicants are only part of the additional requirements imposed by the new regulations. As outlined in our Client Alert of 2013, the new regulations impose many additional requirements that will keep affirmative action practitioners fully occupied.

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