



OFCCP's Revised Rules on Protected Veterans and Individuals with Disabilities

A Report on AGC's Effectiveness in Limiting the Impact of the Final Rules
October 5, 2013

SUMMARY

The Office of Federal Contract Compliance Programs (OFCCP) finalized new rules on affirmative action for protected veterans and individuals with disabilities on August 23, 2013. While disappointed that OFCCP did increase its requirements, AGC was pleased to find that the agency also abandoned much if not most of what it had originally proposed. Very quickly, it became clear that AGC's written comments on the proposed rules, its meetings with federal agencies and Congressional staff, and its detailed study of the federal data on past discrimination against veterans and individuals with disabilities -- which revealed that such discrimination is extremely rare -- all had their intended effect. As it completed the rulemaking process, OFCCP did change course, and ultimately cut more than half of the requirements that it had proposed.

EFFECTIVE DATE

Both Rules: March 24, 2014

COVERAGE

Veterans Rule: Direct Federal contracts and subcontracts of \$100,000 or more

Disabilities Rule: Direct Federal contracts and subcontracts of \$10,000 or more

APPLICANT AND EMPLOYEE FILES

✓ AGC mounted a successful challenge to OFCCP's proposal to require covered contractors to create and retain detailed files on the protected veterans and individuals with disabilities among their applicants and employees, including written reasons for denying employment to such individuals, or for denying them promotions or training, or for denying their requests for accommodations. The final rules completely dropped all of those requirements.

DATA COLLECTION AND ANALYSES

✓ AGC vigorously challenged OFCCP's proposal to require covered contractors to track and/or calculate a long list of statistics on referrals, applicants and new hires. Finally recognizing the great burden that this would impose on covered contractors, OFCCP deleted most of the new statistics from the final rules. The deleted requirements included:

- (1) The number of "priority" referrals that the contractor received from employment services;
- (2) The total number of referrals that the contractor received from employment services;
- (3) The ratio of "priority" referrals to total referrals (only for individuals with disabilities);
- (4) The number of applicants who self-identified as protected veterans or individuals with disabilities, or who are otherwise known as such;
- (5) The total number of job openings and total number of jobs filled;
- (6) The ratio of jobs filled to job openings;
- (7) The total number of applicants for all jobs;

- (8) The ratio of protected veteran applicants or individuals with disabilities to all applicants (applicant ratio);
- (9) The number of protected veteran applicants or individuals with disabilities hired;
- (10) The total number of applicants hired; and
- (11) The ratio of protected veterans or individuals with disabilities hired to all hires (hiring ratio).

The only requirements that the final rules retained were these:

- (1) The number of applicants who self-identified as protected veterans or individuals with disabilities, or who are otherwise known as such;
- (2) The total number of job openings and total number of jobs filled;
- (3) The total number of applicants for all jobs;
- (4) The number of protected veteran or disabled applicants hired; and
- (5) The total number of applicants hired.

RECORD KEEPING REQUIREMENTS

✓ AGC also limited the duration of the recordkeeping requirements. The old rules required contractors to retain records for two years. The new rules require contractors to retain records for three years. OFCCP had, however, proposed a five-year recordkeeping requirement.

TRAINING

✓ AGC persuaded OFCCP to drop its proposal to require covered contractors to provide separate and detailed annual training on each of the affirmative action policies that the new rules require to all employees, and to make and retain detailed records on such training, including the subjects covered, who conducted the training, who received the training, and when the training took place. The final rules revert back to the existing requirements for only periodic and potentially combined training for only those involved in the recruitment, screening, selection, promotion, discipline, and related processes.

JOB DESCRIPTIONS

✓ AGC persuaded OFCCP to drop its proposal to require an “annual” review of all job descriptions (to validate, and if necessary, update all physical and mental qualifications required for each position). The final rules revert back to the existing ones, which only require a “periodic” review of job descriptions.

PERSONNEL PROCESSES

✓ AGC persuaded OFCCP to drop its proposal to require an “annual” review of all hiring and other personnel processes, to determine their impact on protected veterans and individuals with disabilities. The final rules revert back to the existing ones, which only require a “periodic” review of personnel processes.

OUTREACH AND RECRUITMENT

✓ AGC successfully argued that OFCCP should drop its proposal to require each “establishment” of each covered contractor establish and maintain three “linkage agreements” with private groups that have the goal of advancing the interests of protected veterans and/or individuals with disabilities. The only outreach that the new rules require is the outreach that the old rules already required.

✓ The final rules permit covered contractors to post job openings in any manner that that the various employment services permit, dropping the proposal to require covered contractors to post such openings in any manner that such services might choose to require.

✓ At AGC's request, OFCCP discarded its proposal to require all job posting to include the name and location of all hiring locations and all hiring officials. The final rules merely require such postings to include the name and contact information for an HR or other company representative who can answer questions about the posted vacancy.

✓ AGC effectively questioned OFCCP's proposal to require covered contractors to consider protected veterans for all job openings for which they might be qualified, without regard to whether they apply for such openings. The final rules merely encourage covered contractors to take that step.

BENCHMARKS FOR THE HIRING OF PROTECTED VETERANS

✓ OFCCP proposed to require covered contractors to perform the research and analysis necessary to set their own benchmarks for the hiring of protected veterans. At AGC's request, the final rule gives contractors the option of establishing their own benchmarks or simply using the national percentage of veterans in the civilian labor force (currently 8%).

✓ Following several discussions with OFCCP regarding the number of establishments in the construction industry, the agency dropped its proposal to apply the benchmark to each establishment, and decided, instead, that it would apply to a covered contractor's entire workforce.

GOALS FOR THE EMPLOYMENT OF INDIVIDUALS WITH DISABILITIES

✓ AGC persuaded OFCCP to apply its 7% goal for the employment of individuals with disabilities to the broad job categories that covered contractors already use to comply with Executive Order 11246 (which, in the construction industry, would be some combination of the construction crafts and/or the nine job categories that form the foundation for the EEO-1 reports that most contractors already have to file).

✓ AGC persuaded OFCCP to completely drop its 2% sub-goal for the employment of individuals with severe disabilities.

EQUAL OPPORTUNITY CLAUSE

✓ AGC made a persuasive case that requiring contractors to include the E.O. Clause, in its entirety, in all subcontracts would be unduly burdensome. The new rules permit contractors to include the clause by reference. They merely insist that contractors include two specific sentences, in bold print.

WRITTEN AFFIRMATIVE ACTION PROGRAMS

✓ AGC persuaded OFCCP that it would be too burdensome to require covered contractors to make their entire programs, including all applicant hiring data, available all applicants and employees. The new rules revert back to the old ones, omitting any new requirement that such contractors make all applicant hiring data available to applicants or employees.

INVITING VETERANS TO SELF-IDENTIFY

✓ AGC persuaded OFCCP to abandon its proposal to require covered contractors to initiate a discussion with disabled veterans about any need they might have for an accommodation. The new rule only requires contractors to provide an opportunity for disabled veterans to self-identify, though it does require contractors to do so both before they offer employment to disabled veterans, and periodically, to current employees.

INVITING INDIVIDUALS WITH DISABILITIES TO SELF-IDENTIFY

✓ At AGC's request, the final rule permits covered contractors to identify applicants as disabled if it is known or obvious that they fit into the category, and without regard to whether they identify themselves as disabled.

WRITTEN PROCEDURES FOR THE ACCOMMODATION OF INDIVIDUALS WITH DISABILITIES

✓ AGC successfully argued that OFCCP should drop its proposal to require covered contractors to have written procedures for the accommodation of individuals with disabilities, including a written explanation of their reasons for denying any accommodations, and a related requirement that covered contractors give copies of their written explanations to the applicants and employees seeking accommodations.

INTERNAL DISTRIBUTION OF AFFIRMATIVE ACTION POLICY

✓ Instead of rigidly requiring covered contractors to include their affirmative action policies in their “policy manuals,” the final rule merely requires covered contractors to make their policies available to employees, either electronically or in the contractor’s “policy manual.” (Some contractors prefer to have this information posted on an intranet website for employees.)