



THE KULLMAN FIRM

A PROFESSIONAL LAW CORPORATION

CLIENT NEWSLETTER

SPECIAL BULLETIN

OFCCP Significantly Expands Federal Contractor Obligations Towards Individuals With Disabilities

On December 9, 2011, the Office of Federal Contract Compliance Programs (“OFCCP”) proposed new regulations that would significantly expand federal contractors’ obligations under Section 503 of the Rehabilitation Act of 1973 to provide equal employment opportunities for qualified workers with disabilities. There is no way to sugarcoat the fact that, if the proposed regulations take effect, federal contractors and subcontractors will be saddled with an enormous number of new administrative burdens and, more importantly, may become subject to increased risk of liability under the Americans With Disabilities Act. The latter will likely occur as a result of new requirements that employers inquire into the disability status of applicants and existing employees, provide unsuccessful disabled applicants with a statement of written reasons for their denial of employment, and give employees requesting accommodations written bases for the denial of such requests.

Existing Regulations

Under existing law, federal contractors’ duties toward individuals with disabilities are largely voluntary, with few required actions. For example, under existing law, federal contractors are required to (1) include an equal opportunity clause in each of its subcontracts (and require its subcontractors to do the same); (2) make available to employees and applicants an affirmative action plan (“AAP”) for employment of individuals with disabilities; (3) invite job applicants, *after making an offer of employment*, to self-identify whether the applicant believes he or she is disabled; (4) include an equal employment opportunity policy statement in its AAP; (5) ensure that its personnel policies provide for careful, thorough and systematic consideration of the job qualifications of applicants and employees with known disabilities; (6) make reasonable accommodations for known physical and mental limitations to qualified individuals; (7) assign an EEO officer to administer the AAP program; and (8) train recruiting and human resource personnel to ensure AAP commitments are implemented.

Voluntary obligations towards individuals with disabilities under the current regulatory scheme include numerous suggested methods of external and internal dissemination of anti-discrimination policies, outreach and positive recruitment. Additionally, under current law, no statistical or numerical goals are required for employment of individuals with known disabilities.

The existing obligations of federal contractors to provide equal employment opportunities for disabled applicants and employees, whether voluntary or mandatory, have been relatively easy to fulfill in practice. If the OFCCP gets its way, and the regulations as proposed become final (and there is every indication that is very likely), life for federal contractors and OFCCP practitioners is all about to change.

Continued on page 2

Continued from page 1

The Proposed Rules

The OFCCP's proposed regulations drastically increase and enhance specific actions that contractors must take in the areas of recruitment, training, recordkeeping and equal employment opportunity policy dissemination. While the proposed regulations are similar to those that the agency has long required to promote workplace equality for women and minorities, in many ways the obligations imposed on federal contractors for disabled individuals exceed those currently required for women and minorities.

Highlights of the proposed regulations include:

National Utilization Goal: The proposed rules would require all federal contractors and subcontractors to *adopt a national utilization goal for disabled workers equal to 7 percent of their employees in each job group of the contractor's workforce.*

Mandatory Data Collection: Contractors would be required to invite all applicants to voluntarily self-identify as an "individual with a disability" *at both the pre-offer and post-offer stages* of the hiring process. This alarming new provision requiring self-identification at the pre-offer level may very well sound the death knell for the failure-to-hire defense of "we didn't know."

Contractors also would be required to annually invite all employees on an anonymous basis to self-identify as an "individual with a disability."

To make matters worse, the language for contractors to use when applicants and employees are invited to self-identify must mirror language approved by the agency. Contractors cannot use their own language for self-identification surveys at the pre-offer, post-offer or annual survey stages. The language of the pre-offer invitation to self-identify contained in the proposed regulation is written in difficult-to-understand, bureaucratic terminology that likely few employees will fully understand.

Recordkeeping: Like the current adverse impact requirements for women and minority AAPs, contractors would be required to maintain records on the number of applicants and hires who are individuals with disabilities and to establish the hiring ratio of individuals with and without disabilities for each job group.

Accommodation Requests: *Contractors would be required to develop and implement written procedures for processing requests for reasonable accommodation received from disabled employees.* The procedures, at a minimum, would require contractors (i) to identify the person to whom requests for accommodation should be submitted; (ii) to provide written confirmation of a request; (iii) to process requests within specified times; (iv) to provide written bases for denials of requests, and (v) *to inform the applicant or employee that he or she may file a complaint with the OFCCP* if he or she believes the request has been denied without justification.

Outreach and Job Listings: Contractors would be required to engage in a minimum of three specific types of external outreach. First, contractors would have to establish "linkage agreements" with either the local State Vocational Rehabilitation Service Agency nearest the contractor's establishment or a local Employment Network organization.

Second, contractors would have to establish "linkage agreements" with at least one other organization from a list specified by the OFCCP, such as DOL-funded recruitment or training services, One-Stops, Veterans

Continued on page 3

Continued from page 2

Affairs Regional Offices, local disability groups, placement offices of educational institutions, or private recruitment sources.

Third, like the current requirement for Veterans AAPs, contractors would be required to list job openings with Employment One-Stop Career Centers or other appropriate employment delivery systems.

The proposed rule also retains from the current regulations a number of “suggested outreach efforts.” However, with little fanfare and no explanation, the agency has proposed a stark change from the current “suggested outreach efforts,” which suggests that contractors *should consider* disabled applicants for other positions, to the now mandatory provision that, in making hiring decisions, contractors “**shall consider** applicants who are known to have disabilities **for all available positions** for which they may be qualified if the position for which they applied is unavailable.” Obviously, this is a spectacular change for smaller contractors at the administrative level and very likely an impossible change to implement for larger contractors.

Rather than simply referencing EEO requirements in outside communications and corporate documents, new agency-mandated EEO language would be required in *all* solicitations, advertisements, and contracts.

Review of Personnel Processes:

Contractors must design procedures to facilitate review of the implementation of this requirement by the contractors and the Government. These procedures must, at a minimum, include the following steps:

- o For each applicant with a disability, the contractor must be able to identify each vacancy and/or training program for which the applicant was considered;
- o For each employee who is an individual with a disability, the contractor must be able to identify each promotion and/or training program for which the employee was considered;
- o In each case where an applicant or employee who is an individual with a disability is rejected for employment, promotion or training, the *contractor shall prepare a statement of the reasons for rejection as well as a description of any accommodation considered. These materials must be made available to the disabled applicant or employee upon request.*
- o When applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible to place an individual with a disability on the job, the contractor shall make a record containing a description of the accommodation.

If a contractor believes that an applicant or employee, with or without a reasonable accommodation, cannot perform the essential functions of a job without posing a direct threat to himself or herself or others, *the contractor must create a statement of reasons supporting its belief and maintain such statement in its records.*

On at least an annual basis, contractors would have to review personnel processes and physical and mental job qualifications to ensure that, to the extent qualification standards tend to screen out individuals on the basis of disability, they are job related for the position in question and are consistent with business necessity.

Continued to page 4

Continued from page 3

Interestingly, in furtherance of its duties under the Paperwork Reduction Act, the OFCCP projects that the “Reporting, Recordkeeping and Third-Party Disclosure Burden” will cost the average federal contractor \$329 per year, and the total cost of the proposed rule per year is \$473 per contractor. Any of our clients who are able to implement these changes within that budget will be nominated for the Nobel Prize in Economics.

ADAAA Updates: The proposed regulations incorporate changes to the definition of “disability” made by the ADA Amendments Act of 2008, which greatly increased the percentage of the workforce who may be considered disabled.

Comment Period: The Notice of Proposed Rulemaking invites comments from the public on the proposed regulations. Comments must be received by the OFCCP by February 7, 2012. Under the Administrative Procedure Act, the agency is required to consider all comments. Due to the vast increase in costs and, ultimately, the increase in disability-related litigation that would result from compliance with the proposed regulations, The Kullman Firm urges all federal contractors to consider submitting comments to the agency.

The Kullman Firm regularly counsels employers regarding labor and employment issues such as the challenges posed by this proposed OFCCP rule. If you have any questions regarding this or any other labor and employment issue, please contact the Kullman attorney with whom you customarily work.



Management Resource in Labor and Employment Law

1600 Energy Centre, 1100 Poydras Street / New Orleans, LA 70163 / 504.524.4162
Suite A, 4605 Bluebonnet Boulevard / Baton Rouge, LA 70809 / 225.906.4250
Suite 340, 600 University Park Place / Birmingham, AL 35209 / 205.871.5858
Suite 704, Court Square Towers, 200 6th Street North / Columbus, MS 39701 / 662.244.8824
Suite 120, 1640 Lelia Drive / Jackson, MS 39216 / 601.366.2990
1100 Riverview Plaza, 63 S. Royal Street / Mobile, AL 36602 / 251.432.1811

Visit us online at www.kullmanlaw.com

This publication is provided by The Kullman Firm as a service to clients and friends of the Firm. The information contained in this publication should not be construed as legal advice.