



For your information

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## OFCCP Proposes Requiring Federal Contractors to Set 7% Hiring Goal for Individuals with Disabilities

OFCCP proposed revising existing affirmative action regulations to require, for the first time, covered federal contractors and subcontractors to adopt a hiring goal for individuals with disabilities. If implemented, the regulations would set a national utilization goal of 7% in each job group of the contractor's workforce.

### Background

Section 503 of the Rehabilitation Act of 1973 (Section 503), as amended, prohibits discrimination by covered federal contractors and subcontractors (contractors) against individuals on the basis of disability, and imposes certain affirmative action obligations. Section 503 generally requires contractors with contracts or subcontracts of more than \$10,000 for the purchase, sale, or use of personal property or non-personal services (including construction) to take affirmative action to hire and advance qualified individuals with disabilities. Contractors with contracts or subcontracts of \$50,000 or more and at least 50 employees must prepare and maintain a formal Affirmative Action Program (AAP) documenting their compliance efforts. The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) is responsible for enforcing Section 503.

### Proposed Regulations

On December 9, 2011, OFCCP [proposed](#) substantial changes to its nondiscrimination and affirmative action requirements. To align OFCCP regulations with EEOC regulations issued under the Americans with Disabilities Act Amendments Act (ADAAA), OFCCP would expand its definition of an individual with a disability to include an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded by an employer as having such impairment. (See our June 16, 2011 [For Your Information](#).) With that, OFCCP proposes to shift its enforcement focus from whether an individual has a disability to whether contractors are providing equal opportunity.

Major changes proposed by OFCCP include:

- Establishing a national utilization goal for individuals with disabilities

- Revising AAP content and communication requirements
- Mandating reasonable-accommodation and direct-threat procedures
- Requiring contractors to invite individuals with disabilities to voluntarily self-identify at both the *pre-offer* and *post-offer/pre-employment* stages, and to solicit *post-hire* self-identification through anonymous employee surveys
- Increasing contractors' data collection, outreach, and recordkeeping obligations.

### Utilization Goal

The proposed regulations require contractors to set a goal of having 7% of each job group in the contractor's workforce be individuals with disabilities. According to OFCCP, the 7% goal is neither a quota nor a hiring ceiling, but it provides a tool for employers to gauge their progress toward equal employment opportunity and identify where workforce barriers remain. OFCCP proposes that contractors use the same job groups established under [Executive Order 11246](#) to annually evaluate their utilization rate.

#### INSIGHT

The OFCCP's broader definition of disability may help contractors meet the new 7% utilization goal if individuals are willing to self-identify. Because employers cannot aggregate across job groups or assign anonymous self-identifications to particular job groups, they still may have difficulty meeting the goal.

### AAP Requirements

OFCCP proposes new AAP content requirements that include a statement from the contractor's CEO in support of the program, an annual review of personnel processes and job qualification standards, internal and external dissemination of the AAP, and an audit and reporting system for evaluating the contractor's affirmative action efforts. OFCCP would require contractors to identify the company official responsible for affirmative action activities in all internal and external communications concerning affirmative action. In addition, contractors would have to implement and incorporate in their written AAPs reasonable accommodation procedures that contain certain minimum elements, including:

- How to request reasonable accommodation
- The time frame for processing reasonable-accommodation requests
- When medical documentation may be sought
- Requirements for written confirmation of receipt of accommodation requests and for written denials of requests that include the basis for denial
- Listing of the responsible official by name, title, office, and contact information.

OFCCP proposes to limit the time frame for processing requests to five to ten business days if medical documentation is unnecessary and 30 calendar days if documentation is needed. Any denial would have to advise the individual that he or she can file a complaint with OFCCP and how to do so. OFCCP would require contractors to make individualized assessments of whether an individual can perform the essential functions of a job without posing a direct threat to himself, herself, or others in the workplace, and to create a contemporaneous written record of any direct threat.

Under the proposed regulations, contractors would have to provide notice in a form accessible to applicants and employees of their rights and contractors' obligations under Section 503, to incorporate their affirmative action policies in policy manuals, and to discuss the policies in employee orientations, management training programs, and with union representatives. For employees working offsite, contractors could furnish notice electronically, provided the employees can access an electronically posted notice.

The proposed regulations expressly require contractors to notify their subcontractors, including subcontracting vendors and suppliers, of the contractors' affirmative action efforts and to request them to take similar action. A new requirement for contractors to include verbatim a revised equal opportunity clause in all federal subcontracts would likely compel the redrafting of contracts and purchase orders.

### ***Data Collection and Analysis, Outreach, and Recordkeeping***

In a significant shift, OFCCP would require contractors to solicit all job applicants to voluntarily self-identify both *pre-offer* and *post-offer/pre-employment*, and to survey all employees annually on their disability status. OFCCP would prescribe the language contractors would have to use for these purposes. OFCCP also would add a new requirement for contractors to track the number of openings and jobs filled as well as the number of applicants, referrals, and hires with and without disabilities. Contractors would have to maintain specific measurements and comparisons with respect to individuals with disabilities who were referred by state employment services, applied for jobs, and/or were hired.

#### INSIGHT

**Multiple solicitations of an expanded class of individuals with disabilities to self-identify will likely lead to an uptick in discrimination claims and accommodation requests. In the face of repeated solicitations, individuals may feel increased pressure to identify certain "hidden" disabilities, such as psychiatric problems.**

The proposed regulations would require contractors to engage in specific outreach and recruitment efforts, including listing all job openings with One-Stop Career Centers and entering into linkage agreements with State Vocational Rehabilitation Service Agency offices or other specified organizations. Contractors would have to annually review the effectiveness of their outreach efforts in identifying and recruiting individuals with disabilities and to document the review. OFCCP would require contractors to conduct annual self-reviews of their personnel processes and physical and

mental job qualification standards to ensure that they are job related and consistent with business necessity, and conduct annual training for human resources and other personnel involved in the recruiting and hiring process. Contractors would have to document specific actions and their results.

The proposed regulations would require contractors to maintain records for five years on their outreach and recruitment efforts, and to provide data and documents to OFCCP in a format designated by OFCCP. OFCCP also is considering adding an annual reporting requirement for all contractors, even those not selected for a compliance evaluation.

## Conclusion

If adopted, the proposed regulations would dramatically expand protections for job applicants and employees with disabilities under Section 503, and substantially enlarge federal contractors' affirmative action obligations. OFCCP is accepting comments through February 7, 2012.

Meeting a 7% utilization goal in all job categories will be a challenge for many employers, and those that fall short may face increased OFCCP scrutiny. With changes on the horizon, contractors may wish to revisit their current recruitment, hiring, and retention practices along with related tracking systems.

### Buck Can Help

- Review job descriptions to ensure they accurately reflect physical and mental qualifications
- Conduct utilization analyses for individuals with disabilities in each job group
- Conduct employee surveys inviting voluntary self-identification of disability status
- Develop reasonable-accommodation and direct-threat policies and procedures; review and update AAPs, employment policies, practices, and employee handbooks as needed
- Review personnel processes and train managers and supervisors on best practices
- Develop or retool applicant tracking systems for referrals and solicitations to self-identify
- Develop and maintain appropriate recordkeeping, audit, and reporting systems

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.  
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