

OFCCP Proposes Hiring Goals for Veterans

On April 26, 2011 OFCCP published proposed amendments to the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) regulations that protects veterans from employment discrimination after returning from active duty. The proposed amendments impose new obligations on contractors designed to strengthen the affirmative action requirements and thereby increase employment opportunities for veterans.

One of the most significant changes would be the requirement of contractors to establish hiring goals for veterans based on the availability of veteran applicants. In the past, contractors have been required to develop an affirmative action plan for veterans that consists of listing job openings with the local labor department, seeking applicant referrals from veteran organizations, and insuring that veteran applicants and employees are not discriminated against when making employment decisions. Placement goals have never been required due, in part, to the lack of sufficient statistical data indicating the availability and occupational skills of veteran applicants. OFCCP acknowledges that the data from the US Census Bureau is limited and suggests that contractors find the needed availability data from other existing sources, such as quarterly statewide tabulations by the Bureau of Statistics and the Department of Veterans Employment and Training that will be published on OFCCP's website. The proposed rule requires contractors to consider the following factors when establishing hiring benchmarks:

- (1) The average percentage of veterans in the civilian labor force in the state where the contractor is located over the last 3 years;
- (2) the number of veterans, over the last 4 quarters, who were participants in the state employment service in the state where the contractor is located;
- (3) the contractor's veteran referral, applicant, and hiring ratios for the last 12 months;
- (4) the contractor's recent assessments of the effectiveness of its external outreach and recruitment efforts; and
- (5) any other factors, including but not limited to the nature of the contractor's job openings and/or its location which would tend to effect the availability of qualified protected veterans.

In addition to the establishment of hiring goals, contractors would also be required to track referrals of protected veterans, annually evaluate the effectiveness of its outreach and recruiting efforts, and seek self-identification of veteran status from all applicants. Currently, contractors only ask for veteran status after an individual is offered employment.

The public is invited to submit comments to these proposed rule changes for 60 days before they become finalized. We will keep you posted.

OFCCP's New "2 or 2 Test"

In January 2011, the OFCCP gave notice it was abandoning 2 Bush administration policies regarding compensation:

1. The Voluntary Guidelines for Self-Evaluation of Compensation Practices for Compliance with Executive Order 11246 with respect to Systematic Compensation Discrimination 71 Fed. Reg. 35114 (June 16, 2006) created a presumption that any contractor who voluntarily undertook a regression analysis and corrected any resulting compensation issues would be safe from any OFCCP prosecution. Almost no contractors undertook the rigorous task of creating Similarly Situated Employee Groupings (SSIGs) so the impact of abandoning this policy will be minimal.
2. Interpreting Nondiscrimination Requirements of Executive Order 11246 with respect to Systemic Compensation Discrimination 71 Fed. Reg. 35124 (June 16, 2006) officially moved the OFCCP beyond the "DuBray Analysis" to a more rigorous and defensible Multiple Regression analysis. Now that the multiple regression analysis is regularly used by the OFCCP in compensation cases, the withdrawal of the notice is of no consequence.

The Scheduling Letter for any OFCCP Audit includes #11 of the Itemized Listing which deals with compensation:

Please provide annualized compensation data (wages, salaries, commissions, and bonuses) by salary range, rate, grade, or level showing total number of employees by race and gender and total compensation by race and gender. Present these data in the manner most consistent with your current compensation system. If you maintain the information in electronic format, please submit in that format. See 41 CFR 60-1.4(a)(1). You may also include any other information you have already prepared that would assist us in understanding your compensation system(s).

The Bush Administration analyzed the compensation data using a "Tipping Point" or "Trigger Test." The test was geared towards identifying significant compensation disparities. The OFCCP under the Obama Administration has changed course and is interested in any difference in compensation. On June 4, 2010 a Directive was issued which withdrew the use of the Tipping Point" or "Trigger Test." Instead a simple test identifying either a 2% difference in pay or a \$2,000 difference in pay in the data submitted in response to Item #11 is enough for the OFCCP to conduct a more thorough review. In practice, this means if you fail the "2 or 2" test for any job (salary grade, job group), the OFCCP Compliance Officer will send a letter requesting additional information. Note that once you fail any job or category using the "2 or 2 Test" the OFCCP can request data concerning all employees. This usually takes the form of an additional factors request, including all or some of the following:

1. Employee ID
2. Job Title
3. Department
4. Race/Ethnicity
5. Gender
6. Salary/Grade
7. Full/Part Time
8. Exempt/non-exempt

9. Time in grade/job
10. Base salary for full time
11. Hours worked and hourly wage for part time
12. Other compensation
13. SSEGs
14. Employee location
15. Shift
16. Education
17. Prior experience
18. Performance reviews

Yocom & McKee, Inc. recommends clients annually analyze their compensation data using the Regression Analysis in the Complete AAP software. If compensation discrepancies are noted, contractors should make an effort to identify the cause(s) of the pay differences before an OFCCP Compliance Review.

Discontinuance of Active Case Management (ACM) Procedures

On December 2, 2010, Directive 292 withdrew ACM procedures that required the OFCCP find at least a prima facie case before coming on-site. The current administration felt this too burdensome and created "Active Case Enforcement (ACE)" on December 16, 2010.

When a contractor is designated for a compliance review, OFCCP will take the following steps:

1. OFCCP will contact the Equal Employment Opportunity Commission (EEOC) and the State and/or Local Fair Employment Practice (FEP) agency to determine the nature, status and outcome of any complaints that have been filed against the contractor at the establishment under review.
2. The CO will review the contractor's compliance history for the past three years, to assess the contractor's recent compliance history and determine if there are patterns of non-compliance. To do this, the CO will use the OFCCP internal database system, and review any information received from EEOC, State or local FEP, and/or other labor and employment agencies, such as the Department of Labor's Veterans' Employment and Training Service and Wage and Hour Division.
3. An onsite review is not limited to the nature or scope of the indicators that triggered the onsite review.
4. If the compliance review indicates that there is no potential discrimination or unresolved minor technical violations with EO 11246, Section 503 or VEVRAA the CO will follow established closure procedures and issue the Closure for No Apparent Violations or Technical Violations. (This potentially means that if a Compliance Officer finds a technical violation that the contractor adequately addresses during the compliance review, the audit should be closed via the Closure for No Apparent Violations or Technical Violations, not the Closure Letter for Substantive Violations. Formerly the OFCCP would cite the Contractor and issue the Closure Letter for Substantive Violations.)
5. Some contractors selected on the FCSS list may be designated for a compliance evaluation that uses an investigative method other than a compliance review. Specifically, OFCCP may designate a contractor for a compliance evaluation using the offsite review of records, compliance check or focused review investigative procedure: (This provision is of questionable legality. There is currently no authority for the OFCCP to conduct any offsite review of records. Of course the alternative of having them onsite might be practically less desirable.)
6. For quality control purposes, every 25th federal contractor establishment will be selected by FCSS for a full compliance review. (Formerly was every 50th audit)
7. Indicators of potential discrimination may be of an individual and/or class (i.e., two or more victims) nature. (Formerly groups of at least 10)