Proskauer

OFCCP Notice of Proposed Rulemaking

January 18, 2012

On December 8, 2011, the Office of Federal Contract Compliance Programs ("OFCCP") issued proposed amendments to Section 503 of the Rehabilitation Act of 1973. The Act requires all contractors and subcontractors ("contractors") who obtain federal contracts in excess of $10,000 to take affirmative action to employ qualified individuals with disabilities. The proposed OFCCP rules seek to strengthen Section 503 by imposing additional requirements upon qualified federal contractors. This alert provides a general overview of the proposed rules, which include stronger affirmative action provisions, increased data collection obligations, and the establishment of a utilization goal for individuals with disabilities.

A copy of the Notice of Proposed Rulemaking can be found here:

http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/pdf/2011-31371.pdf (pdf version), or

http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/html/2011-31371.htm (text version)

Proposed Section 503 Rules at a glance:

1. Annual review of job qualification standards to ensure such qualifications are job-related and consistent with business necessity

    a. The methods used to evaluate job qualifications and the outcome of the evaluations must be documented

    b. Where the act previously required "periodic" review, the proposed rules require an "annual" review

2. Utilization goal for individuals with disabilities to assist in measuring the effectiveness of contractors' affirmative action efforts

    a. 7 percent goal throughout all job groups

    b. 2 percent sub-goal for individuals with certain particularly severe disabilities

i. Includes total deafness, blindness, missing extremities, partial paralysis, epilepsy, severe intellectual disability, psychiatric disability, and dwarfism

3. Additional data collection pertaining to individuals with disabilities to create greater accountability for contractors

a. Employers are now required to obtain disability data at the application stage, in addition to the post-offer stage

4. Mandatory listings of all jobs, with limited exceptions, with the nearest One-Stop Career Center

a. Similar to the requirement for job listings for veterans

5. Mandate for "linkage agreements" with at least three entities; including

a. A local State Vocational Rehabilitation Service Agency or local agency listed in the Social Security Administration's Ticket to Work Employment Directory

b. An organization listed by the OFCCP, such as EARN or local disability groups, and

c. A disabled veterans service organization listed in the National Resource Directory

d. Must be maintained for five (5) years

6. Requirement to develop and implement specific written procedures for processing requests for reasonable accommodations; including

a. How to request;

b. Written confirmation of requests; and

c. Time frame for processing requests.

7. Requirement of annual evaluation of outreach efforts and the criteria used to evaluate outreach

8. Applicant tracking, including applicant ratio and hiring ratio, tied to applicant identification

    a. Records must be kept for five (5) years

9. Pre-award compliance evaluations.

Basic Provisions/Requirements

ADAAA Provisions Incorporated

§ 60-741.2 incorporates changes required by the Americans with Disabilities Act Amendments Act ("ADAAA"), which became effective on January 1, 2009. Among these changes, the Section 503 proposed rules incorporate the ADAAA's expanded definition of "disability." Key terms of the definition, such as "major life activities," "major bodily functions," and who is "regarded as" having a disability, have been broadened, increasing the scope of employees receiving protection under Section 503.

The ADAAA applies to both the OFCCP and the EEOC. In addition to broadening the scope of covered employees, the definitional change of disability is designed to foster consistency between OFCCP and EEOC requirements (i.e., contractors will have to contend with only one definition of disability). Adoption of the ADAAA requirements will bring the OFCCP into conformity with the EEOC, which incorporated the ADAAA requirements in its revised rules this past March.

http://www.dol.gov/ofccp/regs/compliance/faqs/ADAfaqs.htm

Dissemination of Affirmative Action Policies

Current Section 503 rules require that contractors disseminate affirmative action policies to their employees, but merely suggest the methods of dissemination. § 60-741.23(g) requires contractors to "develop internal procedures to communicate to its employees its obligation to engage in affirmative action efforts." Contractors must "include [] affirmative action polic[ies] in orientation and management training programs." In addition, paragraph (g) provides recommended distribution methods that include using "company newspapers, magazines, annual reports, handbooks, or other media[.]"

http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/pdf/2011-31371.pdf

Review of Personnel Processes

The new rules also incorporate several changes to § 60-741.44. Where current Section 503 rules require "periodic" review of personnel processes, the proposed rules mandate "annual" review of these processes. The proposed rules also require a review of all job qualification standards to ensure that such standards are job-related and consistent with business necessity. The review itself, contractor actions, and responses from employees must all be documented.

Appendix C of the current rules recommends contractors take certain steps during the review of their personnel processes. The proposed rules mandate that contractors, at a minimum, comply with those steps, which include "(1) Identify[ing] the vacancies and training programs for which applicants and employees with disabilities are considered; (2) provid[ing] a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and (3) describe[ing] the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs."

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Reasonable Accommodations

Under Appendix A of the current rules, contractors are required to make reasonable accommodations for both employees and applicants for employment with disabilities, unless the accommodation would create an undue hardship for the contractor. If an accommodation creates an undue hardship, the contractor is "encouraged" to permit the employee to provide or pay for a portion of the accommodation. § 60-741.42 of the proposed rules no longer encourages such action, but rather mandates that contractors permit employees with disabilities to provide or pay for a portion of the accommodation. The proposed rules also require employers to invite employees to request such accommodations during the pre-offer invitation to self-identify. Further, the proposed rules require contractors to "seek the advice of the individual with a disability in providing reasonable accommodation."

In addition, under proposed § 60-741.45, contractors must now "develop and implement specific written procedures for processing requests for reasonable accommodations[.]" Written procedures must, for example, provide employees with information about how to request a reasonable accommodation, the individual responsible for processing and implementing requests, and the time frame in which the contractor will process requests.

http://www.gpo.gov/fdsys/pkg/FR-2011-12-09/pdf/2011-31371.pdf

Increased Data Collection

Section 503 requires contractors to invite individuals with a disability to voluntarily self-identify at the pre-offer stage. Appendix B to § 60-741 provides sample language for pre-offer invitations to self-identify. The proposed rules, however, eliminate Appendix B because § 60-741.42 mandates the language employers must use in the pre-offer self-identification invitation.

In addition, the current rules request employers conduct "regular" anonymous surveys of their employees to provide an opportunity to self-identify for those who do not wish to do so during the hiring process. The new regulations require contractors to conduct "annual" anonymous surveys of their employees.

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New Utilization Goal

The OFCCP proposed a seven (7) percent employment goal for individuals with disabilities, or, alternatively, "a four (4) percent to ten (10) percent range in lieu of a single national utilization goal." According to the OFCCP, the goal is not a quota or restrictive hiring ceiling, but rather an aspirational tool. Failure to meet the goal will not be a violation of law, but failure to meet the goal may mean deficiencies in the contractor's Section 503 compliance. If deficiencies are found, OFCCP will examine a contractor's "good faith" efforts where the goals of the regulations are not met. A contractor's "good faith" efforts may obviate the need for enforcement action.

In addition to the seven (7) percent goal, the OFCCP is considering incorporating a two (2) percent employment sub-goal for individuals with certain particularly severe disabilities. Severe disabilities, as defined in the President's July 2010 Executive Order "Increasing Federal Employment of Individuals with Disabilities," include total deafness, blindness, missing extremities, partial paralysis, epilepsy, severe intellectual disability, psychiatric disability, and dwarfism. If this sub-goal is adopted, the OFCCP will mandate pre-offer invitation to self-identify language similar to § 60-741.42.

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Enforcement

Currently, contractors may be subject to audits if an employee files a complaint or if the OFCCP determines a contractor's compliance evaluations warrant investigation. If the investigation uncovers a violation, "OFCCP may ask the contractor to enter into conciliation negotiations" to correct violations and/or deficiencies. "If conciliation fails, OFCCP may initiate an administrative enforcement proceeding by issuing an administrative complaint against the contractor." Contractors have "20 days to request a review by an Administrative Law Judge, who hears the case and recommends a decision." Decisions are appealable to the DOL's Administrative Review Board which "issues the final decision, whether or not there is an appeal." Penalties for Section 503 violations include back pay and benefits, and restoration of employment status. Penalties also may include cancellation, suspension, or termination of contracts, withholding of progress payments, and debarment. Contractors may appeal the Board's decision to the federal courts.

http://www.dol.gov/compliance/guide/503.htm

Proposed Enforcement Changes

Contractors should be aware that § 60-741.62 of the proposed rules provides for benchmarks in conciliation agreements as one form of remedial action. The benchmarks will be used to measure the contractor's progress in improving identified violations and/or violations in "outreach, recruitment, hiring, or other employment activities."

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Implications for Employers

The proposed Section 503 amendments are likely to impose significant financial and compliance burdens upon contractors. Contractors will have enhanced obligations in the areas of recruitment, training, record keeping, and the dissemination of their affirmative action policies. The OFCCP will conduct reviews of "contractor records for compliance checks and focused reviews either on-site or off-site, at the OFCCP's discretion."

http://www.dol.gov/ofccp/regs/compliance/faqs/Section503_NPRM_faq.htm

With the deadline to submit comments looming, employers should review their Section 503 policies, practices, and compliance procedures. Comments concerning the proposed Section 503 Rules must be submitted by February 7, 2012.

Comments may be submitted electronically at: http://www.regulations.gov/. Comments also may be mailed or hand delivered/couriered to: Barbara J. Bingham, Acting Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, Room N3422, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

If you have any questions regarding OFCCP Section 503 compliance, or would like assistance in submitting comments, please contact your Proskauer attorney or any of the attorneys listed herein.

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