

# OFCCP Announces 2013 Agenda

**January 24, 2013**

On December 21, 2012, the Office of Federal Contracts Compliance Programs ("OFCCP") published its 2013 regulatory goals in the Unified Agenda of Regulatory and Deregulatory Actions ("Unified Agenda"), as required by Executive Order. The Unified Agenda signals that OFCCP intends to aggressively implement new rules and regulations affecting federal contractors and subcontractors in the upcoming year. These rules and regulations are expected to comport with OFCCP's goals as outlined in its Fiscal Year 2013 Congressional Budget Justification and its Notices of Proposed Rulemaking ("NPRM") for veterans and individuals with disabilities, which were issued in April and December of 2011, respectively. For more information regarding Section 503 of the NPRM, see our [client alert of January 18, 2012 OFCCP Notice of Proposed Rulemaking](#).

Contractors and Subcontractors should expect OFCCP regulatory action to include the following:

- i. Implementation of final rules for individuals with disabilities and covered veterans, including:
  - a. Increased enforcement with respect to hiring, worker retention and data collection
  - b. Increased desk audits, on-site activity, and increased focus on Section 503 and VEVRAA
- ii. Implementation of new pay equity data collection tools
- iii. Focus on the construction industry
- iv. Implementation of "Good Jobs for Everyone"
  - a. OFCCP will place greater emphasis on "meaningful and effective" affirmative action evaluations
- v. New Functional Affirmative Action Program ("FAAP") directive

- a. Permits contractors to develop Affirmative Action Plans ("AAP") based on business function or business unit rather than contractor establishments
  - b. Contractors are not eligible for FAAP renewal unless two functional units have passed compliance evaluations during the agreement's three-year term
- vi. Executive Order 13495—Nondisplacement of Qualified Workers Under Service Contracts
- a. New requirement to offer jobs to predecessor contractor's workers
  - b. Effective January 18, 2013

## **I. Final Rules and Regulations for Veterans and Individuals with Disabilities**

OFCCP plans to finalize regulations concerning protected veterans and individuals with disabilities in April of 2013.

### *Veterans*

[Final VEVRAA regulations](#) are scheduled for release in April of this year. The regulations are expected to require that "contractors and subcontractors conduct more substantive analyses of recruitment and placement actions taken under VEVRAA and . . . require the use of benchmarks to measure the effectiveness of affirmative action efforts. The rule would also make revisions to recordkeeping requirements."

[A copy of the Notice of Proposed Rulemaking can be found here.](#)

OFCCP will require contractors to list job vacancies and contact information for each of their locations with appropriate employment delivery systems, engage in at least three specified types of outreach and recruitment efforts each year, provide applicants with a pre-offer invitation to self-identify as "protected veterans," and increase data collection requirements for job referrals, applicants and hires.

### *Individuals with Disabilities*

[Final Section 503 rules](#) are expected to require that contractors annually review recruitment effort effectiveness, enter into at least three linkage agreements, and provide employees with invitations to self-identify as persons with disabilities. The new rules will also broaden the definition of "disability," include new job posting requirements, establish a 7% National Utilization Goal, impose written reasonable accommodation procedures, increase data collection requirements, and revise compliance procedures.

[A copy of the Notice of Proposed Rulemaking can be found here.](#)

These new VEVRAA and Section 503 regulations will impose substantial administrative burdens on contractors and warrant in-depth review of current AAPs and employment policies to ensure compliance.

## **II. Pay Equity**

### *Increased Data Collection*

Pay equity featured prominently in the 2012 presidential election, and that issue promises to remain an Obama administration priority. In conformity with this objective, OFCCP plans to develop a [compensation data collection tool](#) to analyze pay disparities. This policy, however, has drawn harsh criticism. The EEOC commissioned the NAS, at the request of the White House, to review proposed methods for measuring and collecting compensation data. [Their report](#) concluded, in part, that OFCCP should not move forward with the increased data collection requirements because OFCCP failed to adequately articulate its vision of how the agency would utilize collected wage data or to measure the benefits of increased data collection against the burdens and costs to contractors.

Despite NAS recommendations, OFCCP listed June 2013 as its target date to issue a [NPRM concerning the data collection tool](#). OFCCP has not indicated whether or how the agency plans to address any of the NAS concerns during the interim, but contractors should prepare for increased data collection obligations.

## **III. Focus on the Construction Industry**

OFCCP intends to issue a [NPRM with revised regulations governing federal and federally assisted construction contractors and subcontractors](#) by October of 2013. Proposed rules would update "timetables for the utilization of minorities and women based on appropriate workforce, demographic or other relevant data." In addition, proposed rules would require "strengthen[ed] affirmative action programs particularly in the areas of recruitment, training, and apprenticeships."

#### *Amendments to the Sex Discrimination Guidelines*

According to the Department of Labor's Fall 2012 Statement of Regulatory Priorities, "Sex Discrimination Guidelines, found at 41 CFR Part 60-20, have not been updated in more than 30 years[.]" OFCCP intends to issue a [NPRM in August of 2013](#) setting forth contractors' obligations not to discriminate on the basis of sex under Executive Order 11246 . . . and Title VII of the Civil Rights Act of 1964," as amended. Construction contractors should note that [OFCCP has specifically stated](#) that "[t]he nondiscrimination requirement of Sex Discrimination Guidelines . . . applies to contractors and subcontractors performing under federally assisted construction contracts." With sex discrimination in the construction industry soon to become an OFCCP priority, construction contractors should prepare for additional scrutiny.

#### **IV. "Good Jobs for Everyone"**

In its [FY 2013 Budget Justification](#), OFCCP noted that "the agency's enforcement activities focused primarily on hiring discrimination." The agency now plans to "plac[e] greater emphasis on meaningful and effective affirmative action evaluations." In addition, OFCCP will "step[] up its enforcement of equal employment opportunity for individuals with disabilities and covered veterans with respect to hiring, worker retention, and data collection." Contractors should anticipate increased enforcement activities in all aspects of affirmative action.

#### **V. New Functional Affirmative Action Program ("FAAP") Directive**

OFCCP recently implemented Directive No. 305, effective December 17, 2012 through December 31, 2015. Directive 305 lifts a moratorium on the issuance and renewal of FAAP agreements that had been in effect since February of 2010. FAAP agreements permit contractors to develop affirmative action plans based on business function or business unit rather than contractor establishment. But despite the potential benefits of establishing affirmative action plans based on business function or unit, contractors are not eligible for FAAP renewal unless two business functions or units have passed compliance evaluations during the agreement's three-year term. Contractors should consult an attorney before determining whether a FAAP or traditional establishment-based Affirmative Action Plan is more appropriate for their businesses.

## **VI. Executive Order 13495—Nondisplacement of Qualified Workers Under Service Contracts**

On January 30, 2009, President Obama signed Executive Order 13495, which requires federal contractors and subcontractors that enter into contracts that succeed contracts for performance of the same or similar services at the same location to offer non-managerial and non-supervisory employees who were employed under the predecessor contractor a right of first refusal of employment. According to [Department of Labor Regulations](#), the succeeding employers are not permitted to deny employment to such predecessor employees without "written credible information provided by a knowledgeable source" such as "department or agency officials responsible for monitoring performance under the contract." The EO is effective as of January 18, 2013, when both the United States Department of Labor and [Federal Acquisition Regulatory Council](#) final rules went into effect.

If you have any questions regarding the above rules, regulations, or directive, please contact your Proskauer lawyer or any of the lawyers listed herein.