



HR Topics in Government Acquisition: The Changing Landscape

PRESENTED MARCH 11, 2015 TO THE
NATIONAL CONTRACT MANAGEMENT ASSOCIATION

Topics To Cover

- New Rules: Section 503 and VEVRAA
- Steering Hot Topic
- Compensation Issues
- Self-reporting Violations
- Sexual Orientation and Gender Identity Rules
- Guideline on Sex Discrimination
- Other 2015 Developments

New Rules: Section 503 and VEVRAA



- March 24, 2014 - new rules went into effect for individuals with disabilities and protected veterans
- Some rules took effect immediately (EO clauses, notices, posting, taglines in advertisements)
- Some took effect with new plan after 3/24/14 (outreach and recruitment, reporting data for benchmarks and utilization)



New Rules: Section 503 and VEVRAA

On one-year anniversary of 503/VEVRAA effective date most contractors have a transitional plan in place

- Conducting outreach/recruitment
- Soliciting self-identification, collecting data

VETS and 503 Enforcement

- OFCCP reviewing transitional plans
- Focus on progress contractors are making to meet new requirements
- Focus on workplace disability surveys

VETS and 503 Enforcement

- Adherence to schedules for physical/mental qualifications review
- Review and assessment of outreach and recruitment documentation
- Data collection plans, self-ID efforts

VETS and 503 Enforcement

- Listing required job vacancies with ESDS or state job bank?
- Listing for every hire in AAP?
- FMLA, reasonable accommodation policies, reasonable accommodation logs (applicants and employees)
- Mid-2015 uptick in enforcement - early plan contractors will complete their transition AAP year and begin their first full AAP year under the new regulations.

503 and VEVRAA Developments

- Some developments since the 3/24/14 effective date:
 - FAQs on self-identification, EO clauses
 - Change in national veterans benchmark figure (8%, now is 7.2%)
 - VETS-4212 Form released

VETS Reporting

- October 2014 VETS-4212 Form released, replacing VETS-100A
- VETS-4212 must be used for 2015 reporting period (contracts of \$100k or more)
 - Allows for aggregate reporting (not by specific vet type)
 - Greatly reduces data collected and reported
 - Changes invitation to self-ID

Self-ID



Invitation to Self-Identify (Protected Veterans)

This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended by the Jobs for Veterans Act (VEVRAA), which requires Government contractors to take affirmative action to employ and advance in employment:

- (1) Disabled veterans;
- (2) Recently separated veterans;
- (3) Active duty wartime or campaign badge veterans; and
- (4) Armed Forces service medal veterans

These classifications are defined as follows: A **“disabled veteran”** is one of the following: a veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs; or a person who was discharged or released from active duty because of a service-connected disability. A **“recently separated veteran”** means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval, or air service. An **“active duty wartime or campaign badge veteran”** means a veteran who served on active duty in the U.S. military, ground, naval or air service during a war, or in a campaign or expedition for which a campaign badge has been authorized under the laws administered by the Department of Defense. An **“Armed forces service medal veteran”** means a veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985.

If you believe you belong to any of the categories of protected veterans listed above, please indicate by checking the appropriate box below. As a Government contractor subject to VEVRAA, we request this information in order to measure the effectiveness of the outreach and positive recruitment efforts we undertake pursuant to VEVRAA.

- I IDENTIFY AS ONE OR MORE OF THE CLASSIFICATIONS OF PROTECTED VETERAN LISTED ABOVE
 I AM NOT A PROTECTED VETERAN
 I DECLINE TO IDENTIFY MY PROTECTED VETERAN STATUS

Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information provided will be maintained confidentially and used only in ways that are consistent with VEVRAA.

If you are a disabled veteran it would assist us if you tell us whether there are accommodations we could make that would enable you to perform the essential functions of the job, including special equipment, changes in the physical layout of the job, changes in the way the job is customarily performed, provision of personal assistance services or other accommodations. This information will assist us in making reasonable accommodations for your disability.

Steering Hot Topic

- Directing applicants or employees to certain jobs based on stereotypes and biases
- Results in a concentration of one group (e.g. women, minorities) into certain jobs
- Can result in lower compensation, unequal treatment, fewer opportunities for advancement
- Involves issues of compensation, selection, placement and advancement

Steering Example

- Entry level job #1 requires heavy lifting, offers premium pay
- Entry level job #2 no lifting, no premium pay
- Steering women to job #2 job may be discriminatory if the employer does not:
 - Allow applicants to choose their job of interest
 - Evaluate the requirements of the job
 - Evaluate the qualifications of applicants, and
 - Match those to each job whose qualifications best match the job requirements

Steering: OFCCP on Offense

- OFCCP targeting steering in compliance reviews
- OFCCP sees steering as a compensation issue
- Directive 307: addressing compensation discrimination, in “pay analysis groups”
- NPRM for sex discrimination contains steering elements (compensation, performance ratings)

Steering: OFCCP on Offense

- When OFCCP is focusing on a potential steering issue, it looks at:
 - Job Title and group at hire
 - Salary Grade/Level at hire
 - Organizational charts
 - Hours worked, shifts and overtime payments

Steering: OFCCP on Offense

- Looking for concentrations of women and minorities
 - Workforce analysis
 - Physical arrangement of workplace during on-site visits

Avoiding Steering Claims

- Use separate requisitions for separate jobs (no broad requisitions for many different positions)
- List qualifications (and pay ranges if possible)
- Use valid selection procedures(job-related, consistent with business necessity)
- Use a standardized/neutral procedure for placement or choice of shift (i.e., first-to-apply or random placement)

Compensation Discrimination

- Pay Data Requests (Data Collection Tool)
- Equal Pay Report
- Annual Self-Evaluation of Pay Practices
- Minimum Wage Increase
- Pay Transparency

Data Collection Tool

- Proposed Rule Published August 8, 2014, and the comment period ended 1/5/2015
- Amend 41 C.F.R. 60-1.7
- OFCCP Stated Goal:
 - Direct enforcement efforts
 - Deter discriminatory policies and practice
 - Encourage greater voluntary compliance
- Require certain contractors to report summary pay data each calendar year
- Establishment of industry standards

Annual Summary Compensation Report

- Who: Contractors and subcontractors with a contract or PO of \$50,000 or more and more than 100 employees
- What: Submit an equal pay report to the OFCCP with summary compensation data based on sex, race, and ethnicity by EEO-1 job category, and information on the number of employees included in the report and the hours worked.
- When: Data reported from W-2 forms based on a calendar year. Reporting to be completed between January 1 and March 31 for the previous calendar
- How: Data to be submitted using a web-based data tool

Equal Pay Report

- Uses EEO-1 job categories
- Uses total W-2 earnings as reported on W-2s for the calendar year
- Reports total hours worked by all employees in the job category
 - Part-time use 1040 hours (equivalent of 20 hours per week)
 - Full-time use 2080 hours (equivalent of 40 hours per week)
- Wages and hours worked within a job category are reported by race, ethnicity, and sex based on categories used in the EEO-1
- Required to maintain Equal Pay Reports for 2 years, or 1 year if the employer has fewer than 150 employees and government contract of less than \$150,000
- OFCCP states that information will be confidential

OFCCP's Stated Purpose



- Use the data along with other benchmarking information (BLS) to establish industry standards
- Information used to direct its enforcement towards entities where data suggests may be pay violations (target contractors for review by ranking them against “objective standards”)
- Standards can be used by contractors to evaluate their own compliance
- OFCCP believes will act as a deterrent

From the OFCCP



Thus, an establishment where female professionals earn on average 75 percent of what male professionals earn may be reviewed, and those where women earned 90 percent of what men earned may not. This procedure might be labeled a “simple ratio” analysis. In contrast, setting an industry standard using the kind of metrics described above compares the wage ratios for men and women in each establishment to the typical ratio within an industry group or other peer establishments. Under this approach, an establishment where the average female professional earns 75 percent as much as her male co-worker might not be selected for an OFCCP compliance evaluation if the ratios for women in similar firms average 60 percent. These basic principles also would apply when analyzing race or ethnicity-based differences.

Issues for Employers

Calculation of hours worked

- How to handle unpaid leaves
- Calculation of hours for exempt employees
- Calculation of hours for employees who only worked part of the year

Calculation of total wages earned

- Overtime
- Shift differentials
- Commissions
- Bonuses

Issues for Employers



- Compensation systems are varied and take into account myriad factors, which the Equal Pay Report doesn't take into account
- EEO-1 job categories are very broad and summarizing data at this level will not provide meaningful data
- Definition of industry for purposes of setting benchmarks will be too broad to be meaningful
- Data could be easily manipulated by some employers and skew the summarized data

Minimum Wage Increase

- Executive Order 13658 issued February 12, 2014, established a minimum wage for workers on Federal construction and service contracts.
- DOL issued proposed regulations and the final rule was published in December 2014.
- Minimum wage of \$10.10 on January 1, 2015, and adjusted January 1 of each year thereafter by the Secretary of Labor.
- Four major categories of contracts covered by the regulation including:
 - Procurement contracts for construction covered by the Davis-Bacon Act (DBA) and related regulations
 - Service contracts covered by the Service Contract Act (SCA)
 - Concessions contracts
 - Contracts in connection with Federal property or lands and related to offering services to Federal employees, their dependents, or the general public

Minimum Wage Increase

- Workers entitled to minimum wage include those entitled to minimum wage under FLSA (non-exempt employees), and those entitled to prevailing wage under applicable contracts.
- Overtime and deductions from pay rules unchanged
- Anti-retaliation provision to protect employees who complain of wage and hour violations
- Enforcement by the DOL Wage and Hour Division

Pay Transparency

- Executive Order 13665 was issued in April 2014, amending the Equal Opportunity Clause in Executive Order 11246
- Contractors prohibited from discriminating against or taking adverse action against any applicant or employee because he or she inquired about, discussed or disclosed compensation
- Rationale is that employees paid less because of race or gender will not know unless this information is shared

Pay Transparency

- Rule must be incorporated into employee handbook and policies
- Two defenses including disruptive behavior, and disclosure of information learned through performance of essential job functions, e.g., HR
- NRLA protects disclosure of compensation as concerted activity and the new rule provides another level of protection

Self-Reporting Violations

- July 31, 2014: Obama signs Fair Pay and Safe Workplaces Executive Order
- To be implemented on new contracts in stages, on a prioritized basis, during 2016
- Requires disclosure of certain labor law violations
- Paycheck transparency; and
- Prohibition on pre-claim mandatory arbitration agreements



Self-Reporting Violations: Contracts

- By contractors bidding on contracts for goods and services (including construction contracts)
- Valued at more than \$500,000 per contract
- Post-award disclosure/updates every 6 months
- Subcontracts (\$500k or more) have disclosure obligations too



Self-Reporting Violations of What?

Administrative merits determination, arbitral award or decision, or civil judgment within the past three years for violations of:

FLSA, OSH Act, The Migrant and Seasonal Agricultural Worker Protection Act, NLRA, Davis-Bacon Act, Service Contract Act, Executive Order 11246, Section 503 of the Rehabilitation, Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), FMLA, Title VII of the Civil Rights Act, ADA, ADEA, Executive Order 13658 (minimum wage for contractors), and "equivalent state laws"

What is Done With the Report?

- Reporting disclosures made via a website to be developed by GSA
- Contractor's disclosure reviewed by agency's contracting officer
- Determine whether bidding contractor is “a responsible source”

What is Done With the Report?

- Determine whether “appropriate measures” must be taken:
 - Remedial measures
 - Compliance assistance
 - Steps to avoid future violations

What is Done With the Report?

- Particular emphasis on “serious, repeated, willful, or pervasive violations”
 - Refusal to award a contract
 - Referral for suspension/debarment
 - Exercise option on a contract
 - Contract termination

Self-Reporting Violations: Good News

- FAR will be amended to say that:
 - Single violations “may not necessarily give rise to a determination of lack of responsibility,”
 - Depends on the nature of the offense
 - Consideration given to remedial measures and mitigating factors

Paycheck Transparency

- Required for all employee/independent contractors governed by DBA, SCA or ““equivalent state law”
- Provide document in each pay period reporting:
 - hours worked
 - OT-pay
 - any additions or deductions
- No report for exempt employees or independent contractors (if they are informed of status in writing)

Pre-Claim Mandatory Arbitration



- Surprise provision
- Applies to contracts of \$1 million or more (excludes COTS)
- Bans use of pre-claim mandatory arbitration agreements
- Applies to claims brought under Title VII, sexual assault or harassment
- Does not apply to employees employed pursuant to CBAs or independent contractors (pre-order)

What to Do Now

- Review adverse labor decisions subject to reporting (3 years)
- Watch for upcoming regulations, changes to FAR
- Implement practices, policies, training to combat any inference that contractor is not “responsible source”
- If serious or numerous negative violation outcomes, prepare to defend against potential suspension or debarment proceedings.

LGBT Discrimination Rule: History

- July 21, 2014, President Obama signs **EO 13672** extending workplace protections to employees in the federal contracting workplace on the bases of sexual orientation and gender identity
- August 19, 2014, OFCCP issues **Directive 2014-02**, establishing EO 11246 protection on the bases of gender identity and transgender status.

LGBT Discrimination Rule: History

- December 9, 2014, OFCCP publishes **final rule** (without notice and comment), implementing EO 13672, amending EO 11246 and extending sexual orientation and gender identity protections and affirmative action requirements to employees and applicants in the federal contracting workplace.
- April 8, 2015, final rule takes effect (120 days after publication in the Federal Register)
- Final rule applies to all covered contracts entered into or modified on or after 4/8/15

What is Sexual Orientation and Gender Identity?

- Not defined in the final rule
- Sexual orientation generally refers an individual as being heterosexual, lesbian, gay, or bisexual
- Gender identity refers to an individual whose gender identity or gender expression does not correspond with the individual's assigned sex (e.g., transgendered)

Impact of LGBT Rule: The Reality

- 91% of Fortune 500 companies currently prohibit sexual orientation discrimination; 61% include gender identity in their discrimination/harassment policies
- 18 states and D.C. prohibit LGBT discrimination in employment
- Many contractors may already have anti-discrimination and harassment policies

LGBT Changes: Policies and Training



- Review discrimination, antiharassment, and any other affected policies
- Ensure that sexual orientation and gender identity are specifically listed with other classes protected from harassment and discrimination
- For contracts entered into or modified on or after the April 2015 effective date, include sexual orientation and gender identity in training on discrimination and harassment prevention

LGBT Changes: EO Clause

- For all covered contracts entered into or modified on or after April 8, 2015:
 - New EO clause to include sexual orientation and gender identity as protected classifications
 - Amend nondiscrimination policies and related documents to include sexual orientation and gender identity
 - Include in all subcontracts (EO clauses)



LGBT Changes: Taglines

All covered contracts entered into or modified on or after April 8, 2015 - solicitations or advertisements for employees must either:

- State that all qualified applicants will receive considerations for employment without regard to race, color, religion, sex, *sexual orientation*, *gender identity* or national origin; or
- State that the contractor is an “Equal Opportunity Employer (EOE)” (with no reference to each individual protected class).

LGBT Changes: Posters

- “Equal Opportunity is the Law” poster required in all workplaces is being revised to include sexual orientation and gender identity discrimination
- DOL says posters will be updated (no release date yet)
- Use current version of the poster (dated November 2009) until the revised poster is released

LGBT Changes: Affirmative Action?

- EO 13672 requires affirmative action for individuals based on sexual orientation and gender identity
 - No requirement to invite self-ID or data collection
 - No outreach or goals (unlike women, minorities)
- DOL resources directory to help create an inclusive workplace(dol.gov/ofccp/LGBT/LGBT_resources.html)

Guidelines on Sex Discrimination

- Sex Discrimination Guidelines were adopted in 1970 and remained unchanged through 2014
- January 30, 2015, OFCCP published proposed rule on sex discrimination
 - Updating the rules from the guidelines
 - Addressing accommodations for pregnant women
 - Establishing rules regarding gender identity and family caregiver discrimination
- Comments must be received on or before March 31, 2015

Guidelines on Sex Discrimination



- Adverse treatment of an employee because of gender stereotypes related to family caretaking responsibilities is discrimination
- Leaves for childcare must be available to men on the same terms as it is available to women
- Contractors must provide a variety of workplace accommodations to women affected by pregnancy, childbirth, and related conditions (extra breaks, light-duty assignments) on same basis as they would to workers with similar limitations due to a disability or workplace injury
- Unlawful compensation discrimination may result from job segregation or classification on the basis of gender and not just unequal pay for equal work

Guidelines on Sex Discrimination

- Equal contributions to benefit plans for women and men required
- Contractors must develop and implement procedures to ensure workplace free of sexual harassment
- Adverse treatment of employees because they do not conform to gender norms is unlawful sex discrimination
- Discrimination on the basis of gender identity is unlawful discrimination

Guidelines on Sex Discrimination

To the extent the new rule mirrors recent developments under Title VII and the PDA, most contractors are likely in compliance

The new rule does potentially expand existing protections in:

- Caregiver discrimination
- Discrimination based on dress or personal appearance
- Other forms of sex stereotyping as sex discrimination

The new rule recognizes that pregnant women are entitled to accommodation

Guidelines on Sex Discrimination

- In preparation for the new rule:
 - Review and adjust policies
 - Provide training for supervisors and managers
- In addition to filing claims with EEOC, employees will be able to pursue claims with OFCCP
- Penalties may include wages and other compensation for employees, and also possible debarment

Other 2015 Developments

- Construction regulations
- New EEO is the law poster
- More proposed and final regulations

QUESTIONS?

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