



Compliance with the Recordkeeping Requirements of the Regulations Regarding Protected Veterans and Individuals with Disabilities

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Compliance with the regulations regarding protected veterans and individuals with disabilities now goes beyond standard reports and requires contractors to evaluate and modify their policies and practices on a case-by-case and highly individualized basis. In addition to producing annual written affirmative action programs, most of these recordkeeping requirements now appear on the Itemized Listing sent with the Scheduling Letter to federal contractors facing OFCCP audits.

The regulations implementing the non-discrimination and affirmative action obligations of Section 503 (individuals with disabilities),¹ and those of Section 4212/VEVRAA (protected veterans),² became effective on March 24, 2014. These implementing regulations are part of the Code of Federal Regulations (CFR) Title 41: Part 60-300 details the affirmative action and non-discrimination obligations of federal contractors and subcontractors regarding various categories of protected veterans; and Part 60-741 details these obligations regarding individuals with disabilities. The new Scheduling Letter and Itemized Listing (see Exhibit 1) that take into account the updated regulations were approved by OMB and announced by OFCCP at the end of September 2014; they became effective for all audits initiated after mid-October 2014. This new Itemized Listing effectively added eleven (11) new items that concern various recordkeeping and document production requirements found in Sections 503 and 4212 of the regulations. Below we provide a summary of the required affirmative action program components, with a reference to the updated Itemized Listing.

The new AAP requirements are to be completed annually and federal contractors should be prepared to devote time and research in order to meet the new protected veterans and individuals with disabilities regulations. Contractors are given more flexibility on the AAP preparation in their transitional year (the first year AAPs are completed after the

March 24, 2014 effective date) due to the delayed compliance with the AAP requirements of Subpart C of the new regulations.³ However, in their subsequent AAP reports (all AAPs with the reporting cycles starting on or after April 1, 2015), federal contractors are required to satisfy all the AAP requirements covered in the regulations. More importantly, each federal contractor will only have 30 days to submit their AAPs to the OFCCP upon request, as well as to prepare an assessment of various affirmative action obligations for protected veterans and individuals with disabilities. These new assessments should become a part of the annual AAP preparation process.

**Overview of Affirmative Action Program Components
for Protected Veterans and Individuals with Disabilities**

AAP Components	Source		Itemized Listing
	Veterans	IWDs	
Policy Statement	60-300.44(a)	60-741.44(a)	
Review of Personnel Processes	60-300.44(b)	60-741.44(b)	Item 21
Review of Physical and Mental Qualifications	60-300.44(c)	60-741.44(c)	Item 22
Reasonable Accommodation	60-300.44(d)	60-741.44(d)	Item 20
Anti-Harassment Procedures	60-300.44(e)	60-741.44(e)	
External Dissemination of Policy, Outreach, and Positive Recruitment	60-300.44(f)	60-741.44(f)	Items 7 and 11
Internal Dissemination of Policy	60-300.44(g)	60-741.44(g)	
Audit and Reporting System	60-300.44(h)	60-741.44(h)	Items 8 and 12
Responsibility for Implementation	60-300.44(i)	60-741.44(i)	
Affirmative Action Training	60-300.44(j)	60-741.44(j)	
* Data Collection Analysis	60-300.44(k)	60-741.44(k)	Items 9 and 13
** Utilization Analysis	--	60-741.45	Item 10
** Benchmarks for Hiring	60-300.45	--	Item 14

* The documentation on the Data Collection Analysis, although required to be produced and maintained as part of the AAP, does not have to be made available for employee and applicant inspection (as per 41 CFR 60-300.41 and 60-741.41).

** The requirements to produce and maintain the documentation on the Utilization Analysis and adopted Benchmarks for Hiring are technically listed outside the scope of the “required contents of AAP”.

In the following sections, we cover those AAP components concerning Sections 503 and 4212 regulations that will be requested by the OFCCP during the desk-audit stage of the Compliance Evaluation process.

Results of the evaluation of the effectiveness of outreach and recruitment efforts (Items 7 and 11)

Not only are federal contractors required to engage in various outreach and recruitment efforts to recruit qualified protected veterans and individuals with disabilities, they are also required to perform an annual written assessment of all such efforts to evaluate their effectiveness. The results of such evaluation have to be produced to the OFCCP during an audit. While the OFCCP expects contractors to take an individualized approach in evaluating their outreach and recruitment efforts, it has provided some guidance in this area. For example, OFCCP specified that the data metrics collected pursuant to 60-300.44(k) and 60-741.44(k) should be used as one of the evaluation criteria. Further guidance was provided during the OFCCP webinars.⁴ During the webinars, OFCCP provided the following examples of information that contractors may consider collecting for each outreach or recruitment event:

- Name or type of outreach or recruitment activity
- Date of the activity
- Brief description of the activity
- Contractor's evaluation of the activity, possibly in terms of number of protected veterans and individuals with disabilities reached, recruited, interviewed and/or hired.

However, there is no "one size fits all" template that could be used by all contractors. Contractors are responsible for developing a system to document and evaluate their outreach and recruitment efforts that would be suitable for their organizations and to specify the subjective effectiveness criteria for these efforts. Contractors could look for guidance from different third-party sources (outside counsel, industry liaison groups, employer associations, consultants), but it will be difficult to completely outsource this task that relies so heavily on continuous and timely recordkeeping of the efforts taken by the contractors themselves.

Actionable tips:

- Identify local employment agencies and their representatives working with veterans and individuals with disabilities;
- Communicate to those involved in the hiring process of requirements of these regulations;
- Establish and communicate one protocol across your organization's multiple hiring locations to document and evaluate outreach and recruitment events in a timely manner;
- Train recruiting managers within your organization to document their outreach and recruitment efforts;
- Perform periodic internal review of the assessment documentation (quarterly, semi-annual).

Documentation of all actions taken to comply with the audit and reporting system requirements (Items 8 and 12)

Federal contractors previously had a responsibility to design and implement an audit system to measure the effectiveness of the company's AAP. Recent Sections 503 and 4212 regulations added a requirement to *document* all actions taken to comply with these self-audit responsibilities, as well as *retain those documents*, as part of the AAP compliance. Furthermore, contractors are now required to produce the documentation of all actions taken to comply with the audit and reporting system requirements outlined in 41 CFR 60-300.44(h) and 60-741.44(h), during the desk audit phase of the OFCCP compliance evaluation. This documentation requirement creates a need for additional recordkeeping with somewhat generic guidance from the OFCCP. The audit and reporting system should be designed to measure the effectiveness of the contractor's AAP, measure the contractor's compliance with the AAP's specific obligations, and determine the degree to which the contractor's objectives have been met, as well as indicate remedial or follow-up actions, as needed. The most straightforward way to meet these objectives might be to follow the examples provided by the OFCCP during the same training webinars:

- list specific affirmative action program requirements found in paragraphs (a)-(k) of sections 60-300.44 and 60-741.44;

- for each AAP requirement, record the date (if applicable) and the type of compliance (review, inspection, posting, etc.);
- for each AAP requirement, identify the need for remedial or follow-up action.

Examples of the specific AAP requirements may include something as simple as posting the contractor's equal opportunity policy statement on bulletin boards and ensuring at least once a year that the information was posted. Complying with the requirement to provide reasonable accommodation to known physical or mental limitations of the otherwise qualified individuals with disabilities or disabled veterans can be more involved. Since accommodation requests are usually initiated by the applicants or employees throughout the year, they require ongoing attention from the contractor's HR professionals, which only highlights the need to document each request in a timely manner.

Documentation of the computations or comparisons described in sections 60-300.44(k) and 60-741.44(k) (Items 9 and 13)

"Data collection analysis" is a new AAP component requiring the contractors to document and maintain the following information on an annual basis:

- the total number of job openings;
- the total number of jobs filled;
- the total number of applicants for all jobs;
- the number of applicants who self-identified as individuals with disabilities;
- the number of applicants who self-identified as protected veterans;
- the total number of applicants hired;
- the number of applicants with disabilities hired; and
- the number of protected veteran applicants hired.

Certainly, in order to produce these annual numbers, contractors are required to invite applicants and new hires to self-identify their protected veteran and disability status, and to maintain relevant employment records throughout the year. In fact, the OFCCP specifies in its Itemized Listing that contractors who are

more than six months into their current AAP year when they receive a request for such listing, should provide the information on the above items for at least the first six months of the current AAP year.

Complying with the data collection analysis poses additional challenges for the contractors due to the lack of a clear definition of “job openings”, “jobs filled” and “applicants hired”. The only guidance regarding these terms can be found in the Frequently Asked Questions posted on the OFCCP website,⁵ but the regulations themselves do not provide any definitions of these terms. Through their FAQs, OFCCP suggests that

- “job openings” are individual positions advertised as open in a job vacancy announcement or requisition, but not necessarily “filled” at the end;
- jobs can be “filled” either through a competitive process or non-competitively, meaning that they can include both new hires, as well as promotions, transfers and reassignments;
- internal and external applicants can be “hired” through a competitive process, including promotions.

It should be noted, however, that contractors will be able to readily account only for those competitive and non-competitive employment moves that can be easily tracked through their HR information systems.

Before embarking on the process of data collection and reporting, contractors are encouraged to consult with their counsel to adopt the definitions of “job openings”, “jobs filled” and “applicants hired” that would be used for this section of the AAP compliance. Once there is a clear understanding of the categories of employees and applicants that would be considered by the contractor, these instructions have to be communicated across the contractor’s multiple locations to ensure consistency of these data collection processes.

Actionable tips:

- Invite applicants and new hires to self-identify their protected veteran and disability status;
- Review your HRIS to understand what types of employment actions are being regularly captured;

- Consult with your counsel and adopt clear definitions of job openings, jobs filled, and applicants hired; and
- Communicate the information to the relevant personnel across the contractor's multiple locations, if applicable.

The utilization analysis evaluating the representation of IWDs in each job group (or workforce, when appropriate) (Item 10)

As part of affirmative action compliance, contractors are required to annually evaluate their utilization of individuals with disabilities among their incumbents (41 CFR 60-741.45(d)(3)), identify problem areas based upon such evaluation (60-741.45(e)), and develop and execute action-oriented programs designed to correct any identified problem areas (60-741.45(f)). During the OFCCP's compliance evaluations, contractors will be asked to produce the utilization analysis evaluating the representation of individuals with disabilities in each job group, or workforce as a whole when appropriate. The first step towards satisfying this requirement is to conduct a mandated employee survey, inviting all current employees to self-identify as individuals with disabilities. Due to the phased-in compliance schedule, contractors are required to conduct this employee survey at any time during their first AAP year that started after the March 24, 2014 effective date. At the latest, those with "March 1" AAP starting dates, could conduct this survey at any time between March 1, 2015 and February 29, 2016. However, with the regulations now effective for over a year, contractors are encouraged to invite their employees to voluntarily identify their disability status as soon as practically possible.

Documentation of the hiring benchmark adopted (Item 14)

Item 14 of the Itemized Listing requests the "documentation on the hiring benchmark adopted, the methodology used to establish it if using the five factors described in 60-300.45(b)(2)..." Arguably, stating that the hiring benchmark for the protected veterans was established based on the national percentage of veterans in the civilian labor force which is published on the OFCCP website,⁶ should

suffice. However, depending on a contractor's geographic location, it may decide to determine a more localized benchmark for protected veterans.

The language of Item 14 does not suggest that contractors should also provide the comparison of the established hiring benchmark to the actual percent of veteran hires at their organization. However, a simple statistic based on the total number of applicants hired and the number of protected veteran applicants hired which is already provided to the OFCCP in response to Item 13, could be calculated. The estimated actual percentage of hires that are protected veterans could be compared to the benchmark of veteran hires.

Copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution, if any (Item 20)

In their regulations, the OFCCP suggests in section 60-741.44(d)(2) that the “development and use of *written* procedures for processing requests for reasonable accommodation is a *best practice* that may assist the contractor in meeting its reasonable accommodation obligations” (emphasis added). The OFCCP further suggests that having written procedures is not a requirement, and absence of written procedures will not constitute a violation of the AAP requirements. However, by including a request for copies of reasonable accommodation policies, and documentation of any accommodation requests received and their resolution as part of the Itemized Listing, the OFCCP encourages contractors to develop and maintain written policies and procedures regarding reasonable accommodation. The OFCCP provides some guidance on how to develop written reasonable accommodation procedures in Appendix B to part 60-741 of the Code of Federal Regulations. The contractors' legal counsel may provide guidance as to the procedures that are most effective to ensure that these guidelines are being effectively met. Having developed such procedures initially, the contractor would then need to review and, if necessary, update the procedures at least annually, as part of the AAP preparation. Additional and potentially burdensome recordkeeping requirements stem from the need to produce the documentation for the accommodation requests received and their resolution. To effectively comply with this request, HR managers and professionals will have to be trained to maintain a log of such accommodation requests and their resolutions on an ongoing basis.

Actionable tips:

- Consult with legal counsel regarding the most effective accommodation procedures and documentation;
- Develop written reasonable accommodation procedures following the guidance provided in the regulations and by counsel;
- Establish uniform procedures for logging and processing requests for accommodation, as well as recording the resolution steps;
- Train your organization's HR managers and professionals to maintain and timely update all documentation on any accommodation requests.

Most recent assessment of personnel processes, including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment (Item 21)

As with some other required components of the AAPs, contractors previously had an obligation to periodically review and revise their personnel processes to ensure that they “provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees” who are known protected veterans or individuals with disabilities “for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available.”⁷ The personnel processes can include a variety of HR procedures that are specific to each employer, but can generally involve recruiting, hiring, promotion, and termination procedures. Additionally, providing training opportunities, handling accommodation requests and satisfying accessibility requirements, as well as establishing personal and medical leave guidelines, can all fall under the broad umbrella of “personnel processes.” This very broad and possibly over-inclusive interpretation of personnel processes can create a need for excessive recordkeeping, especially when it comes to documenting the assessment of such processes. Contractors have to become aware of these additional documentation requirements and start producing and maintaining the records that describe the review, assessment and modifications to their personnel processes on a regular basis. A thorough annual review of the affirmative action program can help satisfy this periodic review requirement.

Most recent assessment of physical and mental qualifications, including the date the assessment was performed, any actions taken or changes made as a result of the assessment, and the date of the next scheduled assessment (Item 22)

According to 41 CFR 60-300.44(c) and 60-741.44(c), federal contractors should establish and adhere to a schedule for the periodic review of all physical and mental job qualification standards. While the requirement to conduct such review and the purpose of the review are not new to the contractors, the OFCCP now expects that contractors will document each time they perform such an assessment as well as any modifications based on the results of the review.

With its recent rule-making and regulatory activity, the OFCCP has increased the expectations for federal contractors to improve employment opportunities for protected veterans and individuals with disabilities.

“If you don't write it down, that means you don't think about it. If you don't think about it, that means it's not important.” AAPs, however, are as important as any other business practice.

-- Pat Shiu, Director, OFCCP, U.S. Department of Labor.

January 2015 interview to Bloomberg BNA.

To ensure compliance with the new regulations, the OFCCP has also increased its enforcement efforts. While most of the initiatives promulgated by the OFCCP are not new, federal contractors are now directed to take an individualized approach in assessing their affirmative action programs on an ongoing basis. Legal counsel, third-party vendors and consultants can provide useful guidance to contractors, but it increasingly becomes a responsibility of the federal contractors and their HR professionals to continuously monitor, review and assess their programs aimed to promote diversity at their workplace.

¹ See the Final Rule published in the Federal Register, <http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf>

² See the Final Rule published in the Federal Register, <http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21227.pdf>

³ Subpart C of the regulations concerning the protected veterans and individuals with disabilities defines the general purpose and applicability of the AAP requirements; provides details regarding the invitations to self-identify; as well as describes the required contents of the affirmative action programs.

⁴ OFCCP presented public training webinars on Sections 503 and 4212/VEVRAA dealing with the topics on Self-Assessment, Outreach and Recruitment on January 16 and February 6, 2014. Webinar materials are available at http://www.dol.gov/ofccp/regs/compliance/final_rules_webinars.htm.

⁵ See http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA_faq.htm and http://www.dol.gov/ofccp/regs/compliance/faqs/503_faq.htm.

⁶ As of April 2015, the percentage of veterans in the civilian labor force was posted at 7.2% (<http://www.dol-esa.gov/errd/VEVRAA.jsp>).

⁷ See the Final Rules published in the Federal Register, <http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21227.pdf> and <http://www.gpo.gov/fdsys/pkg/FR-2013-09-24/pdf/2013-21228.pdf>.