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On August 8, 2007, the OFCCP published final regulations implementing the amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) that were made by the Jobs for Veterans Act of 2002 (JVA). The final regulations include comments aimed at staffing agencies and recruiting firms.

OFCCP Issues Final Veterans Regulations for Government Contractors

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On August 8, 2007, OFCCP published a final rule in the Federal Register implementing the amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA) that were made by the Jobs for Veterans Act of 2002 (JVA).

Summary of the Changes

The JVA amendments made three principal changes to the affirmative action provisions of the VEVRAA for companies that have federal government contracts that were entered into or modified on or after December 1, 2003.

1. The JVA amendments raised the threshold dollar amount of the government contracts that are subject to the affirmative action provisions of the VEVRAA from \$25,000 to \$100,000.
2. The JVA amendments changed the categories of covered veterans under the VEVRAA.
3. The JVA amendments changed the manner in which the mandatory job listing requirement is to be implemented.

Companies with federal government contracts of \$25,000 or more entered into prior to December 1, 2003, must comply with the pre-JVA VEVRAA requirements. Companies that have both pre-December 1, 2003 contracts of \$25,000 or more and contracts dated December 1, 2003 or later of \$100,000 or more must comply with both sets of obligations. The dual requirements that these regulations impose are a direct result of how Congress drafted the JVA. The OFCCP had no discretion but to create these two separate sets of veterans categories that will apply

depending on what federal government contracts an employer has, their amounts, and when those contracts were last modified.

Effective Date of Final Rule

The final rule becomes effective September 7, 2007, and, for the most part, adopts the provisions that were proposed in the January 20, 2006 Notice of Proposed Rulemaking (NPRM). The implementing regulations will be codified in a new 41 CFR part 60-300. Contractors preparing their affirmative action plans on or after October 1, 2007, should ensure that the new definitions are included in their narratives and their self-identification forms have been updated.

Practical Considerations for Contractors

Practical matters for contractors to consider fall into three primary areas: (1) The Self-Identification Form and the Written Affirmative Action Program, (2) The Mandatory Posting Requirement, and (3) The Major Shift in OFCCP's Treatment of Temporary Employment Agencies. Each are discussed in detail below.

The Self-Identification Form and the Written Affirmative Action Program

If a contractor only has a covered government contract that was entered into before December 1, 2003, that contractor must comply with the requirements in the existing VEVRAA implementing regulations in 41 CFR part 60-250. Under these regulations, a contractor is required to engage in affirmative action for the following veterans categories (definitions appear in an appendix at the end

of this article):

- Special disabled veteran
- Newly separated veteran
- Other protected veteran
- Veteran of the Vietnam era

If a contract, which was entered into prior to December 1, 2003 was subsequently *modified*¹ or extended since December 1, 2003, or if the contractor only has new contracts entered into on or after December 1, 2003, in the amount of \$100,000 or more, the existing VEVRAA regulations do not apply, but the new regulations apply. Under the new regulations, a contractor is required to engage in affirmative action for the following veterans categories:

- Disabled veteran
- Recently separated veteran
- Other protected veteran
- Armed Forces service medal veteran

Only those contractors that have original, unmodified contracts entered into prior to December 1, 2003, in the amount of \$25,000 or more, *and* who have contracts for \$100,000 or more since December 1, 2003, will have to comply with both sets of regulations.

Remember, although the regulations permit contractors to invite applicants to self-identify for some of the veterans categories prior to an offer of employment, contractors may not inquire about the special disabled veteran or the disabled veteran categories prior to an offer of employment. For this reason, we recommend that employers do not solicit self-identification of any veterans information prior to an offer of employment. The regulations do not require it, and for some of the categories, the regulations forbid it.

To complicate matters further, however, the Veterans Employment and Training Service (VETS), which tracks government contractors' employment of veterans on the VETS-100 report, has not yet adjusted its form to solicit information on the new categories. The VETS-100 Report, including the report due on September 30, 2007, requires both pre- and post-December 1, 2003, contractors

to track the number of employees who have self-identified as special disabled veterans, veterans of the Vietnam era, or other protected veterans, as well as the number of new hires who have self-identified as special disabled veterans, veterans of the Vietnam Era, newly separated veterans, or other protected veterans. On August 8, 2006, VETS proposed a new VETS-100A form for companies that have contracts of \$100,000 or more entered into, or modified, after December 1, 2003. Those regulations have not been finalized. Once finalized, those companies that fall under both sets of regulations will have to file a VETS-100 and the new VETS-100A.

Tips for Contractors

Contractors should check with the appropriate procurement officials in their organization to see if all of their covered government contracts that were entered into before December 1, 2003, have been modified or extended since December 1, 2003, thus affording the contractor the simplicity of having to comply with only the new regulations.

If a contractor has only covered government contracts entered into before December 1, 2003, the contractor should:

- engage in affirmative action for veterans under the existing definitions for special disabled veterans, veterans of the Vietnam era, newly separated veterans, and other protected veterans;
- continue to prepare a written affirmative action program pursuant to the existing VEVRAA regulations at 41 CFR part 60-250
- continue to track the number of employees who have self-identified as special disabled veterans, Vietnam era Veterans, or other protected veterans, as well as the number of new hires who have self-identified as special disabled veterans, Vietnam era veterans, newly separated veterans, or other protected veterans for its VETS-100 Report.

If a contractor only has covered government contracts entered into on or after December 1, 2003, the contractor should:

- engage in affirmative action for disabled veterans, recently separated veterans, other protected veterans, and armed forces service medal veterans;
- continue to track the number of employees who have self-identified as special disabled veterans, veterans of the vietnam era, or other protected veterans, as well as the number of new hires who have self-identified as special disabled veterans, veterans of the Vietnam era, newly separated veterans, or other protected veterans for its 2007 VETS-100 Report
- be prepared to switch to tracking only the new categories once the VETS-100A is finalized (leaving open the possibility that the workforce may have to be resurveyed to ensure that individuals can self-identify using the new definitions);
- prepare a written affirmative action program pursuant to the new regulations at 41 CFR part 60-300 ensuring that its definition section has been updated.

If a contractor has covered government contracts entered into both before and on or after December 1, 2003, the contractor must comply with both the new and existing regulations. In this case, the contractor should:

- engage in affirmative action for special disabled veterans, veterans of the Vietnam era, newly separated veterans, and other protected veterans, disabled veterans, recently separated veterans, and armed forces service medal veterans;
- continue to track the number of employees who have self-identified as special disabled veterans and veterans of the Vietnam era, as well as the number of new hires who have self-identified as special disabled veterans, newly separated veterans, other protected veterans, and veterans of the Vietnam Era for the VETS-100 report
- be prepared to file both the VETS-100 and the VETS-100A once the latter is finalized (including the possibility of having to resurvey the existing workforce in order to count employees correctly under

¹ The new regulations define a "modification" as any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions.

the different definitions that apply to both forms); and

- prepare a written affirmative action program pursuant to both sets of regulations.

Because the contents of the written affirmative action program required under the new and existing regulations are the same, the contractor would be able to develop a single written affirmative action program that satisfies the requirements of both regulations so long as the contractor carefully defines the groups of protected, covered veterans and uses a short-hand phrase (such as “covered veterans”) throughout that is all-encompassing.

The Mandatory Posting Requirement

The new regulations eliminate listing employment openings solely with America’s Job Bank as an option for complying with the contractor’s mandatory job listing requirement. Given that America’s Job Bank ceased to exist on June 30, 2007, the new regulations explain that contractors and subcontractors should be listing their employment openings with the appropriate “employment service delivery system” where the opening occurs. The new regulations provide that contractors can satisfy this requirement by listing employment openings with the state workforce agency job bank or the local employment service delivery system where the opening occurs. In an effort to help contractors locate state workforce agency job banks, the OFCCP will provide a link on its website to all such job banks.

The obligation to list vacancies does not apply to temporary positions of three days or less, positions filled exclusively from within the contractor’s organization, or to executive and senior management positions.

The new regulations modified the definition of “executive and senior management” to incorporate the standards for determining whether a person qualifies as an “executive employee” found in the FLSA regulations at 29 CFR 541.100 and 541.101.

Tips for Contractors

Contractors with nationwide operations need to determine the most practical and effective

way to list their employment openings with the state workforce agency job bank or an appropriate employment delivery service system where the opening occurs. Contractors may satisfy this requirement by submitting job listings to the appropriate employment delivery system in a variety of ways, including via mail, fax, e-mail, or other electronic postings. Contractors may also use third parties, such as private or nonprofit sector job banks, Internet gateway and portal sites, and recruiting services to assist them with the transmission of job postings to the appropriate employment delivery system.

In an audit, OFCCP has the prerogative to compare the number of positions filled externally to the contractor’s records demonstrating compliance with the regulations. Contractors should put in place mechanisms to ensure that recruiters and managers filling positions understand the consequences of filling a position externally without the company having proof of the listing with the state workforce agencies or appropriate employment delivery system.

Major Shift in OFCCP’s Treatment of Temporary Employment Agencies

One of the most significant developments arising out of the new regulations pertains to the OFCCP’s comments regarding the treatment of staffing firms and recruiting agencies. In response to the proposed rule obligating employers to list vacancies with the local workforce commission, one workforce development agency expressed concerns about the contractual arrangements that contractors have with temporary agencies and recruiting firms. The commenter asserted that many contractors use temporary agencies to recruit candidates for job vacancies and that when the temporary agencies receive job orders from a client they tend to refer candidates they already have “on-file” rather than list the job with the appropriate employment service delivery system. According to the commenter, temporary agencies often take the position that they are not obligated to comply with the mandatory job listing requirements because they are not subcontractors to the federal contractor. The workforce agency asserted that either tempo-

rary agencies should be considered subcontractors, or contractors listing job orders with temporary agencies also should be required to list their job orders with the employment service.

In its response, the OFCCP made clear that **a contractor’s use of a temporary agency does not relieve the contractor of its obligation to comply with the mandatory job listing requirement and that contractors are required to list with the appropriate employment service delivery system the jobs that also are filled through a temporary agency.**² The OFCCP also disagreed that temporary agencies are excluded from coverage under VEVRAA. The OFCCP noted that the regulations define the term *subcontract* as “any agreement or arrangement between a contractor and any person ... which, in whole or in part, is necessary to the performance of any one or more contracts; or ... under which any portion of the contractor’s obligation under any one or more contracts is performed, undertaken, or assumed.” Therefore, whether a particular subcontract is covered under the VEVRAA or the JVA regulations depends on a variety of factors such as the requirements of the government contract at issue and the role of the subcontractor in fulfilling the obligations of the government contract. Thus, some temporary employment agencies may have agreements with government contractors that would render them a covered subcontractor under VEVRAA or JVA.

Tips for Contractors

The OFCCP appears to have given itself regulatory permission to inquire into the extent contractors are using temporary agencies to recruit candidates for job vacancies and whether the temporary agencies’ work fits within the definition of a subcontract. Contractors should put their temporary agencies on notice of their requirement to list the jobs with the appropriate employment service delivery system. Contractors should also make temporary agencies aware that they might become covered subcontractors if the dollar amount of their contract with the contractor is valued at more than \$100,000 and the temporary agencies’ labor supply is “necessary to the performance

² Executive and senior management positions, positions filled from within the contractor’s organizations, and positions lasting three days or less are exempt from the mandatory job listing requirement.

of any one or more contracts” or “under which any portion of the contractor’s obligation ... is performed, undertaken, or assumed.” The OFCCP appears to be taking the first steps towards enforcing the veterans affirmative action obligations on temporary agencies as covered subcontractors.

VEVRAA Definitions	
Special Disabled Veteran	This term means: (i) A veteran 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 Department of Veterans Affairs for a Disability: (A) Rated at 30 percent or more; (B) Rated at 10 or 20 percent in the case of a veteran who has been determined under 38 U.S.C. 3106 to have a serious employment handicap; or (ii) A person who was discharged or released from active duty because of a service-connected disability.
Veteran of the Vietnam Era	This term means a person who: (1) served on active duty for a period of more than 180 days, and was discharged or released therefrom with other than a dishonorable discharge, if any part of such active duty occurred: (i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or (ii) Between August 5, 1964, and May 7, 1975, in all other cases; or (2) Was discharged or released from active duty for a service-connected disability if any part of such active duty was performed: (i) In the Republic of Vietnam between February 28, 1961, and May 7, 1975; or (ii) Between August 5, 1964, and May 7, 1975, in all other cases.
Newly Separated Veteran	This term means any veteran during the one-year period beginning on the date of such veteran’s discharge or release from active duty.
Other Protected Veteran	This term means a person who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, under laws administered by the Department of Defense.

JVA Definitions	
Disabled Veteran	This term means (A) 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 the laws administered by the Secretary of Veterans Affairs, or (B) a person who was discharged or released from active duty because of a service-connected disability.
Armed Forces Service Medal Veteran	This term means any 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 No. 12985. Note: With respect to this category, contractors may want to consider requiring veterans who self-identify as an “Armed Forces Service Medal Veteran” to provide a copy of their DD Form 214 otherwise known as their Certificate of Release or Discharge from Active Duty.
Recently Separated Veteran	This term 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.
Other Protected Veteran	This term 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.