



COMMENTARY ON PROPOSAL REGARDING CHANGES TO AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS REGARDING PROTECTED VETERANS

The commentary below is submitted by William Osterndorf on behalf of HR Analytical Services, inc., a Milwaukee, Wisconsin based management consulting firm that specializes in assisting federal contractors and subcontractors that need to prepare affirmative action plans under the federal affirmative action regulations. Our clients range in size from 60 employees to more than 12,000 employees. HR Analytical Services has developed thousands of affirmative action plans for companies throughout the nation, and our clients have been through many successful affirmative action reviews by the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP).

INTRODUCTION

Our commentary responds to the proposed rule published by OFCCP on April 26, 2011 in the federal register at 76 F.R. 23358 et seq. (This proposal has an RIN number of 1250-AA00.) The proposed rule makes significant changes to the existing affirmative action regulations for veterans that were promulgated under 38 U.S.C. 4212 (the Vietnam Era Veterans' Readjustment Assistance Act of 1974, or VEVRAA).

As OFCCP states in its background materials to the proposed rule, the current rules (i.e. regulations) regarding the affirmative action responsibilities that federal contractors and subcontractors have for veterans were first published in 1976. OFCCP correctly points out that the circumstances that veterans face are, at the moment, dramatically different than they were during much of the period since these regulations were first published. OFCCP notes that the unemployment rate for veterans is higher than the unemployment rate for persons in peer age groups, and states that there are "barriers our veterans face in returning to civilian life." In response, OFCCP has prepared revisions to the current veterans regulations that are meant to address these issues.

SUMMARY OF PROBLEMS WITH THE PROPOSED RULE

While there appears to be a need to update the existing regulations, OFCCP's proposed rule is problematic in a significant number of ways. A short summary of the major problems in the proposed rule is as follows:

- The proposed rule assumes that corporations are making a conscious effort to exclude veterans from gaining access to new positions and from otherwise enjoying various benefits of employment. This assumption is patently false. It is our experience that our clients are actively seeking to employ, retain, and promote veterans. **Companies throughout the United States and the individuals who work for these companies are proud to have veterans in their organizations, just as they are proud of the service that our veterans have provided to the United States.**
- The proposed rule assumes that corporations have significant resources available to devote to providing programs for veterans. This assumption is also false. Many of our clients continue to struggle with the economic downturn our country is facing, and these clients do not have resources to devote to major new regulatory initiatives.
- The proposed rule assumes that there are data sources available to help find and track information regarding veterans. This assumption is again false. The data sources that OFCCP suggests are available to help find veterans, when they exist at all, are difficult to find and use. Data sources to determine how many qualified veterans exist in the workforce are effectively non-existent.



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- The proposed rule assumes that the costs and other burdens associated with changes to the current veterans regulations are minimal. This assumption is totally false. The nature of the changes proposed by OFCCP would require companies to devote significant time and resources to the implementation of a variety of new programs.
- The proposed rule assumes that the best way for corporations to meet their obligations toward veterans is to create a variety of new record-keeping responsibilities. This assumption reflects OFCCP's decision to act as overseer rather than partner in ensuring the implementation of the affirmative action regulations. OFCCP would best serve the contractor community if it would help companies find ways to recruit qualified veterans rather than require companies to create a variety of programs that will take time away from finding, hiring, training, promoting, and retaining veterans.
- The proposed rule is inconsistent with the current affirmative action regulations regarding persons with disabilities. In the past, the regulations regarding veterans have closely paralleled the regulations regarding persons with disabilities. The proposed rule contains a variety of provisions that are significantly different than the current affirmative action regulations for persons with disabilities (and that are also significantly different than the current affirmative action regulations for minorities and females).

In short, OFCCP is attempting use means that are unreasonable for federal contractors and subcontractors and that are unlikely to resolve the underlying problem of unemployment among veterans.

UNEMPLOYMENT RATES FOR VETERANS

Before addressing any of the specific items in the proposed rule, it is important to address the predicate for many of the proposed changes. It would be difficult to dispute the idea that veterans leaving military service have high unemployment rates, and that these rates are likely higher than those of individuals in various peer groups by age. For example, OFCCP suggests and we can accept the idea that the unemployment rate for non-veterans from 18 to 24 years old is 16.6%, while the unemployment rate for veterans from 18 to 24 years old is 21.1%. However, the reasons for this high level of unemployment are important in understanding why the changes proposed by OFCCP are unhelpful.

While the U.S. economy continues to suffer from the effects of the recent recession, unemployment rates throughout the economy are affected in part by a skills mismatch between workers and positions. Among our company's clients, the organizations that are hiring are frequently seeking very defined skill sets. Some companies have highly-specialized products or services that require employees with specific skills and/or experience. Some companies are seeking to compete in an increasingly challenging global marketplace, and thus must find workers that can help produce the highest-quality results. Some companies are seeking replacements for highly-skilled workers who are retiring from or otherwise leaving positions where there are no internal or external training programs providing a base of qualified candidates. There are a variety of other reasons why our clients are looking for specialized skills, but it is not unusual in our client base for companies to have a limited number of entry-level openings and yet have a certain number of openings where they are struggling to find qualified candidates.

Veterans face a two-fold change when they are seeking to enter the private sector. First, they are potentially competing with a significant number of job seekers who may be interested in the same jobs. Even for entry-



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level positions, veterans potentially face a disadvantage because of the lack of relevant experience. Banks looking for entry-level customer service representatives or manufacturing companies looking for entry-level assemblers will typically look first at candidates who have previous experience. Veterans leaving military service will not have had the opportunity to gain the kind of specific relevant experience that may make them the preferred candidates. Second, and more important for these purposes, veterans do not necessarily have the defined skill sets that employers tend to be seeking. While veterans acquire important skills during their military service, they do not necessarily get the specialized training or experience that will allow them to move into welding positions or product design positions or financial analyst positions or other types of positions that require some type of specialized training and experience. If we simply take the age group from 18 to 24, non-veterans in this age group are more likely to have had an opportunity to acquire specialized training and/or experience.

If the underlying reasons for the higher unemployment rates for veterans are, in part, a lack of experience or training, a solution easily presents itself to this unemployment problem: the federal government must provide additional training and opportunities to persons serving in and leaving the armed forces. Regulatory requirements of the kind proposed by OFCCP cannot combat the fundamental issues that veterans seeking employment face. Instead, OFCCP and other regulatory agencies should join forces to find ways to link employers to veterans who do, in fact, have the specialized skills required for open positions, while at the same time providing resources to veterans and employers that can help to expand the skill set of persons leaving military service.

PROPOSED CHANGES TO 41 CFR 60-250

OFCCP has proposed to make changes to both 41 CFR 60-250 and 41 CFR 60-300. Both of these sets of regulations are meant to provide instruction to federal contractors and subcontractors regarding their affirmative action obligations toward veterans. The regulations at 41 CFR 60-250 apply to companies that have unmodified contracts that were entered into prior to December 1, 2003. The regulations at 41 CFR 60-300 apply to companies that have contracts entered into after this date.

OFCCP has suggested that one approach it may take in regard to revising 41 CFR 60-250 would be to rescind these regulations in their entirety. We strongly encourage OFCCP to take this approach. In speaking to our clients, we are aware of no situations where there are any unmodified contracts that were entered into prior to December 1, 2003. The existence of two sets of slightly different regulations is a source of confusion for federal contractors and subcontractors. We applaud the agency for recognizing that it is time to remove the regulations at 41 CFR 60-250.

CLARIFYING LANGUAGE

OFCCP has proposed a significant number of changes to the nomenclature used in its veterans regulations. We believe this is an important and positive step. For example, the change from the use of "VEVRAA" to the use of "Section 4212" in various parts of the proposed regulations helps to clarify the fact that the regulations are no longer focused on issues concerning veterans of the Vietnam era. The use of the term "active duty wartime or campaign badge veterans" in place of "other protected veterans" is helpful in understanding the nature of the veterans covered by this category. The use of the term "protected



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veterans" as an extended definition of the types of veterans covered under OFCCP's affirmative action regulations for veterans is helpful in providing a means to describe all of the types of covered veterans.

LISTING POSITIONS WITH THE APPROPRIATE EMPLOYMENT SERVICE DELIVERY SYSTEM

The equal opportunity clause currently found at 41 CFR 60-300.5 requires federal contractors and subcontractors to list employment openings with "the appropriate employment service delivery system where the opening occurs." While our clients have at times struggled to determine what constitutes the appropriate employment service delivery system (i.e. state employment service or SES), they have made considerable efforts to ensure that a contact is made to the relevant SES. However, under the proposed rule, companies would be required to provide information to the SES "in the manner and format required" by the SES. This is problematic in two ways. First, not all employment service delivery systems have clearly defined the manner in which companies are to provide information. Second, the manner in which the SES offices request data may vary significantly from state to state. We would encourage OFCCP to work with the various SES offices to clearly define a common set of standards for providing information on job openings before implementing a regulation that has the potential to be very burdensome for companies, especially companies that list openings with more than one location.

The proposed rule requires that a federal contractor or subcontractor provide SES offices with information on (1) the company's status as a federal contractor, (2) the contact information for the contractor hiring official at each location in the state, and (3) the company's request for priority referrals of protected veterans at all locations within the state. The first part of this requirement seems reasonable. However, the second two prongs of this requirement are totally unhelpful. An annual listing of contact information for "the contractor official responsible for hiring at each site" would be both burdensome and valueless. It is not clear what the phrase "contractor official responsible for hiring" means. In most companies, there are multiple people involved in the selection process when hires occur. If OFCCP is looking for a human resources (HR) contact or a senior management contact, the regulations should so specify. Just as important is the fact that an annual listing of hiring officials and a request for priority referrals of veterans are useless to the SES offices. The request to provide priority referral of veterans is a natural consequence of a company's role as a federal contractor or subcontractor. An annual listing of hiring officials is superfluous if each job listing properly contains the name of a contact person for that listing. If OFCCP desires to have companies note that they are contractors or subcontractors on each employment listing, and desires to have a defined contact person for each opening, the agency should have regulatory language to that effect.

DATA COLLECTION REGARDING REFERRALS FROM STATE EMPLOYMENT SERVICE OFFICES

The proposed rule includes a new data collection clause that requires contractors and subcontractors to maintain records on the following:

- Priority referrals of veterans received from each SES office;
- The total number of referrals received from each SES office;
- The ratio of priority referrals to total referrals



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OFCCP makes a number of assumptions in this regard, none of which are true. First, OFCCP assumes that SES offices routinely send referrals to companies in some manner that can be easily tracked. What we find is that our clients may receive referrals from SES offices, but that individuals referred by the SES offices typically apply in the same manner as other candidates. When candidates are asked to indicate the source from which they were referred, our clients find that individuals referred by the SES offices frequently do not identify themselves as SES referrals. Thus, the number of SES referrals as shown in the typical corporate applicant tracking system may be significantly lower than the actual number of SES referrals. Second, OFCCP assumes that persons referred by an SES office will routinely indicate that they fall into a category covered by the term "protected veteran." There is no evidence that veterans will do so, again skewing any type of statistical analysis to be completed in regard to the referral of protected veterans. Finally, OFCCP appears to assume that SES offices will be able to provide extensive data to companies concerning the specific openings that company has listed with the SES, the total number of referrals made by the SES, and the number of protected veterans referred by the SES. There is no evidence to suggest the SES offices will be able to provide this information. Our clients suggest that SES offices currently have problems providing even basic data on positions listed with the local SES offices. It is unlikely the SES offices will suddenly have the manpower or expertise required to provide extensive additional data. In summary, the data collection requirements concerning referrals from the SES offices are unlikely to produce any useful data.¹ We suggest that OFCCP remove this requirement and instead simply require that companies demonstrate that they have properly notified the relevant SES offices of open positions.

NOTICE OF VETERAN RIGHTS

Under the current affirmative action regulations for veterans, a company is required to post a notice informing employees and applicants of the company's obligations under these regulations. The proposed rule has language that significantly extends this posting requirement. First, the proposed rule requires that companies ensure that "applicants or employees who are disabled veterans are provided the notice in a form that is accessible and understandable to the disabled veteran." This requirement is entirely untenable. There are many different forms of disability and many different types of notices that OFCCP might suggest are required in order to satisfy this provision. Further, it would be difficult to provide a notice that is accessible to all disabled veteran applicants in light of the fact that companies would have little or no knowledge of which applicants are disabled veterans and what type of notice would be required. OFCCP should either withdraw this requirement or limit the scope of this requirement so that employers are not required to produce multiple types of notices.

Second, the proposed rule requires that for employees who work at remote locations, the contractor or subcontractor may post the notice regarding the company's affirmative obligations electronically. However, the company must either provide a computer that can access the electronic posting or show that the company has "actual knowledge that such employees otherwise are able to access the electronically posted notices." This requirement places an extensive burden on employers. It is not clear how a company is to demonstrate that it has "actual knowledge" that the employee is able to access the electronic notice for

¹ The paragraph containing these data collection requirements, paragraph 5, also contains a requirement to maintain these records for five (5) years. We will address the five year record-keeping requirement below.



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employees who do not have company-purchased computers. OFCCP should clarify what it means by "actual knowledge" in this regard. One viable approach would be for OFCCP to let employers obtain a written sign-off from employees stating that they are aware of and have read the notice.

APPLICANT SURVEY REGARDING STATUS AS A PROTECTED VETERAN

The proposed rule requires that federal contractors and subcontractors survey applicants at the pre-offer stage of the job selection process about their status as "protected veterans." As per OFCCP's proposed definitions, a "protected veteran" for these purposes is an individual who falls within one of the four classes of veterans who are protected under the federal government's affirmative action laws for veterans. These four classes are disabled veterans, recently separated veterans, Armed Forces Service Medal veterans, and active duty wartime or campaign badge veterans. Since OFCCP appears to be set on requiring a pre-offer survey of applicants for veteran status, a survey form that only asks for information about status as a "protected veteran" seems to be the most appropriate way to solicit information on veteran status.

There are two issues connected to the requirement in the proposed rule to survey applicants for veteran status. First, there is no definition of "applicant" found in the current or proposed veterans regulations. OFCCP's current regulations concerning minorities and females have a specific definition of applicants that has been helpful to contractors and subcontractors in determining actions to take regarding applicants.² It is not clear whether the language concerning applicants found in the regulations regarding minorities and females would implicitly be ported over to the new veterans regulations, or whether OFCCP intends to use some other definition of applicant under the veterans regulations. We would strongly encourage OFCCP to explicitly state that the definition of applicant used in the regulations for minorities and females will also be used in the regulations regarding veterans.

Second, as noted above, OFCCP expects companies to record information on referrals received from the SES offices. We expect that OFCCP intends that the information provided by the SES offices should show whether veterans referred by the SES offices are "protected veterans" or not "protected veterans." However, OFCCP should explicitly state this in its regulations to ensure that information provided by the SES offices, and that the information provided by candidates referred by the SES offices, does not include disabled veteran status.

DOCUMENTATION REGARDING CONSIDERATION OF VETERANS

The current regulations regarding veterans require contractors to review personnel processes to ensure that there is "careful, thorough, and systematic consideration of the job qualifications of applicants and employees" who fall into one of the categories of protected veterans covered under the federal affirmative action regulations. (See 41 CFR 60-300.44(b).) Currently, companies are required to ensure that their personnel processes "do not stereotype" veterans, and companies are required to consider only the portion

² The formal definition of "applicant" in the regulations for minorities and females technically applies only to those persons who are "Internet applicants." However, the language of the regulations and the explanatory materials regarding this definition of "Internet applicant" bring a huge majority (if not all) of the applicants for most corporations within the confines of the language found in these regulations.



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of a veteran's military record that may be relevant to the requirements of any particular personnel-related matter. While OFCCP makes suggestions in its current regulations as to specific actions to take, much of the review of personnel processes is left to the contractor or subcontractor.

The proposed rule, rather than leaving the manner in which companies evaluate personnel practices up to the company, creates an incredibly burdensome structure in which companies are required to create documentation for any selection decision regarding a protected veteran. With regard to hiring, when protected veterans appear in applicant pools, the proposed rule states that companies must be able to identify the vacancies for which these protected veterans were considered as well as the reasons these individuals were rejected. We have clients that would find it difficult to identify the specific vacancies for which individual protected veterans were considered because their applicant tracking systems simply do not have the capability of providing reports on one particular subset of applicants such as protected veterans.

The background materials for the proposed rule suggest that employers will be required to provide a "statement of reasons explaining the circumstances for rejecting protected veterans." While most companies provide a disposition reason regarding the reasons that certain candidates are not hired, companies do not routinely create extensive narratives regarding the reasons that specific candidates are rejected. Creating such narratives would be time-consuming and would be unlikely to help ensure that more protected veterans are hired. We suggest that OFCCP modify the language in its proposal to allow companies to use the standard disposition reasons in their applicant tracking systems to explain the reasons certain applicants are not hired, and that OFCCP allow companies to provide information by requisition or applicant pool rather than by reporting on protected veterans alone.

More burdensome still is the requirement to provide the same "statement of reasons explaining the circumstances for rejecting protected veterans" for situations where an employee who is a veteran is considered for a promotion or a training opportunity. Unlike applicant tracking, employers do not routinely track the reasons that employees are rejected for promotion or training opportunities. OFCCP appears to be operating under the assumption that there are well-defined pools of persons who are considered for promotion or training opportunities within most companies, and that there is some type of "applicant tracking system" used to record data for these purposes. This is not accurate. Many promotion or training opportunities are offered to specific employees who have demonstrated certain skills or achievements. No one else is considered for these situations. Conversely, there are promotions and training opportunities that are effectively open to all employees. In order to meet the requirements of the proposed rule, many of our clients would need to create entirely new systems to identify employees who are being considered for promotion and training opportunities.

Along with creating new systems to track promotions and training opportunities, companies would be required to specifically single out protected veterans to determine when they were considered for promotion and training opportunities. It is not unusual that a manager evaluating candidates for promotion or training opportunities would be unaware that a certain employee is a veteran. At some point in the consideration process, human resources practitioners would be required to inform managers about the protected veteran status of employees in order to track this information. This would potentially stigmatize protected veteran employees by treating them differently than other employees.



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OFCCP's requirement to document consideration of protected veteran employees for promotion or training opportunities is not only burdensome and potentially stigmatizing, it is unnecessary. While OFCCP has suggested that the unemployment rates for veterans are higher than those of peer groups, we have seen no evidence to suggest that veterans are less likely to be promoted or offered training opportunities than other employees. In fact, discussions with our clients suggest that on the occasions when managers are aware of an employee's status as a veteran, the employee may be more likely to be considered for promotion or training than other employees. Thus, in this regard, OFCCP is providing a solution in search of a problem.

LINKAGE AGREEMENTS

The proposed rule requires that federal contractors and subcontractors establish various linkage agreements with recruitment sources that may be able to provide candidates who are protected veterans. Our first concern in this regard involves the term "linkage agreement." The definition of the linkage agreement in the proposed rule is as follows:

Linkage Agreement means an agreement describing the connection between contractors and appropriate recruitment and/or training sources.

It is not clear from this definition what the linkage agreement should contain, how the agreement would be enforced, or what measurements would be used to determine the viability of the agreement. A "linkage agreement" could mean anything from a formal, well-defined contract to a verbal commitment to work together on a particular project. If OFCCP intends to allow contractors the flexibility to establish various types of agreements with recruitment sources, then the current language makes sense. If OFCCP has other expectations regarding the contents of linkage agreements, it should make its expectations clear.

Under the proposed rule, companies would be required to have at least three linkage agreements. One agreement would be with the local veterans' employment representative in the SES office nearest the contractor's establishment. This linkage agreement seems pointless since contractors and subcontractors are already required to list positions with the relevant SES office. It does, however, become problematic for multi-site employers. It appears from the proposed rule that companies with multiple sites would be required to have multiple linkage agreements. This would be burdensome for companies to manage. We would suggest eliminating the linkage agreements with the SES offices.

Companies would be required to have a second linkage agreement with one of five sources that are listed in section 41 CFR 60-300.44(f)1(I). While we have no particular knowledge of or objection to the five listed sources, it is not clear why these five sources were specifically included in the regulations. We have clients in remote areas of the United States and clients with highly specialized employee populations that may find it difficult to get viable candidates from any of these five recruitment sources.

Companies would be required to have a third linkage agreement with one of the organizations that are part of the National Resource Directory. Again, we have no particular objection to the organizations that are part of the National Resource Directory. There are organizations in this directory that some of our clients have used with great success.



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The primary issue we have with the requirement to establish linkage agreements is the idea that employers are limited to particular recruitment sources in order to find qualified protected veterans. If OFCCP's primary interest is to have companies establish relationships with recruitment sources that may be able to refer qualified protected veterans, it should simply allow companies to demonstrate that they have relationships with three organizations that have been successful in referring veterans. Since OFCCP expects to measure the results of outreach efforts made by contractors and subcontractors, there is little value in circumscribing the manner in which outreach is conducted.

ASSESSMENT OF EXTERNAL OUTREACH AND RECRUITMENT EFFORTS

The proposed rule requires that contractors annually assess the effectiveness of efforts made to recruit protected veterans. Much of the assessment is associated with data collection analyses that we will discuss below. However, this section of the proposed rule contains the following problematic language:

The contractor's conclusion as to the effectiveness of its outreach efforts shall be reasonable as determined **by OFCCP** [emphasis added] in light of these regulations.

The background materials for the proposed rule suggest that the "primary indicator of effectiveness is whether qualified veterans have been hired."

While OFCCP should have a role in determining whether a company's outreach efforts have been successful, there **MUST** be standards that OFCCP publically announces in this regard. Under the proposed rule, there is no clear definition of what would constitute reasonable outreach efforts by a federal contractor or subcontractor. Any two OFCCP compliance officers could have fundamentally different interpretations of what constitutes reasonable outreach, just as any two OFCCP district offices or any two OFCCP regional offices could have different standards for what constitutes reasonable outreach. If the only standard for determining whether outreach efforts have been reasonable involves the number of veterans hired, the proposed rule would effectively become a quota system for hiring protected veterans. Traditionally, OFCCP has been as concerned with the good faith efforts made to find minorities, females, veterans, and persons with disabilities as it was concerned with results. Contractors will need to know if OFCCP is moving to a different model where the primary focus is an evaluation of numerical results. Otherwise, OFCCP needs to provide standards that companies and compliance officers can use to evaluate outreach efforts.

TRAINING REGARDING VETERANS

The current regulations at 41 CFR 60-300.44 include a number of suggestions regarding efforts that companies should consider to make employees aware of its affirmative action efforts regarding veterans. The proposed rule, by contrast, turns many of these suggestions into requirements. While some of these requirements may be reasonable and would parallel efforts that many contractors are currently making, there is one requirement that is totally unreasonable. This is the requirement to "schedule meetings on an annual basis with all employees to discuss its affirmative action policies..." OFCCP makes a variety of assumptions in this regard, all of which are totally false.

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- OFCCP assumes that companies have annual meetings in which various topics are discussed with employees. We have no clients that conduct such meetings.
- OFCCP assumes that in the alternative, companies could easily schedule on-line sessions with all employees. While there are rare occasions in which companies may provide on-line training or may provide critical information to all employees via on-line sessions, we have no clients that conduct routine (or even occasional) on-line sessions for all employees on topics of limited scope.
- OFCCP assumes that companies need to inform employees of the value of having veterans in the workplace. In all the discussions we have had with clients, our clients have nothing but the highest regard for our veterans and the service our veterans have provided to the country. Employees already understand the value that veterans bring to the workforce.
- Most critically, OFCCP assumes that annual meetings with all employees to discuss the company's affirmative action obligations regarding veterans would be valuable in providing greater opportunities for veterans. We fear that the opposite may be true. Meetings with all employees to specifically discuss the needs and interests of veterans may stigmatize veterans by suggesting either that veterans need additional help to be effective in the workplace or by suggesting that veterans are receiving special treatment that is not afforded to other employees with similar skills and abilities.

There may be a need to have a certain level of training for hiring managers in regard to the importance of outreach and positive recruitment efforts to find and hire veterans. There may even be value in having a certain level of training for managers concerning the need to promote, train, and retain veterans. However, there is no value whatsoever in requiring that all employees attend annual meetings regarding veterans.³

Along with the training for all employees, the proposed rule includes a provision regarding the nature of the training that is to be provided for "all personnel involved in...recruitment, screening, selection, promotion, disciplinary" and other personnel activities. Under the proposed rule, the training for these employees (who would primarily be management or human resources employees) shall include "the benefits of employing protected veterans, appropriate sensitivity toward protected veteran applicants and employees, and the legal responsibilities of the contractor and its agents regarding protected veterans generally and disabled veterans specifically..." Again, we find no value in training about the benefits of employing protected veterans. There is no evidence to suggest that companies question the value of employing veterans.

If OFCCP's primary interest in training managers and human resources staff (and other employees) is to alert employees to issues regarding disabled veterans, OFCCP should create language that supports this objective. While it is not clear what kind of "sensitivity" issues may exist regarding veteran status, there certainly may be issues regarding disabilities that veterans are facing. However, rather than re-drafting its veterans regulations to deal with issues regarding disabled veterans, OFCCP may want to deal with these issues when a proposed rule regarding persons with disabilities is released.⁴

³ Below, we discuss another critical reason that suggests training for all employees regarding veterans makes no sense, which is the cost associated with delivering training to all employees.

⁴ OFCCP has already released an Advanced Notice of Proposed Rulemaking on its regulations regarding persons with disabilities, and has indicated that a Notice of Proposed Rulemaking is expected some time in 2011.

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DATA COLLECTION ANALYSIS

The proposed rule includes a section on the analysis of data to be collected regarding veterans that has no parallel in the current veterans regulations. This provision regarding analysis of data and the provision regarding benchmarks for hiring are clearly meant to provide OFCCP with quantifiable measures for evaluating the affirmative action efforts of federal contractors and subcontractors. While we understand OFCCP's desire to use some objective measure to evaluate the efforts of contractors and subcontractors, some of the data to be collected does not appear to be viable for these purposes.

The data to be collected under the proposed rule and some of the issues associated with the data collection are discussed below. Under the proposed rule, companies are to report on:

- The number of priority referrals of protected veterans received from the applicable SES. As noted above, it is not clear how companies will effectively capture this data. Our clients have found that persons referred by the SES frequently do not indicate that they learned about openings from the SES when self-identifying referral source. It is not clear whether or how the SES offices will be able to provide this data to companies.
- The total number of referrals received from the applicable SES. The points above apply here as well.
- The ratio of priority referrals to total referrals. It is not clear what value this ratio has, since both numerator and denominator in this ratio may be significantly skewed. Even if the numbers reported were accurate, it is not clear what this ratio would tell a company about its outreach efforts.
- The total number of applicants who are protected veterans. While it may make sense to collect data on applicants who are protected veterans, OFCCP must define what constitutes an applicant for these purposes. (This point holds for any of the measures below that evaluate data on "applicants.")
- The total number of job openings and the total number of jobs filled.
- The ratio of jobs filled to job openings. It is not clear what significance this number has. There are many reasons that job openings are not filled. We are not aware of any circumstance in which the presence of protected veteran applicants would have an influence on this ratio.
- The total number of applicants for all jobs.
- The ratio of protected veteran applicants to all applicants.
- The number of protected veteran applicants hired.
- The total number of applicants hired.
- The ratio of protected veterans hired to all hires.

The number of items that OFCCP is asking companies to report on will place a significant burden on all federal contractors and subcontractors. OFCCP would be best served by limiting the number of items for data collection in order to reduce the burden on companies, parallel the data being collected on minorities and females, and provide for a meaningful set of measures that can be effectively reviewed.

CONTRACTOR ESTABLISHED BENCHMARKS FOR HIRING

As noted above, OFCCP is clearly trying to establish quantifiable measures for evaluating a company's affirmative action efforts in this section of the proposed rule. While the data collection noted above has its problematic elements, the section of the proposed rule on benchmarks to be used to evaluate hiring is



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entirely untenable. Not only does OFCCP make a series of false assumptions, but it introduces a five (5) year record retention requirement that is not only unrelated to any record retention requirement in its other regulations but unrelated to any record retention requirement we are aware of regarding hiring.

Federal contractors and subcontractors have been establishing placement goals to add minorities and females to their organizations for decades. While the methodology for establishing these placement goals has its flaws, this methodology is both well-known and well-defined. Companies have used data from the decennial census and internal workforce data to determine placement goals for their various groupings of similar jobs.⁵ Even when contractors and OFCCP have disagreed on specific elements of the process used to set placement goals, all parties can rely on the fact that a defined process exists and that there is data available for these purposes.

OFCCP is now seeking to port this concept of placement goals to hiring activity for veterans. While OFCCP speaks in terms of "hiring benchmarks" rather than "placement goals", OFCCP is clearly trying to find a way to establish some kind of viable figure to measure against. Unfortunately, there are a number of flaws in OFCCP's proposal rule.

The first major flaw in OFCCP's proposal on benchmarks involves the idea that there can be a meaningful benchmark that applies to the entire workforce in an affirmative action plan. The placement goals established for minorities and females compare internal and external populations in specific jobs to groupings of like jobs that exist in a contractor's workforce. Placement goals for one company will look very different than placement goals for the next company because of the type of company, the nature of the workforce, the specific type of openings that each company may have, and other factors related to each company's individual employee population. Similarly, placement goals for different types of positions within a company will look very different because of the skills required, the types of employees in the internal and external population with those specific skills, and so on. For example, the placement goals for an accounting firm will look very different than the placement goals for a manufacturing company, and the placement goals for entry-level production positions at the manufacturing company will look very different than the placement goals for management positions at the same company. Any meaningful benchmark for placement of veterans should take into account the nature of the positions available at the company.

The second major flaw in OFCCP's proposal on benchmarks involves the assumption that OFCCP will be able to make available the kind of data that would be useful in establishing company-wide benchmarks. OFCCP indicates that companies should use "the average percentage of veterans in the civilian labor force in the States(s) [ibid] where the contractor is located" and "the number of veterans, over the previous four quarters, who were participants in the employment service delivery system in the States(s) [ibid] where the contractor is located" as factors in developing benchmarks. OFCCP suggests that it will publish this information on its web site. While OFCCP may be able to gather data on veterans in the civilian labor force, the agency is likely to find it very difficult to effectively gather information on the number of veterans who used the SES over any given period. Further, under this proposal, OFCCP will be responsible for not only

⁵ While results from the 2010 decennial census are starting to become available, it is not clear when data to be used for affirmative action purposes will be available, or what form this data will take.



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gathering this data for all states but also for updating at least some of this data on a quarterly basis. It is not clear what will happen when OFCCP is unable to fulfill its obligations in this regard.

The third major flaw in OFCCP's proposal on benchmarks involves the assumption that it is appropriate to use state-wide data in making calculations for benchmarking purposes. Federal contractors and subcontractors frequently do not recruit on a state-wide basis. Companies may recruit from a very local market for some positions; they may recruit on a national basis for other positions. State-wide data will have limited relevance to the recruiting that occurs in most companies.

OFCCP appears to realize some of the limitations to its statistical model for establishing benchmarks when it suggests that companies can use "any other factors...which would tend to affect the availability of qualified protected veterans." Unfortunately, OFCCP again makes an assumption that is unfounded. OFCCP appears to assume that it would be possible to find statistical data or other information on "qualified" protected veterans. We have seen no evidence that there is available statistical data to this effect. While there might be colloquial evidence in this regard, there is no common source of information concerning the number of qualified protected veterans who are available for any particular opening.

As part of its initiative to establish benchmarks, OFCCP's proposed rule requires companies to retain any information collected for benchmarking purposes, including the data collected on applicants, hires, and so on, for a period of five years. While we understand that OFCCP may be trying to develop a database that would help it understand how many veterans are available for openings, the five-year record retention requirement makes no sense. A new record retention period would cause significant confusion among federal contractors and subcontractors, especially because it would be difficult to determine what would need to be kept and what could be discarded as per other record retention limits. Further, a five-year record retention requirement would result in considerable burden to companies.

In light of all of the above, we suggest that OFCCP eliminate the benchmarking requirements from the proposed rule. At some point when there is better data available, the agency may want to look anew at this possibility. In the meantime, OFCCP should use applicant and hire data as a means to determine whether companies are making sufficient outreach efforts. OFCCP would be well served by creating record retention requirements for these purposes that parallel the requirements found in its regulations for minorities and females.

IMPACT OF THE PROPOSED RULE ON CONTRACTORS

In its background materials on the proposed rule, OFCCP has provided estimates concerning the time it expects contractors will spend implementing the proposed rule, and the costs connected to implementing the proposed rule. On page 23383 of the Federal Register containing the proposed rule, OFCCP states that the "total estimated annual cost to small contractors nationwide is...approximately \$560 per small contractor." Earlier, on page 23382, OFCCP states that the annual average cost per contractor establishment for complying with the provisions of the proposed rule that fall under the Paperwork Reduction Act would be \$396. OFCCP asked for input on its cost burden analysis. Our input is simple: OFCCP's cost estimates are ludicrous.



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A few simple examples help to demonstrate that OFCCP does not understand the nature of the potential burdens associated with these regulations.

Training for All Employees

The proposed rule requires that companies conduct training for all employees. OFCCP suggests that it will take an average of 1.2 hours per contractor establishment to comply with this requirement. Unfortunately, the agency fails to take into account the following factors associated with establishment-wide training:

- There would be time required to develop training materials. Even if a company used a basic template provided by OFCCP, someone would need to re-tailor the template to comport with the specific circumstances at the facility. There are many companies that are not willing to use templates for these purposes, and that would instead develop materials on their own.
- There would be time required to present any form of training. As noted above, we are unaware of any companies that have company-wide meetings. Thus, there would likely be multiple training sessions required.
- Should a company decide to do training on-line, there would be technical resources required to present and monitor the training.
- There would be lost productivity time associated with attendance at any type of training on veterans issues. OFCCP's claim that there is value in helping companies understand the contributions veterans may bring to the workforce is offset by the fact that time away from work for this purpose will not increase the overall productivity of the workforce or otherwise move forward any revenue-producing corporate initiative.

Clearly, there would be multiple hours on the part of human resources and information technology staff to prepare for any type of training. The result would involve thousands of dollars in direct costs for this training even without counting the lost productivity time.

Applicant Survey

The proposed rule requires that companies survey all applicants for status as a protected veteran. While the applicant survey may be a logical part of OFCCP's efforts to understand whether federal contractors and subcontractors are reaching out to veterans, the applicant survey is not without cost.

- Companies will be required to redesign and reprint all survey forms used in paper applications.
- Companies will be required to modify on-line application systems with the new survey.
- Companies will be required to modify data collection systems to incorporate a new survey category, "protected veteran."

All of these actions have significant costs for any particular establishment. While most of our clients have moved away from paper application forms, there are a few that still use these forms for some purposes. Redesign and reprinting costs can be considerable. More important to most of our clients would be the changes that must be made to their on-line application systems. There would be either internal IT time or external consulting time required to modify these systems, and possibly both. Many of our clients are using



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on-line application systems that are not easily modified, as these systems are built for both federal contractors and non-contractors. While some companies providing on-line application systems would quickly make changes to accommodate new regulatory requirements, it is unlikely these changes will be free to clients. Our clients would then need to find internal or external IT resources to modify other systems used to collect and report on data. It is not clear whether companies would incur thousands of dollars in additional costs or tens of thousands of dollars or more. It IS clear they would spend far more than \$560 just to deal with the applicant survey component of the proposed rule.

Each of the other components of the proposed rule have the potential for significant additional cost to federal contractors and subcontractors. One of our clients has assumed that they would be required to hire at least one additional full-time person simply to deal with the number of requirements in the proposed rule. Since this client has approximately 15 facilities, the cost of adding a full-time person spread out through the number of facilities would be approximately \$3,000 per facility. This is without the added costs for printing, reprogramming, purchasing resources, and so on that would be associated with the proposed rule.

A short summary of the impact of the proposed rule on contractors is this: the proposed rule would have significant costs and add significant burdens for limited results. OFCCP would be well-served by returning to the drawing board and trying to develop a proposal where the agency would act as a conduit to referral organizations as both OFCCP and federal contractors and subcontractors attempt to do their best to recognize the excellent service that our nation has received from our veterans.