

## **AFFIRMATIVE ACTION COMPLIANCE (Part 3): *Is Your Organization Subject to the Vietnam Era Veterans' Readjustment Assistance Act?***

As noted in the first two parts of this series, an employer faces various affirmative action requirements when it is considering whether to enter the federal contracting arena. There are three main pieces of law/regulation with which federal contractors and subcontractors must comply: (1) Executive Order 11246 (minorities and females); (2) Section 503 of the Rehabilitation Act (Individuals with Disabilities ("IWD")); and (3) the Vietnam Era Veterans' Readjustment Assistance Act ("VEVRAA") (veterans), as amended by the Jobs for Veterans Act of 2002.

"Basic coverage" for each of these laws have different thresholds. For EO 11246, a contractor is covered if the dollar amount of *contracts in the aggregate* in any twelve-month period exceeds \$10,000. For Section 503, a contractor is covered if it enters into a *single* contract of \$15,000 or more. For VEVRAA, the threshold dollar amount is a *single* contract of \$150,000 or more.

*Does this mean my organization needs to have a written VEVRAA affirmative action plan?*

Maybe. As mentioned above, a contractor is covered by VEVRAA when it engages in a *single* contract worth at least \$150,000.00 for any twelve-month period with a Federal executive agency. Once a contractor meets this "basic" coverage threshold, "covered contractors" must comply with VEVRAA and take affirmative action in general with regard to protected veterans and ensure nondiscrimination in hiring and employment of veterans. In addition, aside from being subjected to a "full-blown" compliance review by the Office of Federal Contract Compliance Programs ("OFCCP"), which includes an audit of the contractor's employment practices under all three statutes, the OFCCP has begun what they term "focused reviews" which are on-site audits focusing only on one of the statutes (*see* part 2 of this series). OFCCP is expected to send out scheduling letters for VEVRAA focused reviews on Veteran's Day 2019.

Under each of the above laws, a written affirmative action plan (over and above the other requirements of basic coverage) is required when the contractor meets a dollar amount/employee count threshold. For EO 11246 and Section 503 this obligation applies to contractors that have fifty or more employees **and** have a single government contract for \$50,000.00 or more. Under VEVRAA, the threshold is fifty or more employees **and** a single government contract of \$150,000 or more. Thus, once a contractor meets the dollar amount threshold for basic coverage, it is a matter of the number of employees as to whether a written VEVRAA affirmative action plan is necessary. In addition, a contractor can potentially be required to have three written

AAPs if it meets all of the above thresholds, which is not at all unusual.<sup>1</sup>

*So, what are my obligations if I do not need to have a written AAP?*

Whether or not a contractor meets the threshold for creating a written VEVRAA AAP, contractors that meet the preliminary coverage threshold of VEVRAA must comply with the obligations set forth in the regulations as summarized below.

*1. Include the Equal Opportunity Clause in Subcontracts*

All covered contractors and subcontractors must include in each of their covered "federal subcontracts" the separate Equal Opportunity ("EO") clause concerning protected veterans. It is not necessary to quote the EO clause verbatim (it is very long). Instead, the clause can be included in a subcontract by reference.

*2. Maintain Proper Records*

Under VEVRAA, the record retention period is one year for contractors with fewer than 150 employees. Contractors with more than 150 employees must keep personnel records for two years from the date of creation or the date of the personnel transaction referenced in the document, whichever occurs later. However, contractors must keep *all* personnel records of involuntarily terminated employees for two years *from the date of the termination*. Personnel records include those relating to hiring, assignment, promotion, demotion, transfer, layoff and termination, requests for reasonable accommodation, and rates of pay or other terms of compensation.

*3. Notify the State Workforce Agency or State or Local Employment Services Delivery System (ESDS) of All Available Jobs*

A covered contractor must list employment openings with the state Workforce Agency or State or Local ESDS. Moreover, the contractor must list employment openings with the ESDS at least concurrently with the use of any other recruitment source or effort. The listings "must provide information about the job vacancy in any manner and format permitted by the appropriate employment service delivery system which will allow that system to provide priority referral of veterans protected by VEVRAA for that job vacancy."

However, contractors need not list:

- positions to be filled *exclusively* from internal sources;

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<sup>1</sup> Many contractors choose to combine the Section 503 and VEVRAA AAPs into one document; however, due to the revised Section 503 and VEVRAA regulations that became effective March 24, 2014, some contractors have decided to maintain separate plans for each of these regulations. Considering the potential now for "focused reviews," drafting separate plans may become more popular.

- positions from traditional union hall referral arrangements;
- "executive and top management" positions (positions that would meet the executive exemption under the Fair Labor Standards Act); or
- positions lasting three days or less.

In addition to the above, upon the *first* listing of a job vacancy with the ESDS, the contractor must provide certain additional information to the ESDS:

- The company is a federal Contractor subject to VEVRAA;
- The Contractor desires "priority referrals" of protected veterans;
- The name and location of each of the contractor's hiring location in the state; and
- The contact information for the hiring officer at each location, including the identity of any 3<sup>rd</sup> party search companies.

Unless any of the information above changes, the contractor does not need to provide this information with subsequent listings. However, if there is a change, the contractor must provide the updated information simultaneously with its next job listing.

This listing requirement is probably the number one area of contractor violation with regard to VEVRAA. Even seasoned contractors have difficulty fully complying with this obligation. Contractors, whose audits would have otherwise closed without issue, are often "dinged" by OFCCP for not meeting this requirement.

#### 4. *Display the EEO Poster*

The same poster required under the Executive Order will suffice to meet this obligation. The poster is available at <https://www.dol.gov/ofccp/regs/compliance/posters/pdf/eeopost.pdf>.

#### 5. *Notify the Union*

Contractors must notify the union that the contractor is bound by VEVRAA and is required to take affirmative action to employ and advance in employment protected veterans.

#### 6. *File a Veterans' 4212 Employment Report (VETS-4212)*

Covered contractors must annually file a Federal Contractor Veterans' Employment Report (VETS-4212) with the Office of Veterans' Employment and Training, Services U.S. Department of Labor. The format of this report is similar to the annual EO report. More information on this requirement can be found at: <https://www.dol.gov/agencies/vets/programs/vets4212>.

*What if I need to have a written VEVRAA AAP?*

If you are a government contractor that meets the threshold to develop and implement a written AAP, the written plan must include mandatory compliance language, often referred to as the "narrative." Other than the narrative, the VEVRAA written AAP must contain:

- Documentation of the evaluation of the contractor's personnel processes.
- An assessment of the contractor's outreach and recruitment of protected veterans.
- A data collection analysis that includes, for the prior AAP year, the number of applicants who self-identified as protected veterans pre-offer; total number of job openings; total number of jobs filled; total number of applicants for all jobs; total number of protected veterans hired; and total number of applicants hired.
- In addition, although not included as part of the AAP, the contractor must establish a hiring benchmark (although this benchmark is currently 5.9%, it is updated annually) for protected veterans and perform an analysis which compares the percentage of protected veterans hired, in the prior AAP year, to the total number of applicants hired.

In addition to the above, contractors that meet the threshold to have a written VEVRAA AAP must provide:

*1. Invitation to Self-Identify*

Under the regulations, contractors must invite applicants to self-identify in two stages. Pre-offer the invitation simply invites the applicant to identify whether he/she is a protected veteran. If an offer of employment is extended to the applicant, the contractor must then invite the applicant to self-identify whether he/she belongs to one or more specific categories of protected veterans.

A sample of these self-identification forms may be found at Appendix B to 41 C.F.R. Part 60-300. However, unlike the mandatory use of OFCCP's Section 503 self-identification form (see part 2), the sample VEVRAA forms are not mandatory. Nonetheless, the forms can be easily duplicated and contain all of the required information. An easy way to access the DOL sample self-identification forms can be found here: <https://www.dol.gov/ofccp/VEVRAA/index.html>. Contractors must keep a separate file on persons who have self-identified and provide that file to OFCCP upon request.

*2. Access to the VEVRAA AAP*

Covered contractors must make available its VEVRAA AAP for inspection to any employee upon request (there is no such requirement with respect to the contractor's Executive Order AAP). The contractor must post a notice identifying the location and hours during which employees and applicants may *access* the AAP for protected veterans (also, contractors may provide access to the AAP electronically). However, the contractor is not obligated to, and should not, provide a copy of the AAP to employees. Also, the contractor is not obligated to, and should not, provide either the data collection analysis or the hiring benchmark analysis (see above bullets) to employees.

*3. More Record Retention*

Contractors who are required to develop a written VEVRAA AAP must also keep the following records for *three* years:

- Documentation of its external outreach activities and assessment/evaluation of the effectiveness of those activities;
- Documentation necessary for the data collection analysis; and
- Documentation of the contractor's established hiring benchmark each year.

If you have any questions about the matters discussed in this issue of Compliance Matters, please call your firm contact at (818) 508-3700, or visit us online at [www.brgslaw.com](http://www.brgslaw.com).

Sincerely,  
David Harvey  
Ballard Rosenberg Golper & Savitt, LLP