

Morgan Lewis

together

**OFCCP Revisions to Affirmative Action
Requirements for Individuals with Disabilities
and Protected Veterans**

Robert J. Smith
William E. Doyle, Jr.
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Agenda

- Review each significant new AAP requirement
- Discuss practical steps to implement those requirements
- Address questions related to particular requirements

Effective Date

- 180 days from publication in the Federal Register
- Most burdensome new AAP requirements – OFCCP provides a “grace period” based on the renewal date of a contractor’s AAP in place as of the effective date
 - For employers with calendar-year AAPs, obligations do not become effective until Jan. 2015
 - Another example: For a contractor with an Oct.-Sept. AAP year, obligations would become effective starting Oct. 1, 2014

New Conventions and Definitions

- Individuals with Disabilities (IWDs)
 - New regulatory definitions to conform to the ADAAA of 2008
- Protected Veterans (PVs)
 - General term that includes all covered veteran categories:
 - *Armed Forces Service Medal veterans*
 - *Disabled veterans*
 - *Recently separated veterans*
 - *Other protected veterans are now “active duty or wartime campaign badge veterans”*

New AAP Requirements

1. Subcontractor flow-down clause
2. Solicit voluntary self-identification (pre- and postoffer/postemployment)
3. Applicant process revisions and data review
4. Utilization goals for IWDs by AAP job group
5. Hiring Benchmarks for PVs for contractor AAP workforce
6. Expanded “good-faith” outreach efforts
7. Review of personnel practices
8. Review of job-related qualifications
9. Training
10. Recordkeeping and annual assessments

Proposed Regulations Not Adopted in Final Regulations

- Requirement to keep records for five years
- Removed requirements that would have required contractors to keep separate files for IWDs and PVs covering every time they applied for promotion or training
- Requirement to consider IWD and PV employees for every job opening they qualified for even if they didn't apply
- Requirement to sign linkage agreements with state unemployment agencies to refer IWDs and PVs for jobs
- Requirement that contractors perform a state by state statistical analysis to identify and track the most effective referral sources

Subcontractor Flow-Down Clauses

- Mandatory new text for subcontractor flow-down clause:
 - “This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a) and 41 CFR 741.5(a). These regulations prohibit discrimination against qualified individuals on the basis of protected veteran status and disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.”
- Address through new contracts after effective date; no need to revise existing contracts
 - During audits, OFCCP will ask for several examples of subcontracts with the new clauses

Subcontractor Flow-Down Suggested Text

- Federal Contractor Requirements: “This order/contract is subject to the requirements of 41 CFR 60-1.4 and 29 CFR part 471, Appendix A to Subpart A, which are incorporated into this order/contract by reference, **as applicable**. In addition, this order/contract is subject to the requirements of 41 CFR 60-300.5(a) and 41 CFR 60-741.5(a), which are incorporated herein by reference, as applicable. The latter two regulations prohibit discrimination against qualified individuals on the basis of protected veteran status and disability and require affirmative action to employ and advance in employment protected veterans and qualified individuals with disabilities.”

Subcontractor Flow-Down

- “As applicable” appears to be permissible and effective. See *OFCCP v. O’Melveny & Myers*, ARB No. 12-014, slip op. at 7 (Aug. 30, 2013):
 - “[W]e agree with O’Melveny’s understanding of the Contract’s incorporation language: the fact that the laws or their implementing regulations are incorporated into the DOE contract by reference merely signifies that **should any of the cited laws or regulations be applicable, the parties agree to their adherence.**” (Emphasis added.)
- Allows for inclusion as a standard term in all contracts without suggesting that the clause is applicable or effective.

Voluntary Identification Solicitation Requirements

- Preoffer Applicant Stage: IWDs and PVs
 - “Internet Applicant” definition applies
 - Solicitation when applicant applies or is considered
 - Solicitation of general category of PVs
- Postoffer Stage: IWDs and PVs
 - Solicitation of specific veterans categories (suggested form in Appendix B of VEVRAA regulations)
- Employees: IWDs
 - First year of compliance requirement/contractor coverage
 - Five-year intervals thereafter
- Must use OFCCP’s form for IWDs (not yet published)

Do PreOffer Solicitation Requirements Violate the ADA?

- An EEOC informal discussion letter asserts that the preoffer solicitation requirement does not require employers to violate the ADA prohibition on preemployment inquiries:
 - “Because complying with a DOL rule requiring contractors to invite voluntary pre-offer identification would allow applicants to self-identify for purposes of benefiting from potential affirmative action in a hiring decision, the contractor’s invitation for this purpose would not violate the ADA.”
- Employers should opt for “consideration” trigger
- What about exposure to individual ADA claims from unsuccessful applicants?

Implementing Solicitation Requirements

- Work with ATS vendors to modify existing self-identification screens to include OFCCP text
 - May need to revise the OFCCP's text slightly, but be cautious
- Changes to internal systems to solicit from employees
- Consider procedures and forms for solicitation of employees who do not have access to electronic media

Applicant Data Analysis

60-300.44(k)(1)-(5); 60-741.44(k)(1)-(5)

- Unspecified annual analysis across entire workforce (not by AAP job group or job title) of:
 - (1) total number of voluntarily self-identified or “known” IWDs and PVs
 - (2) total number of (i) job openings and (ii) jobs filled
 - (3) total number of applicants for all jobs
 - (4) total number of IWDs and PVs hired
 - (5) total number of applicants hired

Applicant Data Analysis

60-300.44(k)(1)-(5); 60-741.44(k)(1)-(5)

- OFCCP asserts that it will not conduct adverse impact analyses or allege discrimination based solely on analysis of applicant and hire data
- Data need not be included in the AAP version that is available to employees for inspection upon request

Applicant Data Analysis

- Despite OFCCP's assertion, the data analysis could be used in private litigation or EEOC enforcement actions
- Consider conducting privileged risk assessments of the applicant data
 - Determine disparity trends that could be used to support discrimination claims
 - Manage claim/litigation risk

Uniform 7% Utilization Goals for IWDs

60-741.45

- For each E.O. 11246 AAP job group, compare the representation of IWDs in the job group against the 7% goal
- If the actual representation of IWDs falls below 7%, must engage in “good-faith efforts” to improve the representation of IWDs in the job group
 - Appears to require “any difference” rule as the regulations make no mention of a “significant difference”
 - Contractors with less than 100 employees may apply 7% utilization goal to the total workforce

Uniform 7% Utilization Goals for IWDs

- OFCCP states that compliance will be determined based on “good-faith” efforts and not on failure to meet utilization goals
- Importance of utilization goals depends on OFCCP audit of contractor practices and what practical standards COs use to determine if “good-faith” efforts were **sufficient**

Uniform 7% Utilization Goals for IWDs

- OFCCP encourages employers to consider voluntarily granting preferential treatment to qualified individuals with disabilities
 - Need to consider state or local EEO laws that would not be preempted
 - May be confusing to contractor personnel who could implement the disability preference but must avoid similar preferences based on race or gender

VEVRAA Hiring Benchmarks for PVs

60-300.45

- Across AAP, not by AAP job group
- Contractor benchmark choice:
 - Annual percentage of veterans in the workforce (8%); or
 - Tailored benchmark developed using published availability data from various sources (e.g., the Bureau of Labor Statistics and the Veterans' Employment and Training Service), the contractor's applicant and hire ratios, and other factors unique to the contractor's circumstances
- Hiring benchmark designed to measure the progress and effectiveness of the contractor's "good-faith" efforts; not an expectation of a goal that will be met

Hiring Benchmarks for PVs

- Cost-benefit analysis to consider options for 8% or tailored benchmark
 - Cost of developing benchmark with AAP vendor
 - *Assumes that the tailored benchmark will be lower than 8%*
 - Cost of additional good-faith efforts chasing an unreasonably high 8% goal
 - Expectations with regard to OFCCP audits where contractor does not meet the 8% goal

Expanded “Good-Faith” Efforts

60-300.44(f)(1) and (g); 60-741.44(f)(1) and (g)

Mandatory Efforts:

- Provide EO policy statement in a form understandable to applicants and employees with disabilities, e.g., Braille or large-print versions
- Include the affirmative action policy in employee handbooks or otherwise make it available to employees
- Provide written notification regarding the contractor’s affirmative action policy to all subcontractors
- Notify union officials of the affirmative action policy

Expanded “Good-Faith” Efforts

Additional Efforts That May Be Needed Depending on Circumstances

- Assistance from a variety of organizations, examples of which are listed in the regulations, for recruiting and developing on-the-job training
- Briefing sessions for recruiting sources
- Targeted recruitment at educational institutions
- Participation in internships and other development programs for IWDs and PVs
- Consideration of job applicants who are IWDs and PVs for other open positions for which they are qualified

Expanded “Good-Faith” Efforts

Additional Efforts That May Be Needed Depending on Circumstances

- Periodic meetings with executives, managers, and employees to discuss the contractor’s EO policies and commitment to affirmative action for IWDs and PVs
- Discuss contractor’s affirmative action policies in company newsletters and other internal publications
- Discuss the EO policy and affirmative action program during initial orientation and management training programs

Mandatory Evaluation of “Good-Faith” Efforts

60-300.44(f)(3); 60-741.44(f)(3)

- Contractors must annually evaluate the effectiveness of external, targeted recruiting and other “good-faith efforts”
 - Must include consideration of the number of IWDs and PVs that applied to positions over the past three years
- Document the evaluation methods used, the conclusions reached, and the steps taken to improve recruiting efforts
- Contractors must identify alternative efforts if their “outreach efforts” were not “effective”

Documentation of “Good-Faith” Efforts

- Even before the new regulations, OFCCP’s recent audit approaches made clear that contractors should develop procedures to make and retain records documenting their “good-faith” efforts
- OFCCP will not accept AAP narrative representations but will require proof of “good-faith” efforts

Electronic Recruitment and Technology Leverage

- Distribute electronic job postings broadly to diversity sites including sites targeted at IWDs and PVs, typically through subscription service with third-party vendors
 - Monitor and document periodically that the job listings are being posted by the diversity site by taking screen shots of the postings
- New regulations require contractors to post with the applicable state employment service in the manner required by the particular entity
 - Annually provide additional information including status as a federal contractor, contact information, and request for priority referrals of PVs

Review of Physical and Mental Qualifications Standards

60-300.44(c); 60-741.44(c)

- No change to regulatory requirement, but will be audited during compliance reviews
- Scheduled review of physical and mental qualification standards to ensure that the standards are job related and consistent with business necessity to the extent that they screen out IWDs and PVs

Review of Qualifications Standards

- Likely request for statistical evidence or documentation of review of standards' impact (not specific)
- Must document the review and the methods used and whether any modifications were made based on the review

Practical Implementation of Qualifications Standards Review

- Focus on physical qualifications such as lifting requirements
- Develop process for reviewing the physical qualifications against the job descriptions and job duties
- Document the review in terms of confirming that the job duties require the physical qualification standard
- Consult counsel if unsure before documenting any negative impressions

Review of Personnel Practices

60-300.44(b); 60-741.44(b)

- No change to regulatory requirement, but will be audited during compliance reviews
- Required review to ensure that IWD and PVs are:
 - Considered for employment and training opportunities for which they are qualified
 - Not subject to “stereotyping” that limits job opportunities
 - Provided equal access to personnel processes, including those involving information and communications technologies

Review of Personnel Practices

- Must document the periodic review and the methods used and whether any modifications were made based on the review
- Review descriptions must be included in the AAP and are subject to OFCCP scrutiny during audits
- Clear indication that the requirement will be enforced and that contractors must demonstrate proof of compliance during audits

Practical Implementation of Personnel Practices Review

- Develop review process and documentation formats and train HR on how to implement the process
- Identify IWDs and PVs in the workforce covered by the particular HR manager
- Review job postings and training opportunities the individuals applied for and ensure there is no trend of not obtaining opportunities
 - Consult counsel before documenting any impression of a negative trend
 - Encourage IWDs and PVs to apply for future opportunities through form emails sent to those individuals

Mandatory Training

60-300.44(j); 60-741.44(j)

- Mandatory training on AAP implementation for all personnel involved in recruitment, screening, selection, promotion, disciplinary, and related processes
- Contractors have flexibility to develop training programs as OFCCP did not adopt proposal that mandated particular training topics and requirements for contractors
- Clear that OFCCP will enforce this requirement and demand proof of compliance during audits

Mandatory Training

- For many employers, it may be efficient to include several slides outlining provisions of the company's EO policy in general EEO training that is already provided to managers and others involved with making selection and employment decisions
- Electronic and on-demand training would be sufficient
- Consider what records of training will be used to demonstrate compliance

Implementation Training

- Contractors should also consider training programs for their HR and recruiting teams as to:
 - The new requirements
 - New policies, procedures, and practices developed to comply with mandatory training requirements
 - Their roles in implementing the new compliance procedures

Expanded Recordkeeping

- Retain records necessary to demonstrate compliance with these new requirements for three years:
 - “Good-faith” outreach efforts and review of their effectiveness
 - Review of job qualifications and their impact
 - Review of personnel practices
 - Applicant and hiring data/analysis
 - Utilization goal and hiring benchmark outcomes
- Other records subject to two-year retention requirement:
 - Materials used in mandatory training

Additional Requirements

- Provide EO “notice” form mandated by OFCCP in electronic format for remote workers and as part of on-line applicant systems
 - For on-line applicant system, most practical to have a link to the notice
- Job postings and advertisements must state that contractor is in equal opportunity employer of IWDs and PVs
- Must provide reasonable accommodation notices for on-line applicant systems
 - Formalizes OFCCP Directive that agency has enforced for several years

Presenters



Robert J. Smith

Washington, DC

202.739.5065

rsmith@morganlewis.com

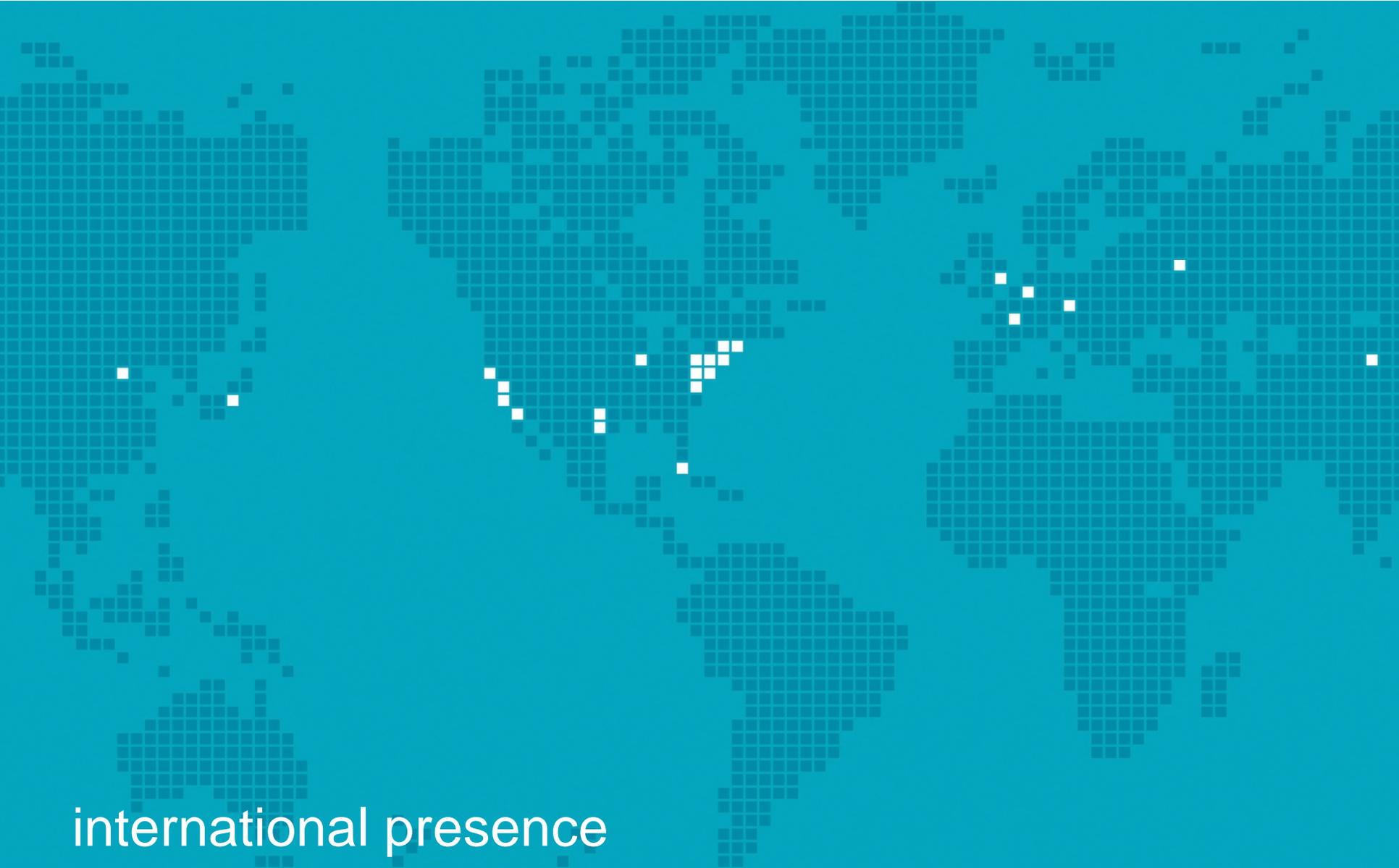


William E. Doyle, Jr.

Washington, DC

202.739.5208

wdoyle@morganlewis.com



international presence

Almaty Beijing Boston Brussels Chicago Dallas Frankfurt Harrisburg Houston Irvine
London Los Angeles Miami Moscow New York Palo Alto Paris Philadelphia Pittsburgh
Princeton San Francisco Tokyo Washington Wilmington