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## **OFCCP Game-Changing Final Rules: Complying Amid Vigorous Enforcement**

Establishing Hiring Benchmarks, Meeting New Data  
Collection Requirements and Accommodation Rules

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WEDNESDAY, APRIL 9, 2014

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# **OFCCP GAME-CHANGING FINAL RULES: COMPLYING AMID VIGOROUS ENFORCEMENT**

# Presenters

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# Overview

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- I. Introduction to 503/VEVRAA Regulations
- II. Posting/Notice Obligations
- III. Self-Identification Issues
- IV. Benchmark & Utilization Goals
- V. Data Collection & Analysis
- VI. Outreach & Recruitment Obligations
- VII. AAP Requirements & Preparation
- VIII. Reasonable Accommodation Obligations & Strategies
- IX. Impact of FCCM & Audit Trends

# **I. Introduction: Final Rules Amending Section 503 & VEVRAA Regulations**

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# Introduction: Final Rules Amending Section 503 & VEVRAA Regulations

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- 3 Affirmative Action Laws
  - Executive Order 11246 (minorities, females)
  - **Section 503** Regulations (individuals with disabilities)
  - **VEVRAA/JVA** (protected veterans) with self-audit process, particularly if problem areas were identified
- Jurisdiction
  - Section 503 - \$10K/\$50K + 50 employees
  - VEVRAA - \$100K/\$100K + 50 employees
- Impact of New Regulations
  - New Nondiscrimination Obligations
  - New Affirmative Action Obligations
  - New Recordkeeping Obligations



# Introduction: Final Rules Amending Section 503 & VEVRAA Regulations

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- **March 24, 2014 = Effective Date**
  - All subparts to be enforced as March 24, 2014 except:
    - Subpart C - phased in compliance date for affirmative action requirements as of the next AAP cycle after March 24, 2014
      - Self-Identification Process (pre/post/other)
      - Applicant/hire/job opening data
      - Outreach efforts
      - Assessment of external recruitment/outreach
      - Utilization Goal (Section 503)
      - Hiring Benchmark (VEVRAA)

## II. Posting/Notice Obligations

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# Flow Down Language

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- For VEVRAA/503 flow down must now be in bold
  - Can combine EO/VEVRAA/503 into one clause, or keep EO separate and combine VEVRAA/503
  - Must continue EO 13496 flow down
- Strategic and Implementation Issues
  - Consider combining VEVRAA and Section 503 mandatory flow down language
  - Consider how to deal with EO 13496 flow down
  - Continue use of “if applicable” predicate
- One alternative:
  - **[Company name] is a federal contractor. As a result, but only if applicable, the Equal Opportunity Clause set forth in 41 C.F.R. parts 60-1.4(a), and the employee notice found at 29 C.F.R. Part 471, Appendix A to Subpart A are incorporated by reference herein. In addition, but also only if applicable, [Supplier/vendor/subcontractor] shall abide by the requirements of 41 CFR §§ 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals on the basis of protected veteran status or disability, and require affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans and individuals with disabilities.**

# Annual EEO/AA Policy Statement and “Tag Line”

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- Annual EEO/AA Policy Statement
  - Must be endorsed by CEO/President
  - Notice of policy must be sent to suppliers/vendors
  - Must be made available electronically to virtual employees
- EEO is the Law Poster must be linked to on line application
- Tag Line
  - Add “disability” and “protected veteran status” to “all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin”
    - Agency will accept F/M/Disability/Vets
- Strategic and Implementation Issues
  - Work with IT to ensure compliance with policy statement and EEO poster requirements
  - Tag line is required for job postings, job advertisements and all other employment solicitations

# Employment Service Delivery System (“ESDS”)

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- Furnish job postings consistent with format permitted by ESDS (applies to vendors)
- Identify for ESDS the “contractor official” at each hiring location
  - Update as necessary
- Strategic and Implementation Issues
  - Work with DE/AJE/others on ESDS compliance
  - Consider state, regional or district “contractor officials”

# Notices to Employees

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- Physical Notices
  - Alternative form of notice for disabled - **if requested**
    - Braille/Large Type
    - Lower placement for those in wheel chairs
- Electronic Notices
  - Electronic posting permissible for remote employees
  - Maintain record of email or employee's verification on intranet
  - Periodically confirm distribution works
- Strategic and Implementation Issues
  - Review physical postings for notice to IWD (lower placement)
  - Determine how to disseminate and record receipt of electronic notices for employees
  - Schedule periodic review to confirm distribution

# III. Self-Identification Issues

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# Self-Identification Issues

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- **Applicants** - option to disclose **disability** and **general veteran status**
  - Mandatory use of OMB Disability Self-ID Form
    - The OMB number and expiration date
    - The text of the form without alteration
    - A sans-serif font, such as Calibri or Arial,
    - At least 11-pitch for font size (at least 10-pitch for footnote and burden statement)
  - Voluntary use of Veteran Self-ID Form
- **Employees**
  - Post-Offer: option to disclose **disability** and **specific veteran status**
  - First year of coverage under regulations: **disability**
  - Every five years: **disability**
  - Periodically: **disability**



## **IV. Benchmark & Utilization Goals**

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# Benchmark & Utilization Goals

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- **Implementation Deadline for Both is Next AAP Cycle After March 24, 2014**
- **VEVRAA's Hiring Benchmark** - Annually set per AAP establishment by either -
  - Using 8% (national percentage of veterans in workforce); OR
  - Establishing a benchmark which is combination of:
    - The average % of veterans in the state(s) labor force for preceding three years;
    - The number of veterans (over past 4 quarters) who participated in ESDS where contractor is located;
    - The applicant and hiring ratios for the previous year;
    - Most recent assessment of effectiveness of external; outreach/recruitment efforts; and
    - Any other factors, including but not limited to, the nature of the contractor's job openings and/or location.

# Benchmark & Utilization Goals

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- **Section 503's Utilization Goal** of 7% of employment of qualified individuals with disabilities
  - Goal applies to each job group per AAP in the contractor's workforce
  - But, if less than 100 or fewer employees, it may apply company-wide.
- Requirement to evaluate utilization annually
  - If goal not met, then assess and identify impediments
  - Then, develop and execute action-oriented programs to correct
  - Goal applies to each job group per AAP in the contractor's workforce
  - But, if less than 100 or fewer employees, it may apply company-wide.
- 7% is subject to periodic review and update by the OFCCP Director
- Visual Inspection - Pros and Cons

# V. Data Collection and Analysis

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# Data Analytics Requirements

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- New requirements specific to data collection and analytics
- Must document and update annually:
  - Applicants: Total number of applicants and number of applicants **who are known** individuals with disabilities
  - Hires: Total number of job openings, jobs filled, and individuals with disabilities and veterans hired
  - Openings: Total number of job openings and jobs filled
- Also expect snapshot analysis of workforce composition
- Should also be considered in connection with self-audit process, particularly if problem areas were identified
- Documentation should be retained and accessible for three years
- NOT required to provide to employees who request copy of AAP

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# Questions Raised

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- “Total number of job openings” refers to the number of individual positions advertised as open in a job vacancy announcement or requisition
- “Jobs filled” refers to all jobs the company filled by any means (competitive or non-competitive)
  - New hires, plus
  - Employees placed into new positions via promotions, transfers and reassignments
- “Hired” refers solely to applicants (internal and external) who are hired through a competitive process, including promotions
- An existing HRIS or ATS can serve as the “data analysis file” for data collected
  - Must be stored securely, apart from other personnel information
  - Access to data must be limited solely to contractor personnel who have a “need to know” to comply with OFCCP regulations
  - Cannot be maintained in confidential medical file

# OFCCP's Proposed Template (IWD Only)

	2014	2015	2016
Number of applicants who self-identify as individuals with disabilities pre-offer	25	35	50
Total number of job openings	17	24	32
Total number of jobs filled	17	24	32
Total number of applicants for all jobs	250	520	840
Number of applicants with disabilities hired	0	2	3
Total number of applicants hired	17	24	32



# Relationship with Self-Auditing

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- Contractors have existing, independent obligation to undertake self-audits
- Self-audit process should:
  - Measure the effectiveness of the AAP, including an assessment of new goals and annual utilization analyses
  - Indicate any need for remedial action
  - Determine degree to which objectives have been and are being reached
  - Determine whether IWD have opportunity to participate in educational, training, recreation and social activities
  - Monitor compliance with technical compliance obligations
- Key stakeholders and senior management should be consulted and briefed
- New rule requires contractors to document the actions they take to comply with the self-audit requirements

# OFCCP's Model Self-Audit Table – Compliance Obligations

AAP Components	AAP Requirements	Compliance (Y/N) and date last inspected/reviewed (if applicable)	Remedial/Follow-up actions necessary (if any)
Policy Statement (§ 60-741.44(a))	EEO policy statement posted on bulletin boards	Y (last inspected on mm/dd/yyyy)	None
	Policy available in a form that is accessible and understandable to IWDs	Y (last inspected on mm/dd/yyyy)	None
	EEO policy indicates top executive support for AAP	Y (policy statement signed by CEO on mm/dd/yyyy)	New CEO starting mm/dd/yyyy. Publish new policy statement.
Review of Personnel Processes (§ 60-741.44(b))	Periodic review of personnel processes	Y (last review conducted on mm/dd/yyyy)	Modify applicant flow logs to include tracking of IWDs during the job application process. Schedule next review of personnel processes on (mm/dd/yyyy)
	Reasonable accommodation provided for applicants and employees who are IWDs	Y (last review conducted on mm/dd/yyyy)	Time and attendance software system is not accessible. Provide alternate means for timekeeping as accommodation for employees who are IWDs. May procure upgrade to an accessible software package.

# OFCCP's Model Self-Audit Table – Compliance Obligations

Review of Physical and Mental Qualifications (§ 60-741.44(c))	Schedule for a review of physical and mental qualification standards	Y	Review scheduled annually – next review will be conducted on mm/dd/yyyy.
	Identify qualification standards that screen out qualified IWDs and ensure they are job-related and consistent with business necessity	Y	No standards identified.
Reasonable Accommodation (§ 60-741.44(d));	....	....	....
Anti-Harassment Procedures (§ 60-741.44(e));	....	....	....
External Dissemination of Policy, Outreach, and Positive Recruitment (§ 60-741.44(f))	....	....	....
Internal Dissemination of Policy (§ 60-741.44(g))	....	....	....
....			
....			
....			
....			

# OFCCP's Model Self-Audit Table – Personnel Activity

Category and Job Group Number	External Hires		External Applicants		Promotions – Into Job Group		Transfers	Reassignments
	Total	IWD	Total	IWD	Total	IWD	Total	IWD
Officials and Managers Job Group: 1	1	0	9	1	1	0	0	0
Professionals Job Group: 2	2	0	24	3	1	0	0	0
Sales Workers Job Group: 4	0	0	0	0	0	0	0	0
Category and Job Group Number	Retirements		Terminations		Layoffs		Recalls	
	Total	IWD	Total	IWD	Total	IWD	Total	IWD
Officials and Managers Job Group: 1	0	0	1	0	0	0	0	0
Professionals Job Group: 2	0	0	0	0	0	0	0	0
Sales Workers Job Group: 4	0	0	1	0	0	0	0	0

# VI. Outreach and Recruitment Obligations

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# Outreach and Recruitment

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- Has always been a contractor obligation, but Final Rules impose new or enhanced requirements
  - Some differences between VEVRAA and 503, consistent with differences between a “hiring benchmark” and a “utilization goal”
- For both VEVRAA and 503 a contractor must
  - Document all recruitment and outreach activities
  - 3 year record retention for documentation
    - EO 11246 remains 2 years, but . . .
  - Self-critical assessment, informed by required metrics
- Under VEVRAA, contractors must annually assess their outreach and recruitment efforts and document this evaluation
  - Evaluation must include the criteria used to evaluate the effectiveness of each effort and a conclusion as to whether each effort was effective
  - If contractor concludes that totality of its efforts were not effective it must implement alternative outreach and recruitment
    - Similar language not included in Section 503 Final Rule

# Outreach and Recruitment

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- Strategic and Implementation Issues
  - Expect continued heightened scrutiny
    - Agency has been enforcing at higher level since proposed rules were issued - lots of outreach Conciliation Agreements
    - Postings on job boards alone will not be sufficient
    - Expectation will be both national and local partnerships
      - Will require local in house resources
  - OFCCP has recently published a *Disability and Veterans Community Resources Directory* on its web site -- [www.dol-esa.gov/errd/resources.html](http://www.dol-esa.gov/errd/resources.html)
    - Local organizations like ones listed in recent Conciliation Agreements
    - Use them
    - But experience to date is limited qualified referrals from these sources

## **VII. AAP Preparation**

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# Expectations for Initial AAPs

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- The problem: Because contractors are not *required* to comply with Subpart C until their next AAP cycle, they may not have certain of the data necessary to conduct data analytics and goals analysis
- OFCCP's expectations:
  - AAPs should address everything the contractor has done to comply with elements of Subpart C that are not new
  - AAPs should address everything the contractor has done to come into compliance with the new provisions of Subpart C that went into effect on March 24
  - To the extent the contractor is not in full compliance with the new provisions of Subpart C, discuss the steps it plans to take to come into compliance
- **“OFCCP understands that the first AAP is a transitional one for contractors. Therefore, a contractor will NOT be found in violation of the new Subpart C, so long as it can demonstrate that it has acted reasonably, in like of its particular circumstances.”** OFCCP FAQ (emphasis in original)

# New Elements that Should Be Included

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- Evidence that contractor is complying with requirement to invite voluntary self-identification
- Compliant EO policy statement
- Review of contractor's personnel processes
- Schedule for the review of all physical and mental job qualification standards and evidence that contractor adheres to schedule
- Procedures developed and implemented to ensure that employees are not harassed on the basis of protected status
- Review and assessment of outreach and recruitment efforts
- Documentation that contractor has implemented and disseminated its commitment to AA to employ and advance IWD and protected veterans
  - Subcontractors
  - Unions
  - Recruiting sources

# New Elements that Should Be Included

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- Evidence that contractor has designed and implemented an audit and reporting system
- Identification of individual assigned responsibility for implementation of AAP
- Data analytics
  - Results of data collection and analytics
  - Snapshot of composition of workforce
  - Results of utilization analysis and application of goals and benchmarks
- Discussion of problem areas and solutions identified through goals, data analytics and self-audit process

# VIII. Reasonable Accommodation Obligations & Strategies

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# Reasonable Accommodation Policy

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- NPRM proposed mandatory adoption of written reasonable accommodations policy
- Final rules made written policy optional, but expect scrutiny of process during a compliance evaluation
- “Best practices” identified by OFCCP set forth in Appendix B to Section 503 final rule
  - Create “written procedures”
    - Written policy; written receipt of request; written denial
  - Provides guidance on:
    - Responsible official
    - To whom to direct requests
    - Timelines for responding to request
    - Training requirements
    - Policy distribution

# Strategy and Implementation Issues

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- Consider adoption of written policy, but is not required and may reduce flexibility
- Prepare side by side of Appendix B and current process and practice
  - Identify gaps
  - Consider modifications to narrow gaps
  - Train to any modifications
  - Document process and practice, even if no written policy
- Be prepared to present and defend in compliance evaluation

# **IX. Audit Trends**

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# Traditional Audit Process

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- Scheduling letter to head of establishment
  - Copies of current year AAPs, including analysis of prior year transactions
  - EEO-1 reports and CBAs
  - Updates to transactional data (if more than six months into AAP cycle)
- Desk audit
  - Can request production of updated data or request data (e.g., hiring data, compensation data) in perceived problem areas
  - Can require proof of compliance (e.g., VETs postings)
  - Typically require compliance checklist or questionnaire
- On-site review
  - Interview personnel
  - Request records
  - Site inspection



# Guidance from OFCCP FAQs

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- New categories of information in Subpart C should be provided in response to initial scheduling letter, including:
  - Analysis of goals and benchmarks
  - Data analytics
- Failure to meet goals/benchmarks alone will not provide basis for NOV, but may trigger further compliance inquiries
- May examine information after the date of the scheduling letter if OFCCP determines it is necessary to investigate Section 503/VETS compliance
- Upon request, contractor must inform OFCCP of the format(s) in which it maintains its records and other information and provide information in the available format(s) selected by OFCCP
- Either off-site or on-site, OFCCP may (1) request the contractor provide documents; and (2) conduct focused reviews

# Issues on Which OFCCP Is Likely to Focus During Audits

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- Invitations voluntarily to self-identify (applicant and post-offer)
- Self-identification surveys of employees (IWD)
- EO statement in AAP that shows top executive support
- Applicants and employees with disabilities have access to personnel processes, including those offered through electronic means
- Annual assessment and documentation of outreach and recruitment efforts
- Documentation of self-audit and reporting system obligations
- Training of employees involved in key personnel and compliance activities
- Conduct (and document) data and goals analysis and develop action plans to address problem areas
- Comply with VETS posting obligations, including new notification and methodology requirements
- Flow down and notice obligations

# Pre-Audits

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- Conduct privileged pre-audit to confirm compliance and identify potential “red flags”
  - Technical compliance (e.g., policy content, AAP content, posting obligations)
  - Results of goals and data analytics
  - Resulting good faith efforts (and documentation of them)
  - Accessibility and accommodation policies and compliance
  - Internal and external complaints
- Also confirm compliance with prior requirements, such as the review of job requirements, which will likely receive renewed focus
- If problems areas are identified, address them or be prepared to explain plan for getting into compliance
- Identify who will become the “face” for the contractor for the audit

# Response to Initial Scheduling Letter

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- Provide current, updated AAPs in response to scheduling letter
- AAPs should describe the efforts the contractor has undertaken to comply with the new rules and include the results of goals and data analytics
- Also consider providing a detailed cover letter
  - If have not met goals, describe efforts to make progress towards them, including good faith efforts identified in AAP
  - Describe data analytics and self-audit process and results
- OFCCP understands that first AAP will be a “transitional” audit
  - Will expect strict compliance with old requirements
  - If not in compliance with new requirement, will expect explanation of status and plans for compliance

# Desk Audit and On-Site

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- Will likely request documentation establishing:
  - Compliance with technical requirements, including subcontractor flow-down requirements
  - Goals and data metrics
  - Good faith efforts
  - Accommodation policies and compliance
- Because first AAP may not be compliant, may focus on ongoing compliance efforts (see example)
- Be prepared for OFCCP to contact external sources, such as EDS, to confirm compliance
- Compliance requirements will likely become part of “closing questionnaire”
- On-site will address these issues and likely include facility accommodation inspection

# Example of Scope of Audit

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- Not required to implement Subpart C requirements until next AAP cycle
- Assume your next cycle starts 1/1/15
- You receive a scheduling letter on 3/15/15
- At that time, you complied with most of the new technical requirements, but do not have data analytics because you did not implement this requirement until 1/1/15
- The desk phase of the audit continues through the end of 2015
- Will/can OFCCP demand your annual data analytics for applicants, hiring and jobs filled?