



College and University Professional
Association for Human Resources

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VIA U.S. Mail and Electronic Submittal: www.regulations.gov

Ms. Debra Carr
Director, Planning and Program Development
Office of Federal Contract Compliance Programs
U.S. Department of Labor
200 Constitution Ave., NW, Room C-3325
Washington D.C. 20210

**Re: Affirmative Action and Nondiscrimination Obligations of Contractors
and Subcontractors Regarding Protected Veterans
RIN # 1250-AA00**

Dear Ms. Carr:

The Society for Human Resource Management (“SHRM”) and the College and University Professional Association for Human Resources (“CUPA-HR”), with their counsel Fortney & Scott, LLC, is pleased to submit these comments in response to the U.S. Department of Labor’s (“DOL’s”) Office of Federal Contracts Compliance Programs (“OFCCP”) Notice of Proposed Rulemaking (“NPRM”) with respect to the regulations implementing the affirmative action provisions of the Vietnam Era Veterans Readjustment Assistance Act of 1974 (“VEVRAA”), published in the Federal Register on April 26, 2011,¹ with respect to amending the current regulations at 41 CFR Parts 60-250 and 60-300.

SHRM and CUPA-HR strongly support the general goals of the proposed rules—improving outreach to veterans, strengthening existing affirmative action provisions, expanding required training of contractors’ workforces that is targeted and effective, expanding contractors’ access to data that are reliable and effective for assisting in evaluating affirmative action efforts, and requiring the establishment of hiring goals for covered veterans for the purpose of improving veterans’ employment. SHRM and CUPA-HR strongly support these goals and other efforts to improve employment opportunities for our nation’s veterans. Additionally, SHRM and CUPA-HR support amending the VEVRAA regulations in a manner that focuses on the improved employment opportunities for protected veterans.

¹ 76 Fed. Reg. 23358 *et seq.* (2011).

Following our careful review of the regulations, we have concluded that, although well intended, unfortunately, the regulations as proposed focus primarily on expanded processes and steps for federal contractors that will significantly increase the burdens and costs on federal contractors without improving employment opportunities for veterans. In addition, and just as importantly, SHRM and CUPA-HR are extremely concerned that by creating a completely separate and distinct series of affirmative action procedures and processes that are unique to veterans, which materially differ from federal contractors' obligations for other protected groups, the proposed regulations will have the unacceptable result of undermining the goal of *equal* employment opportunity for protected veterans and other protected groups.

At the outset, we would note that we were disappointed that OFCCP denied our reasonable request, along with similar requests by others, for a 60-day extension of time in which to prepare more detailed responses. This rulemaking effort is an important and significant one, and all stakeholder groups involved should have had the requisite time needed to provide thorough responses. While we are pleased that OFCCP extended the comment period, limiting this extension to 14 days that included the July 4th holiday prevented SHRM and CUPA-HR from completely surveying its respective memberships to provide more detailed comments and information to address the range of issues raised by the proposed rule.

We do however look forward to continuing to work with the OFCCP to improve the rule to achieve the shared goal of increasing the employment opportunities of our nation's veterans.

BACKGROUND ON SHRM AND CUPA-HR

These comments are provided by two significantly experienced human resources organization, both of which are recognized leaders in the human resources field. Additionally, in developing these comments, both SHRM and CUPA-HR had invaluable input and feedback from some of the leading Veterans Service Organizations ("VSOs"), including The American Legion, Paralyzed Veterans of America and Disabled American Veterans. SHRM and CUPA-HR look forward to continuing to work closely with these and other VSOs to address expanded employment opportunities for protected veterans in the future.

The Society for Human Resource Management is the world's largest association devoted to human resource ("HR") management. Representing more than 250,000 members in over 140 countries, SHRM serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

In addition to its traditional member services, SHRM has made extensive efforts on behalf of our nation's veterans. SHRM's webpage dedicated to the employment of veterans (<http://www.shrm.org/hrdisciplines/staffingmanagement/Articles/Pages/Military.aspx>) highlights that the transition of veterans into the workplace

is a key concern for SHRM and for the HR profession. As evidenced by SHRM's many studies of its members, HR professionals embrace a responsibility to help our nation's military reclaim their civilian lives and return to meaningful and productive work. For example, to assist employers in recruiting and retaining current and former members of the military, SHRM has collaborated with key federal agencies, including partnering with the Department of Defense ("DoD") Employer Support of the Guard and Reserve ("ESGR") and serving on the Secretary of Defense Employer Support Freedom Award National Selection Board. The Freedom Award is the DoD's highest recognition given to employers for exceptional support of their employees serving in the Guard and Reserve.

SHRM also has developed a special training workshop on military employment developed as part of its Annual Conference. The first event in 2010 called, "Military Veterans: Transitioning Skills to the New Economy," brought together HR professionals, business leaders, federal agencies and hundreds of members of the military to highlight how both employers and veterans benefit each other, focusing on the skills each need to succeed as partners. Among the speakers was Ray Jefferson, DOL Assistant Secretary for Veterans' Employment and Training Service ("VETS"). The 2011 Annual Conference Workshop was offered at no charge to more than 12,000 HR professionals and focused on how to recruit and accommodate veterans, wounded warriors and spouses, and how to support and retain veterans in the workplace.

SHRM has developed a deeper relationship with DOL-VETS, working together to inform employers across the nation about the resources that are available to them in finding, recruiting and retaining military veterans. In a related effort, the White House invited SHRM to participate in "Joining Forces," an initiative focused on the needs of military. SHRM also is entering a similar collaboration with the Department of Veterans Affairs ("VA"). In addition, Congress has recognized SHRM's expertise/involvement by inviting SHRM to provide testimony on this topic. Finally, numerous SHRM-affiliated chapters and state councils have held successful job fairs and hiring programs directly aimed at the local veterans in their communities.

The *College and University Professional Association for Human Resources* provides dynamic leadership to the higher education human resources profession and the higher education community by delivering essential knowledge, resources and connections that enhance individual and institutional capacity and effectiveness. Its membership is institution-based and includes close to 90 percent of all U.S. doctoral institutions, around 70 percent of all master's institutions, over 50 percent of all bachelor's institutions, and almost 500 two-year and specialized institutions. CUPA-HR also serves other organizations that are affiliated with higher education. It provides vital resources to more than 12,000 higher education HR professionals at over 1,700 institutions—every day.

CUPA-HR regularly engages its members through various sources on veteran-related issues in an effort to educate members on the importance of veteran recruitment and the resources available. As part of that effort, CUPA-HR has created a dedicated website for members, which serves as a toolkit with detailed information about recruiting

veterans and complying with the various federal laws that pertain to hiring and employment of veterans and veterans with service related disabilities.

INTRODUCTION

As noted above, SHRM and CUPA-HR stand squarely in favor of the goal of improved employment opportunities for veterans. For years, both SHRM and CUPA-HR have undertaken numerous efforts to assist veterans, particularly disabled veterans, in their re-integration into the society they bravely served. The members of both SHRM and CUPA-HR have been materially involved in the recruitment and hiring process addressed by the proposed regulations. Indeed, the common concern of both organizations' members for veterans' employment and the common activities to reach that goal brought SHRM and CUPA-HR together for the purpose of commenting on the proposed regulations.

The following comments, given the short timeframe, necessarily are limited to those regulations we believe are most critical to achieving the goal of increased veterans' employment.

First, we commend OFCCP for the goal of the proposed rule and for establishing a common definition of "protected veteran." We also agree with the NPRM proposal to eliminate Part 60-250 regulations governing contracts entered into prior to December 1, 2003 (and not modified after that date). To assist OFCCP in the rulemaking, SHRM and CUPA-HR also are supplying certain information as requested in the NPRM with regard to outreach resources. We also, as we will point out in our comments, believe there are other areas where OFCCP has proposed a change to the VEVRAA regulations that, with some modifications, would be effective in increasing the hiring of veterans.

SHRM and CUPA-HR have concerns however about the primary focus of the proposed regulations on the required processes and steps, without any significant analysis of whether the proposed new and, in some cases, significantly burdensome processes will result in greater employment opportunities for the protected veterans. Based on the experiences of our members, both SHRM and CUPA-HR believe that many of the proposed required steps and processes included in the proposed regulations will not result in more effective or greater employment opportunities for protected veterans. Additionally, the detailed proposed processes generally follow a "one-size-fits-all" approach, and fail to take into account the vastly different resources and circumstances of the federal contractor community, which includes very large employers with significant resources, to small employers with much more limited resources for performing the human resources functions, including recruiting and hiring. It should be noted that while the citizenry and the federal government as a whole tend to think of most employers as large Fortune 100 and Fortune 500-sized organizations, the bulk of the employment opportunities are with organizations with less than 500 employees.

Our concerns about the process-focused regulations include the lack of research or data cited by OFCCP to support the assertions that the proposals are effective (and a

countervailing silence on research that disagrees with OFCCP's assertions), the dismissal of legal conflicts and impediments to several of the proposals, the shifting to contractors of traditional government roles of collecting reliable data, and, in sum, the enormous administrative burdens the proposals impose. In addition, the regulations as written do not appear to strike a balance between enforcement and a best practices approach that demonstrate that they will lead to the effective hiring of veterans.

Our concerns with respect to the proposed regulations, and, in particular, the additional processes that would be unique to veterans, can be summarized in the common theme that will be sounded throughout our response: ***veterans should be treated like all other protected groups***. Our particular focus on the concerns of veterans takes on special significance only in terms of equal treatment, **not** by creating unique and separate affirmative action processes and procedures for veterans. Not only do we question the effectiveness of these special proposals, but we are also deeply concerned that such proposed regulations could further stigmatize the very individuals they are designed to help and would pit individuals of one protected class against another in the employment selection process.

SHRM and CUPA-HR find it problematic that, from among the protected groups, OFCCP is requiring, for veterans only, a different EEO clause; a separate self-identification process; a singular outreach process and linkage arrangement to employment agencies; unparalleled, detailed communication and training requirements; unique data collection procedures; atypical record keeping obligations; and the establishment of a new and unfamiliar concept of "benchmarks" rather than goals. SHRM and CUPA-HR strongly believe that *using the existing affirmative action process rather than creating new processes to cover the needs of veterans only, is the most effective means to integrate veterans into society generally* and to enhance their employment opportunities. For example, the establishment by OFCCP of "benchmarks" applicable to veterans does not clarify what is needed from the contractor; instead, the OFCCP's insertion of this new term and concept, intended to supplant the long-established term of "goal," creates significant confusion. What exactly does "benchmarks" mean and how does it differ from the "goals" established for other protected groups? The application of "goals" by federal contractors in meeting their affirmative action obligations is well established, and the term "goals" is supported and informed by over 25 years of legal guidance and precedent. Introducing the different standard of "benchmarks" will, at a minimum, result in unnecessary confusion and, most likely, years of extensive litigation. The regulations should avoid such a result and instead should require contractors to meet the same criteria with respect to veterans as other protected classes, *i.e.*, "goals." SHRM and CUPA-HR support the use of measurements, but what is being measured should comport with realistic and easily identified and accessible data, and be consistent with what is being measured for other protected groups.

Further, SHRM and CUPA-HR are concerned that the OFCCP has not identified any studies, surveys or research of any kind to support its assertions that these proposed regulations will actually improve employment opportunities for veterans. As detailed

below, under the proposed regulations, there is a significant and unjustified amount of new requirements imposed on contractors, but there is little evidence that the proposed new requirements will result in increased employment opportunities for protected veterans. Employers understand existing procedures and requirements, which have been demonstrated, historically, to be successful and effective. It is, therefore, not appropriate to create a new panoply of requirements without identifying a sound justification for doing so.

OUTREACH

Section 60-250.44(f)² External dissemination of policy, outreach and positive recruitment

As will be explained more fully below, because of (i) the limited effectiveness of many of the identified programs; and (ii) the variety and breadth of other data sources, OFCCP should exercise a coordinating function, bringing together the best and most useful aspects of the many different vehicles currently available, into a unified system for use by veterans, federal contractors and the employer community in general. It is essential that employers understand their obligations to recruit and hire protected veterans. This is made more difficult by the proposed rule's scattershot approach to identifying mandatory and potential resources or linkage agreements that may not lead to the increased hiring of veterans. Moreover, while larger employers may have resources to understand and follow the available processes, smaller contractors, and particularly subcontractors, are likely to be overwhelmed. Therefore, the government, which is in the best position to aggregate the available data, information and resources, should develop an easily accessible "one-stop" website or portal for contractors and employers to use rather than burden every employer with investigating the myriad resources to identify what may be most useful.

The NPRM requires that federal contractors follow three outreach and recruitment efforts intended to inform protected veterans of prospective employment. Two require contractors to enter into linkage agreements and establish ongoing relationships with named entities, as detailed and discussed below. The third requires the contractor to consult the "Employer Resources" section of the National Resource Directory. There are aspects of this proposal that we support and believe will help increase the hiring of veterans, as described below; but SHRM and CUPA-HR also believe that the outreach program as proposed is unwieldy, duplicative, difficult to understand and comply with, and requires further adjustments to reach its goal. Accordingly, we believe that the outreach program as proposed could be improved so that more veterans are employed, which is what should define "success" for contractors, veterans and OFCCP.

SHRM and CUPA-HR believe that as the situation presents itself today, it is appropriate that a federal contractor enter into a linkage agreement with Local Veterans Employment Representatives ("LVERs") who are located nearest to the contractor's

² Following the references as made by OFCCP in the NPRM, these comments reference 41 CFR Part 60-250 rather than Part 60-300, but the comments are applicable to either.

establishment. *See* 60-250.44(f)(1)(i). These positions are funded through DOL’s VETS. The VETS website describes the program, which provides funding through State Employment Security Agencies to provide job development, placement and support services directly to qualified veterans.

In addition, the proposed rule does not mention the Disabled Veterans Outreach Program (“DVOP”), which also is funded through DOL’s VETS and charged with developing jobs and job training opportunities for disabled and other veterans. Both LVER and are specifically tasked with promoting employment opportunities for veterans with disabilities. While these programs target *individuals* for employment, rather than veterans as a group, SHRM and CUPA-HR recommend that OFCCP consider whether these DOL-funded programs may provide another avenue that OFCCP could identify for federal contractors to consider—but not be required—as part of the contractors’ outreach efforts directed to the veteran community.

The proposed rule also requires that the contractor enlist the assistance and support of at least one of the other persons and organizations listed, which include the nearest VA regional office, veterans’ representatives on college campuses, national veterans’ service organization officers in the contractor’s area, local veterans groups and veterans’ service centers near the contractor, as are listed in the current paragraph (f)(1), and the Transition Assistance Program (“TAP”). *See* 76 Fed. Reg. at 23365; Section 60-250.44(f)(1). We understand that there are limitations in both TAP and DTAP (Disabled Transition Assistance Program—intended to assist former service members with disabilities) that may result in these programs not being particularly effective for federal contractors’ outreach and expanded hiring efforts. The programs do not cover all service members being discharged from the military; only the Marine Corps requires that its separating service members participate in the programs and our understanding is that TAP is not available to members of the Reserve or National Guard, and that TAP is available only at locations near military bases or similar facilities. In addition, we have been advised by veterans’ advocates that those veterans that the programs do reach are provided advice of variable quality, often including information that is excessive and confusing rather than helpful. The materials provided do not focus only on employment issues, but also cover benefits available through the VA and other programs. TAP and DTAP also lose contact with the former military members after they leave the service, particularly after they have finally joined the civilian world. For these reasons, OFCCP should consider whether the use of either the TAP or DTAP programs as constituted today are effective for outreach, and likely to result in expanded employment opportunities for protected veterans.

The proposed rule also requires contractors to consult with the “Employer Resources” section of the National Resource Directory (“NRD”) (http://m.nationalresourcedirectory.gov/employment/job_services_and_employment_resources) (as identified in the Preamble at 76 Fed. Reg. at 23365). *See* Section 60-250.44(f)(1)(ii).³ At the outset, it should be noted that there is no “Employer Resources”

³ A different URL, http://www.nationalresourcedirectory.gov/employment/employer_resources is identified in the proposed regulation itself. It does not exist.

section—only an “employment resources” section—geared toward the searching veteran. This resource, too, suffers from many of the same problems noted above with respect to TAP. The NRD website describes itself as “a collaborative partnership among the Departments of Defense, Labor and Veterans Affairs that contains information from federal, state and local government agencies; Veterans service and benefit organizations; non-profit and community-based organizations; academic institutions and professional associations that provide assistance to Service Members, Veterans and their families.” It services “Wounded Warriors, Service Members, Veterans, their families and those who support them.” As indicated by the website, it provides access to thousands of services and resources at the national, state and local levels to support recovery, rehabilitation and community reintegration. Visitors can find information on a variety of topics including benefits and compensation, education and training, employment, family and caregiver support, health, homeless assistance, housing, transportation and travel, volunteer opportunities and other services and resources. The Preamble to the NPRM states, “The NPRM gives contractors and subcontractors the flexibility to select any organization on the National Resource Directory for outreach and recruit purposes. Since this website is a great nationwide resource, any contractor would likely find it useful in fulfilling its affirmative action obligations, such as recruiting veterans.”

Although the Employment Resources page within the NRD contains a wealth of information, including links specifically for federal contractors, the biggest issue with this resource is that it is not designed as a tool for employers. Information on resources to locate job candidates is mixed in with general information on hiring veterans and various government policy initiatives. Information on where to find job candidates consists of a series of web links that are redundant to many of those already listed in the proposed rule. While it aggregates a massive amount of information, it would take employers an undue amount of effort to find entities to link with, and employers have no way of knowing which resource is the best for their purposes. At most, this website should be listed as a suggested resource, not a mandated one.

Employers, particularly smaller contractors, need concise, reliable information about whom to contact and how, in their efforts to reach protected veterans. To address this shortcoming, we respectfully submit that OFCCP working with VETS, DoD, the VA and stakeholder groups, should spearhead an effort to establish a “one-stop shop” portal for federal contractors and employers to use for contacting protected veterans. Such a portal would significantly benefit veterans by enabling them to know where to focus their job seeking efforts. Similarly, it would benefit contractors and employers by enabling them to more successfully recruit qualified veterans. SHRM and CUPA-HR would welcome the opportunity to work with the federal government to assist in the design of such a portal.

Under Section 60-250.44(f)(2), the NPRM sets out “suggested outreach efforts.” We applaud OFCCP for the listing of the optional outreach means identified in this paragraph. These suggestions allow contractors to determine for themselves potentially viable and non-viable local alternatives. They include formal briefing sessions, preferably on company premises, with representatives from recruiting sources; special

efforts to reach student veterans; participation in work study programs of VA rehabilitation facilities; engagement of protected veterans in career days, youth programs and related activities in communities; and other efforts aimed at attracting qualified protected veterans. All of these are useful suggestions and can provide additional ideas for contractors to pursue in their Section 4212 compliance undertakings. Moreover, this proposal should be the model for all the outreach provisions so that they can use the outreach mechanisms that best suit their individual needs. To help ensure that federal contractors understand what OFCCP requires for compliance, SHRM and CUPA-HR recommend that OFCCP specify that contractors engage in a specified number of outreach efforts; *e.g.*, at least one from the list or other efforts that are comparable.

The NPRM requests that stakeholders provide information on recruitment sources not included in the NPRM that might increase employment of protected veterans. SHRM and CUPA-HR are attempting to identify additional means through which employers and contractors currently recruit and hire protected veterans. It is these types of resources, however, that OFCCP should aggregate and use for its “one stop shop” resource. For example, the VA and the federal Rehabilitation Services Administration (“RSA”) recently signed a memorandum of understanding under which the VR&E and state vocational rehabilitation agencies will work together to help veterans with significant disabilities who are seeking employment opportunities. We recommend that OFCCP’s regulations address these resources to encourage more of these organic partnerships that are developing daily as opposed to a static listing that may become old and out-dated.

In addition, there is an entire set of programs and policies within the VA devoted to promoting veteran-owned small businesses (“VOSB”) and service-disabled-veteran-owned small businesses (“SDVOSB”), many of which are federal contractors. They could be valuable resources as potential hiring pools for protected veterans or for subcontractors. In addition, The Center for Veterans Enterprise (“CVE”) was created as a subdivision of the VA Office of Small and Disadvantaged Business Utilization (“OSDBU”). The VA OSDBU is intended to serve as an advocate for VOSBs and SDVOSBs, providing information about contracting with the federal government, hosting vendor conferences and offering other support for veteran entrepreneurs. Contact information for the VA OSDBU can be found at <http://www.va.gov/osdbu/about/contacts.asp>—and the link to the home page for that office is <http://www.va.gov/osdbu/about/index.asp>. Again, it would be beneficial for the regulations to address these resources and to demonstrate to contractors how they can be accessed to meet their recruitment obligations pertaining to veterans.

Further, in testimony given on June 1, 2011, before the House Veterans Affairs Committee, several witnesses identified the National Labor Exchange (“NLX”), “an automated initiative operating on the Internet,” as a comprehensive set of programs and services to assist employers (*e.g.*, federal government contractors) in complying with VEVRAA regulations. Members can have their job openings automatically indexed (scraped) directly from their corporate career sites and made available to veterans through NLX and VetCentral, which assists participating members in complying with Jobs for Veterans Act regulations. Vet Central, which feeds job listings to State Employment

Services offices nationwide, is fully integrated into the NLX. In addition, NLX obtains downloads of postings from USAJOBS—the federal government’s job opening portal—and distributes them to state job banks. To date, over 20 states have asked that USAJOBS be included in their state job bank postings. According to other testimony at the same hearing, NLX, which offers Section 4212/VEVRAA compliance assistance through VetCentral, works with state job banks to receive electronic postings from their state workforce agencies. The final regulations would benefit if OFCCP’s efforts were informed by a review of the hearing testimony and the NLX as an example to inform and build upon with regard to its own efforts to develop a one stop portal.⁴

These resources demonstrate that with thoughtful government coordination and use of **existing** resources, OFCCP can develop and institute a more successful program that is more likely to achieve the sought-after goal of reaching and hiring protected veterans. SHRM and CUPA-HR recommend that OFCCP coordinate these resources, perhaps by building easy-use websites for national and local jobs, rather than requiring individual contractors’ to reach out to all these varied sources in their different locations, in the multiple formats that currently exist. Such a coordinated system would make employers efforts to identify protected veterans seeking employment less burdensome and more successful. With such a system in place, employers and HR professionals will not be faced with the suggested hit-or-miss approach and instead can successfully identify, recruit and hire protected veterans more efficiently and effectively.

Section 60-300.5(a) Equal opportunity clause

Under Section 60-300.5(a), the NPRM sets forth the equal opportunity clause that must be included in each Government contract, subcontract and modifications, renewals, or extensions thereto. Paragraph 2 of the Equal Opportunity for Section 4212 Protected Veterans language mandated by this section provides that a federal contractor list all employment opportunities available at the time of the execution of the contract with the “appropriate employment service delivery system where the opening occurs.” In addition, it states, “In order to satisfy the listing requirement described herein, contractors must provide information about the job vacancy in the manner and format required by the appropriate employment service delivery system.” What this means is that contractors must provide job posting data to *each individual state and local employment office in the format that each individual state and local office requires*. Because most of the multitude of offices use different formats, this will be a logistical nightmare for all contractors, especially national and multi-state employers. It is both unnecessary and unreasonable to burden contractors with this requirement. It serves no rational purpose to mandate that a contractor reformat its notice of an employment opportunity for each

⁴ See, e.g., Prepared Statements of Richard A. Hobbie, Executive Director, National Association of State Workforce Agencies and of Jolene Jeffries, Direct Employers Association, June 1, 2011, House Veterans Affairs Committee hearing on “Putting America’s Veterans Back to Work.” <http://veterans.house.gov/prepared-statement/prepared-statement-richard-hobbie-executive-director-national-association-state>.

office and, in fact, it may result in deterring rather than encouraging veterans' employment.

SHRM and CUPA-HR believe that OFCCP needs to develop a standardized format that contractors can use to provide the job posting data in a uniform fashion to all government employment offices and require the appropriate employment service delivery system conform to that format. These offices do not operate independently of the Federal government and, accordingly, it is proper and legal for the Federal government to require the service delivery system to adopt a specified format. For example, requiring a listing using a readily available template, based on a Word or Excel format that is compatible with the typical recruitment records and software, that could be transmitted electronically, would be a significant improvement.

Again, it is appropriate here as elsewhere in these comments on this NPRM to ask whether it is justified to require an exercise that calls for a contractor's additional time and expense for veterans only that is not required for other protected groups. We believe that too many of the particularized requirements imposed on contractors for protected veterans are not necessary and will discourage contractors. All protected groups deserve similar treatment and no one protected group should be treated differently for employment opportunities.

CONGRUENCE WITH THE AMERICANS WITH DISABILITIES ACT (AS AMENDED) ("ADA")

Section 60-300.42; Appendix B to Part 60-300

SHRM and CUPA-HR are particularly concerned with how protected veterans with disabilities will be treated under the proposed regulations. Well-meaning provisions have, in the past, had the unintended consequence of further stigmatizing this group of worthy individuals. "Special" requirements, "special" accommodations, and similar mechanisms have served to segregate and separate them from other applicants and employees in the eyes of employers without providing material benefits. We fear that the proposed regulations suffer from this same failing.

Section 60-300.42: Invitation to Self-Identify.

At the outset, we recognize the realities that protected veterans and protected veterans with disabilities face in the job market. Based on extensive experience and the research in the field, we know that *many veterans choose not to self-identify as veterans* for a variety of reasons, including possible employer apprehensiveness about hiring someone who 1) may be called back to active duty; 2) may have difficulty making the transition to civilian life; or 3) may have a hidden limitation, mental or physical, regardless of whether it is a disability, and so on. In sum, the self-identification process is not the mere data-collecting measure it appears to be. Even when, as in the proposed regulations, the self-identification is contemplated as the basis for a hiring incentive or a priority referral (referenced in proposed Section 60-250.5, and elsewhere), it is not necessarily a benign event.

The proposed regulations exacerbate this situation by creating a *second, mandatory*, post-offer invitation to self-identify for those who have done so as protected veterans. The second self-identification would be for the purpose of permitting the veteran to self-identify as being as a specifically protected veteran, which, for the most part, will affect disabled veterans.

Finally, the proposed regulations state that if a protected veteran self-identifies as being disabled, the contractor is *required* to ask if an accommodation is needed. While well-intended, it is unnecessary; and, more importantly, it violates the Americans with Disabilities Act, as amended (“ADA”).

At every point in the recruitment and hiring process, a veteran applicant will be aware of the essential functions of the job and of his or her abilities. Presumably, every contractor will, at the appropriate time in the recruitment process, inquire if the veteran applicant can perform the essential functions of the job, with or without an accommodation, as contemplated by the ADA, and the applicant will respond. Absent a manifest disability giving rise to a reasonable belief that the veteran applicant may not be able to do the job, that is (and should be) the end of it.

Neither the proposed rule nor the template provided in Appendix B make clear that an individual must be able to perform the “essential functions” of the position, which is the keystone of the ADA. The proposed rule, by asking for the employee to self-identify as a disabled veteran, instead suggests that the key factor is whether the individual can work “properly and safely.” No mention is made as to whether the individual can perform the essential functions of the job. In today’s workplace, with so many desk jobs, such as information specialists, computer programmers, as well as mid-level supervisors, accountants and other traditional office jobs, offering accommodations because the individual is, for example, in a wheelchair, may violate the ADA. Moreover, there is no assurance that the Equal Employment Opportunity Commission (EEOC) will view OFCCP’s process as a legal basis for excusing compliance with the ADA. Clearly, federal contractors cannot be required to make the Hobson’s choice of deciding whether to comply with the OFCCP’s regulations or the ADA, and OFCCP’s regulations must conform to the existing ADA obligations in order to avoid such an illogical result.

The ADA, as construed by the EEOC, prohibits pre-employment inquiries regarding disabilities, including the need for an accommodation. *See EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* (May 1994). The assurances of OFCCP notwithstanding, the ADA's prohibition should require the removal of this provision from the proposed regulations. Further, respect for disabled veterans leads to the same conclusion. This different procedure does not advance the nation's disabled veterans' integration into the workforce.

SHRM and CUPA-HR urge that this section of the proposed regulation be withdrawn and that the Invitation to Self-Identify as it currently exists remain in the regulations. The interests of protected veterans will be served as will those of contractors and OFCCP, an impending conflict with the ADA will be resolved, and no new or special processes need be invented for disabled veterans.

Sections 60-300.5; 60-300.42(a); 60-300.44(k); 60-300.45: Data Collection; Contractor established benchmarks for hiring.

In its explanation of the Data Collection provision of the NPRM (Section 60-300.44(k)), OFCCP states:

. . . no structured data regarding the number of protected veterans who are referred for or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of protected veterans in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting protected veteran candidates. The proposed regulations provide for the collection of referral data (*see* Sec. 60-300.5, paragraph 5 of the EO clause), as well as applicant data (*see* Sec. 60-300.42(a) at 23377-78).

Although we agree that no specific database for this purpose exists, SHRM and CUPA-HR question the degree to which OFCCP has mined the data available from the various Departments and agencies of the federal government tasked with monitoring protected veterans before imposing this requirement. In any event, we believe that because of the critical role these data will have in assessing the effectiveness of contractors' efforts in recruiting and hiring protected veterans, OFCCP should require contractors to use reliable federally collected data for veterans, as it does for every other protected group. We note, for example, that hiring data is already maintained by contractors in their VETS-100 forms, and the requirement for reporting under VETS is referenced in this proposed rule. Before this rule becomes final, at a minimum, OFCCP

should coordinate with VETS regarding the data being collected and determine how these data may be used.

We also are concerned that these proposed regulations shift to contractors the obligation to create census data regarding protected veterans, in order to establish hiring “benchmarks”, based on a mixture of OFCCP-provided data and data gathered by and unique to each contractor. The Data Collection proposal improperly shifts to the private sector—for protected veterans only—the responsibility to do the job the federal government should do: *i.e.*, provide accurate and reliable data concerning the availability of protected veterans. The means, scattered throughout these proposed regulations, are so difficult to understand, so burdensome, so unwieldy, and so costly that they may ultimately deter rather than encourage veterans’ employment. Any goals—and not “benchmarks” —should be based on data made readily available by the federal government, while fully addressing employment needs of protected veterans. Further, SHRM and CUPA-HR question the establishment of “benchmarks” for hiring that do not mirror the current goals and timetables that exist for every other affected group under the purview of the OFCCP.

DATA COLLECTION

At the heart of every Affirmative Action Plan is a Utilization Analysis. Based on census data provided by the federal government, every federal contractor can assess the degree to which its recruiting and hiring efforts have succeeded in creating a workforce that reflects the available candidates for each job in its relevant geographical area. The irreplaceable element in this Analysis is reliable, commonly-used, government-provided census data. The proposed regulation discards this carefully wrought procedure and in its place would create a new, different, untested, unproven process with little regard for the burden it places on contractors. Further, OFCCP, having failed to cite any underlying studies supporting this new process, provides no rationale upon which to believe that its maze of requirements will aid veterans in securing employment.

Before implementing such sweeping and burdensome new requirements, OFCCP, at a minimum, should be required to demonstrate why it is unable to acquire the necessary data regarding protected veterans available from the various Departments and agencies of the federal government.

The proposed Data Collection regulations require that the contractor obtain the following data:

- (1) The number of priority referrals of veterans protected by this part that the contractor received from applicable employment service delivery system(s);
- (2) The number of total referrals that the contractor received from applicable employment service delivery system(s);
- (3) The ratio of priority referrals of veterans to total referrals (referral ratio);
- (4) The number of applicants who self-identified as protected veterans pursuant to Sec. 60-300.42(a), or who are otherwise known as protected veterans;

- (5) The total number of job openings and total number of jobs filled;
- (6) The ratio of jobs filled to job openings;
- (7) The total number of applicants for all jobs;
- (8) The ratio of protected veteran applicants to all applicants (applicant ratio);
- (9) The number of protected veteran applicants hired;
- (10) The total number of applicants hired; and
- (11) The ratio of protected veterans hired to all hires (hiring ratio).

NPRM: Sec. 60-300-44(k).

A certain percentage of veterans are known to be reluctant to identify themselves as veterans. Adding to this difficulty is the fact that many veterans with hidden disabilities have multiple reasons not to self identify. Without virtually 100 percent self-identification, there is no ability to create reliable responses to (1) and (3), above. The same problem pertains with respect to the self-identification of applicants. Self-identification is an inherently random process, particularly for statistical purposes. The ratios that a contractor is required to create under (8) and (11), and even the raw figure of total protected veterans hired (10), above, are all incomplete, inchoate, and unreliable. Furthermore, if the agency's aim in requiring the collection of this data is to create a national database of protected veterans available for employment, then that is a task doomed by the limitations of the process.

The limitations in the proposed rule extend to any efforts to enforce the regulations. Because the data for each contractor will differ, there is no rational basis for comparing the effectiveness of one contractor's recruiting and hiring with another's or with a central, common, reliable data pool. If, as OFCCP states, "The primary indicator of effectiveness is whether qualified veterans have been hired" (NPRM at 23366, explanation of Sec. 60-300.44(f)(3)), contractors must have confidence that any assessments of "effectiveness" do not reflect the random, incomplete, particularized data that is an intrinsic element of the proposed regulations.

Before implementing such a sweeping and burdensome new requirement, OFCCP, at a minimum, should collect the census data regarding protected veterans that is available from the various Departments and agencies of the federal government. Others in government believe the data is there, were OFCCP only to make the effort to discover them. For example, at the June 1, 2011 hearing of the House Committee on Veteran's Affairs, "Putting America's Veterans Back to Work," Ranking Member Bob Filner forthrightly stated that the VA has the data. Rep. Filner went on to specify that the Veterans Benefits Administration has the required data. The proposed regulations, however, fail to address the Veterans Benefits Administration's data and also fail to explain OFCCP's consideration of these data.

SHRM and CUPA-HR can identify numerous other data sources that together would assist in identifying the veteran population in order to reach the ultimate goal of increasing employment of veterans. These include the VA website http://www.va.gov/vetdata/Veteran_Population.asp that breaks down veteran population

by county. It also includes DOL's VETS, which can obtain information from its VETS-100 forms that generally have not been accessed. In addition, we refer OFCCP to the resources identified in response to the NPRM request for resources that can be used for outreach. OFCCP already acknowledges the availability of numerous other databases (*see* NPRM at 23376; explanation of Sec. 60-300.43(f) and Sec. 60-300.45) and of its own access to Bureau of Labor Statistics and VETS data, which it asserts is sufficient to include in the "benchmark" process (NPRM at 23376; explanation of Sec. 60-300.45).

Mere accessibility to these data sources, however, does not mean ease of use. Most of these websites are difficult to master and maneuver and the masses of data must be unearthed and carefully sifted. In sum, using these websites would challenge nearly every human resource professional at every federal contractor, substantially adding to the burdens these regulations impose and materially delaying the recruitment and hiring of protected veterans. Moreover, the information from these sources must be combined with information gleaned from still other sources in order to be meaningful. In our view, mining the census data efficiently and effectively to identify protected veterans is a job for a professional, schooled in using government databases: *i.e.*, the OFCCP. It is the OFCCP—either by itself or in coordination with other federal agencies—that can best gather the available data, some of which is identified above, and in coordination with the VA and its sources for such data, then develop and provide availability data for federal contractors.

The collection of census data for governmental purposes is a quintessential role of government (*see* U.S. Constitution, Article 1). There is no reason why this traditional role should be shifted to over-burdened federal contractors solely for the purposes of the proposed regulations. Rather than having one appropriate governmental agency efficiently collect and collate the data into a commonly available database, the proposed regulations would require thousands of individual contractors to devote time and effort at considerable cost to an effort that will, by its very nature, be a patchwork quilt of individual data sets, of little use to anyone. Obviously, there is a better way: as it does for every other protected group, OFCCP, in concert with other agencies of the federal government, should provide the necessary data, first, to facilitate the identification, recruitment and hiring of protected veterans and, second, to assure fair, sound, uniform enforcement.

FIVE-YEAR RECORDKEEPING

Section 60-250.80; 250-44(j)

Why do OFCCP's proposed regulations require data relating to protected veterans be retained for five years, rather than two years, as required for all other protected groups? It is obvious that OFCCP hopes to build a veterans database from the information the contractors collect. But unreliable data does not improve with age nor does it grow better as it grows in size. A pool of flimsy data based on self-identification does not become more reliable because it is larger. On the contrary, the omissions multiply, rendering 60 months of data more error-filled than the annual data of which it is comprised.

Further, if OFCCP believes it needs five years of records to establish adequate data concerning availability of protected veterans, what does it propose to do about enforcement of "benchmarks" in the interim? Defer? Veterans deserve better.

As stated above, we maintain that the problems with the processes and procedures proposed in this section of the NPRM are unavoidable and fatal. But the solution is also apparent: treat veterans as others are treated. Provide census and availability data for veterans as OFFCP and other federal agencies do for others. Require contractors to treat protected veterans as they must treat other protected groups—including maintaining the same two-year recordkeeping.

Section 60-300.45: Benchmarks for Hiring

The establishment of "benchmarks" for hiring protected veterans "for the first time" raises many questions. As these "benchmarks" would be inextricably tied to the "priority referral process" (Section 60-250.5) and the Data Collection procedures discussed above, it is difficult to respond to this proposed regulation without reference to other provisions of the NPRM.

The initial response of SHRM and CUPA-HR to this new proposal is in keeping with its general position: why create an entirely new procedure with entirely new standards and mechanisms for veterans? The contractor community is familiar and experienced with the goals and timetables used for affirmative action with respect to all other protected groups. We believe that the existing system of goals and timetables should be used for protected veterans as well. Our initial and continuing theme resounds: forcing contractors to master new, burdensome, time-consuming, and costly procedures solely for the purpose of recruiting and hiring protected veterans will deter and not encourage the hiring of protected veterans

There are additional problems with the proposed regulation. We have already addressed the limitations inherent in any procedure that relies on the unreliable data gleaned from self-identification. That data is critical to the “benchmarking” process and suffers from the same limitations. Creating “benchmarks” from questionable data cannot but yield questionable “benchmarks”. Further exacerbating the situation is the legal insufficiency of a hiring process based on “priority referrals” and encouraged by an assessment mechanism that openly admits that, “The primary indicator of effectiveness is whether qualified veterans have been hired.” NPRM at 23366; explanation of Sec. 60-300.44(f). In the absence of a hiring standard derived from uniform, common, reliable data rather than the series of assumptions, conjectures, estimates, and extrapolations that make up the core of the benchmarking process, OFCCP’s “indicator of effectiveness” sounds very like a quota: an artificial objective based on artificial components.

There is also a significant legal impediment to the benchmarking and assessment processes OFCCP proposes. Our research has failed to identify any law, including VEVRAA, which creates a hiring preference for veterans in the private sector. As a result, the hiring of veterans by any contractor would be voluntary and, thus, exposed to scrutiny and challenge under Title VII and all other equal employment laws by other applicants, including applicants protected by the Executive Order. *See, e.g.*, EEOC Policy Guidance on Veterans’ Preference Under Title VII, August 10, 1990, and cases cited therein, explaining, *inter alia*, why Section 712 of Title VII provides no safe harbor in this situation. Because protected veterans are still overwhelmingly men, hiring imbalances arising from the priority referral and benchmarking processes are a pressing reality. Thus, legal challenges to those imbalances are a fact that every contractor must consider.

SHRM and CUPA-HR believe that the regulatory imperatives in the proposed regulations—from priority referrals, to applicant ratios, to “benchmarks”, culminating with hiring being the “primary indicator” of compliance—are legally perilous. The legal pitfalls of those processes are more than sufficient reasons to re-examine and improve by re-writing the proposed regulations. Without a safe haven for prioritizing the hire of veterans over that of any other protected group, an employer may be charged with failing to comply with the law for prioritizing the veteran or, conversely, for hiring a woman or African American when also obligated to hire a veteran. It is essential, therefore, that OFCCP develop a better approach to harmonize the obligations of contractors.

We urge that all references to “priority referrals” and hiring “indicators” in 60-250.5, 60-300.44, 60-300.45, and elsewhere, be excised because of the legal consequences of such use and the overall principle of treating veterans equal to other protected classes. SHRM and CUPA-HR recognize that such an excision will require a re-drafting of the data collection procedures of 60-300.44 and the benchmark process of 60-300.45, but we regard those as positive achievements, removing burdensome, stigmatizing, and legally questionable provisions from the proposed regulations. We respectfully recommend that OFCCP reconsider the way in which the proposed regulations seek to incentivize self-identification by means of a thinly veiled promise of preferred hiring in a manner that violates basic tenets of equal treatment, as expressed in

Tile VII and the legal requirements of the ADA. Finally, we urge OFCCP to reconsider the way in which the proposed regulations compel contractors to collect inherently flawed data that will be then used as the basis for an inevitably flawed, legally suspect benchmarking, hiring, and enforcement process.

SHRM and CUPA-HR believe that the appropriate solution to these regulatory shortcomings is apparent: treat protected veterans as other protected individuals are treated. First, OFCCP or other appropriate agencies should collect the census and availability data and make the data available to contractors. Then, the rest of the existing affirmative action process, as outlined in Executive Order 11246, follows as a matter of course, based on well established legal principles. With reliable availability data, meaningful goals and timetables could be established. Needless additional special provisions in the proposed regulations can be eliminated and contractors will be able to integrate the recruitment and hiring of protected veterans into a system with which they are familiar, a system that works.

TIME AND RESOURCES IMPACT ON HUMAN RESOURCE SPECIALISTS AND CONTRACTORS

OFCCP candidly notes that “the overall population of protected veterans is already relatively small.” NPRM at 23363; explanation of Sec. 60-300.42. In light of that, OFCCP should be sensitive to the unique, additional burdens the proposed regulations impose and the resistance the proposals are likely to meet. Instead, OFCCP heaps one new, special requirement upon another; apparently blind to the difficulties they will impose and the deterrents to hiring they will create. This burden is particularly onerous for smaller employers, including many which are veteran-owned or service-disabled veteran owned small businesses. Considering that on average, most small employers incur regulatory costs of at least 30 percent higher than larger counterparts—36 percent in 2010—these regulations may even drive small businesses from federal contracting—if even they could fully understand and comply with the mandates. *See* Small Business Advocate, Vol. 30, No. 4 at p. 3 (May 2011) (published by the SBA Office of Advocacy)(www.sba.gov/advocacy).

OFCCP estimates of the burden are too low, and not realistic. Given the short time provided during this comment period, however, it was not possible to develop and conduct a survey of stakeholders who would provide OFCCP with a truer estimate of the time and expenses the proposed regulations would entail. It is clear that the estimates are very low and simply inaccurate.

Given the multiplicity of tasks asked of contractors—from the mandatory, specified multi-faceted outreach program, to the massive collection and maintenance of five years of data, to special training, to special annual accounting updates of **all** job descriptions, OFCCP fails to take into account the cost in time and money these functions will impose. Merely becoming familiar with the resources available will be hugely time-consuming. Efforts to use those resources and collect data that is intended to create the benchmarks for enforcement also will entail more time than identified.

In particular, the detailed training requirements, that mandate training for persons not involved in hiring and recruiting are a significant burden that, based on our extensive experience in successful training, are unlikely to improve the efforts to hire protected veterans. To be effective, any training requirements must be focused on the persons responsible for recruiting and hiring, and be able to be tailored to the wide range of workplaces that are subject to the requirements—a “one-size-fits-all” approach will not provide effective training. Training is not an exercise; to have value, it must be useful.

SHRM and CUPA-HR again ask why OFCCP has chosen to create and impose new procedures for dealing with veterans that differ from other protected groups. These annual activities are costly, time-consuming and burdensome and may engender resentment for the very group OFCCP seeks to protect, and one most deserving of respect not resentment.

CONCLUSIONS

SHRM and CUPA-HR joined together to comment on the proposed regulations in recognition of their mutual interest in encouraging veterans’ employment and concern regarding the impact of the proposal. We fully support OFCCP’s goals and do not want to obstruct, impede, or delay those goals.

For over 45 years, the OFCCP has administered affirmative action efforts for minorities and women. Although no one questions that even greater success would be welcome, it is safe to say that the successful integration of minorities and women into the workforces of federal contractors is one of the proudest achievements of the Executive Branch, DOL and the OFCCP. SHRM and CUPA-HR maintain that the procedures and processes that have been proven to be so successful with minorities and women should be used with veterans. Or, to state the obverse, why do veterans need such completely different mechanisms, across the entire spectrum of activities under the OFCCP’s purview? Before OFCCP mandates that contractors learn and implement different recruiting, recordkeeping, training, communication, data collection and hiring mechanisms, at the very least, OFCCP should offer some basis beyond its own belief that all these new, time-consuming and costly procedures will result in increased employment of veterans.

As indicated, SHRM and CUPA-HR have deep concerns over the lack of any significant research or coordination with other offices in the U.S. Government working with veterans, or with the very VSOs established to serve our nation’s veterans. Many of the issues described above, and certainly many of the resources that we have identified in response to OFCCP’s request for information, could have been identified and utilized prior to publishing these problematic proposals. Moreover, OFCCP’s apparent reliance on various contractors’ individual collation of data over a five-year period to enforce section 4212 is as unrealistic as it is burdensome. The unreliable data that is the inevitable outcome of the proposed regulation offers no basis for effective hiring or even-handed enforcement.

In addition, SHRM and CUPA-HR share a fundamental concern that OFCCP has not conducted or identified studies to determine whether the administrative burdens being placed on federal contractors and their human resource specialists will have any bearing on attaining the successful outreach to and employment of protected veterans. Moreover, the estimated time that OFCCP indicates will be needed to comply with the regulations is unrealistic, underestimated and, simply, wrong, and if adequate, additional time to comment had been granted, we would have surveyed our members and provided more detailed and accurate burden estimates.

Furthermore, although SHRM and CUPA-HR question the effectiveness of these special proposals, its members also are concerned that this special treatment may cause others to stigmatize the very individuals the proposals are supposed to be helping. Most importantly, these proposed regulations indicate a preferential hiring of veterans over other protected groups whom contractors cannot ignore. As discussed above, this raises insuperable legal hurdles requiring that this proposal be re-worked. Creating a singular and different affirmative action process and procedure for veterans performs a disservice to veterans.

SHRM and CUPA-HR yield to no others in the depth and breadth of their active support for veterans in every sphere of society, including employment, but recognize that only under limited statutory circumstances are veterans provided priority over other protected groups. It is essential that any rules propounded by OFCCP treat veterans as all other protected groups are treated.

In sum, it is the core belief of SHRM and CUPA-HR that the most effective process for veterans is a process that provides veterans with what they most desire: to be treated the same as others. Accordingly, we maintain that OFCCP should focus on integrating veterans into the existing affirmative action process. Harmonizing the overall process, to cover veterans, minorities and women, will be more effective and benefit all on many levels. In this way, OFCCP can help veterans become fully-employed civilians. To provide equal treatment for veterans supports this country's legal and ethical principles. SHRM and CUPA-HR believe, as do veterans, that on a level playing field, the qualities, character, experience and abilities of veterans will supply all the "priority" they need or want.

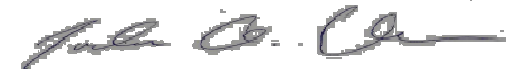
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