

Alert: Department of Labor Issues New Affirmative Action Rules That Will Likely Carry Significant Challenges and Costs for Contractors

September 09, 2013

McGlinchey Alert On August 27, 2013, the Department of Labor's Office of Federal Contractor Compliance Programs ("OFCCP") issued new affirmative action rules designed to increase the hiring of veterans and disabled workers by federal contractors. The new rules require contractors to set hiring goals, ask job applicants to self-identify as veterans or disabled, maintain additional data regarding hiring decisions, conduct regular surveys of employees regarding their disability status, and retain various records for a period of three years.

The rules have been pending for some time; however, because of the uncertainty surrounding what they would look like in final form, employers have not yet been able to take any action to implement them. Although there is considerable debate regarding how much it will cost companies to comply with the new rules, it is clear that significant investments will be required by companies in order to make changes to human resources departments, hire additional staff to conduct employee outreach, revise hiring and data retention policies, update job applications and change information technology systems. The rules will take effect in March 2014. In implementing the rules, contractors will need to be very careful making any hiring changes that may result in violations of other OFCCP requirements. For example, by hiring more veterans, who are overwhelmingly male, companies need to ensure that they are not discriminating against females. In addition, because the disability rule depends on self-reporting, if employees are reluctant to do so, this could result in companies undercounting their number of disabled employees. Moreover, the records that companies will be required to keep could be used by the OFCCP to pursue enforcement actions on various grounds – including, for example, that companies are not taking sufficient action with respect to employee outreach or even that they are violating the Americans with Disabilities Act.

Even companies that do not contract directly with the federal government need to be cognizant of the new requirements. The rules require contractors to include equal opportunity clauses in future subcontracts, which according to the OFCCP means that subcontractors will be required to comply with the new veteran and

disability rules. This will undoubtedly cause legal disputes between the OFCCP, prime contractors and their vendors and suppliers going forward.