

day when the technician was servicing a private firm. Likewise, workers who were on an assembly line whose products were shipped at times to the Government and at times to private customers were covered, as were employees of the airline carrier whose duties included at times helping to transport Federal employees pursuant to a contract.

14. On the other hand, a person whose duties were permanently changed may have gained or lost coverage as a result. For example, an engineer who had been working on developing weapons under a contract with the military, and who accordingly was covered, may have been transferred to work on development of civilian aircraft for private customers. If the new position did not include any contract-related duties, the individual lost protection under the act at the time of the transfer.

15. It is the position's regular or assigned duties that were controlling. If a portion, however small, of a position's regular duties was necessary to or facilitated carrying out a Government contract, the position was covered. On the other hand, the isolated and unanticipated performance, outside the position's regular duties, of a contract-related task will not result in a finding of coverage. For example, suppose another employee of the photocopy machine company, whose regular duties were in no way contract-related, was unexpectedly needed to substitute for the technician who repaired the machine leased to the Government. Assuming substitution in such situations was not one of the employee's regular or foreseeable duties, his or her isolated performance of the task on a particular occasion would not result in a finding of coverage. In some cases, there will be a formal written position description that will serve as evidence of the position's actual duties and responsibilities. In other cases, there may not be a written position description, or the position description may be inaccurate or incomplete. In all cases, however, it should be possible to identify the position's actual duties, and to make a determination of coverage on that basis.

16. The fact that a position is deemed not to have been engaged in carrying out a Government contract does not affect the individual's rights under the Americans with Disabilities Act of 1990.

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DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60-250

RIN 1215-AA62

Affirmative Action Obligations of Contractors and Subcontractors for Disabled Veterans and Veterans of the Vietnam Era; Invitation to Self-Identify

AGENCY: Office of Federal Contract Compliance Programs (OFCCP), Labor.

ACTION: Interim rule with request for comments.

SUMMARY: This interim rule modifies the OFCCP regulation requiring Government contractors to invite job applicants to inform the contractor whether the applicant believes that he or she may be covered by the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, and wishes to benefit under the contractor's affirmative action program. These changes are substantively identical to OFCCP revisions, published elsewhere in this issue of the Federal Register, to the rule requiring invitations to self-identify under Section 503 of the Rehabilitation Act of 1973. Issuing identical rule changes will minimize regulatory burdens, because Government contractors will not need separate forms, notices and posters for inviting self-identification under the two affirmative action laws.

DATES: This interim rule will take effect on August 29, 1996.

OFCCP invites comments on this interim rule. To be assured of consideration, comments must be in writing and must be received on or before July 1, 1996.

ADDRESSES: Comments should be sent to Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C-3325-200 Constitution Avenue, N.W., Washington, D.C. 20210.

As a convenience to commenters, OFCCP will accept public comments transmitted by facsimile (FAX) machine. The telephone number of the FAX receiver is (202) 219-6195. Only public comments of six or fewer pages will be accepted via FAX transmittal. This limitation is necessary in order to assure access to the equipment. Receipt of FAX transmittals will not be acknowledged, except that the sender may request confirmation of receipt by calling OFCCP at (202) 219-9430 (voice) or 1 (800) 326-2577 (TDD).

Comments received will be available for public inspection in Room C-3325, from 9 a.m. to 5 p.m., Monday through Friday, except legal holidays, from May 15, 1996 until this interim rule is published in final form. Persons who need assistance to review the comments will be provided with appropriate aids such as readers or print magnifiers. To schedule an appointment, call (202) 219-9430 (voice) or 1 (800) 326-2577 (TDD).

Copies of this interim rule are available in the following alternative formats: large print, electronic file on computer disk and audio-tape. Copies may be obtained from OFCCP by calling

(202) 219-9430 (voice) or 1 (800) 326-2577 (TDD).

FOR FURTHER INFORMATION CONTACT: Joe N. Kennedy, Deputy Director, Office of Federal Contract Compliance Programs, Room C-3325, 200 Constitution Avenue NW., Washington, D.C. 20210. Telephone: (202) 219-9475 (voice), 1 (800) 326-2577 (TDD).

SUPPLEMENTARY INFORMATION:

Background

The affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (Section 4212, VEVRAA, or the Act), require parties holding Government contracts and subcontracts of \$10,000 or more, to "take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era." OFCCP enforces Section 4212 and has published implementing regulations at 41 CFR Part 60-250. Covered disabled veterans include persons entitled to disability compensation under the laws administered by the Department of Veterans Affairs for disability rated at 30 percent or more, and persons whose discharge or release from active duty was for a disability incurred or aggravated in the line of duty. 41 CFR 250.2.

Today's interim rule regarding the invitation to self-identify in 41 CFR 60-250.5(d), described in detail below, is prompted by OFCCP's publication, elsewhere in today's Federal Register, of a final rule revising the regulations at 41 CFR Part 60-741 implementing Section 503 of the Rehabilitation Act of 1973. Section 503 requires that Government contractors and subcontractors take affirmative action to employ and advance in employment qualified individuals with disabilities.

Because of the close similarity between VEVRAA and Section 503 in terms of their substantive protections and jurisdictional requirements, these two laws have been treated in tandem by OFCCP and often by Government contractors as well. For instance, OFCCP's regulations implementing the two laws historically have been parallel. Many contractors use the same notices and forms to comply with their regulatory duties under each law. One such obligation is that contractors extend to their employees and applicants an invitation to identify themselves as being covered under the law and wishing to benefit under the contractor's affirmative action program. Under the existing VEVRAA regulation at 41 CFR 60-250.5(d), contractors must extend the invitation to all job

applicants. By contrast, the new Section 503 rule at 41 CFR 60-741.42(a) explicitly requires contractors to invite applicants to self-identify after making offers of employment and before applicants begin their employment duties. The new Section 503 rule, which is consistent with standards set under the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. 12112(d); 29 CFR 1630.13-.14), permits inviting an applicant to self-identify before a job offer is made only in two limited circumstances: (i) if the invitation is made when the contractor actually is undertaking affirmative action at the pre-offer stage; and (ii) if the invitation is made pursuant to a Federal, state or local law requiring affirmative action for individuals with disabilities.

Representatives of Government contractors have expressed concern that if contractors are faced with a self-identification requirement under VEVRAA that is different than the requirement under Section 503, each contractor will have to revise its forms, notices, and posters when the Section 503 final regulations take effect, and then change these same forms, notices, and posters again when OFCCP promulgates its contemplated revisions to the VEVRAA regulations. Consistent with suggestions by the regulated community, this interim rule modifies the VEVRAA self-identification regulation to mirror the parallel regulation under Section 503 and makes these changes effective at the same time as the new Section 503 regulations.

The Department believes that there is good cause under the Administrative Procedure Act (APA), 5 U.S.C. 553(b)(B), to issue today's interim rule without first issuing a proposed rule and undergoing rulemaking procedures. As noted above, if this interim rule is not effective at the same time as the Section 503 regulations, covered contractors will need to have separate forms, notices and posters for inviting self-identification under the two laws. Delaying uniformity among these OFCCP rules, as well as with the ADA, will waste resources within the regulated community and confuse the public as to the law. In addition, the issues concerning Government contractors' inviting individuals with disabilities to self-identify to obtain the benefits of affirmative action programs, and conformance with the Equal Employment Opportunity Commission's (EEOC) implementation of the ADA, were already subject to public scrutiny during the Section 503 rulemaking. *See, e.g.,* 57 FR 48084, 48095, 48097, Oct. 21, 1992. The modifications made to § 60-250.5(d) are in accordance with the

Congressional mandate expressed in the ADA regarding pre-employment inquiries of the existence of disabilities.

For these reasons, publication of this interim rule in proposed form prior to the effective date of the Section 503 invitation to self-identify regulation is impracticable, unnecessary and contrary to the public interest. Thus, good cause exists under the APA to dispense with notice of proposed rulemaking.

Summary of the Interim Rule

This interim rule, 41 CFR 60-250.5(d), is substantively the same as the new Section 503 regulation at 41 CFR 60-741.42; it adopts the standards contained in the ADA implementing regulations regarding disability discrimination, but applies these standards to covered disabled veterans and veterans of the Vietnam era. Much of § 60-250.5(d), however, will remain the same as it has been since it was published 20 years ago. (41 FR 26386, 26389, June 25, 1976.) A summary of the major changes to the previous rule follows.

Paragraph (d)(1) of the interim rule mirrors language in the Section 503 final rule at § 60-741.42(a). Paragraph (d)(1) requires the contractor, after making an offer of employment and before the applicant begins his or her employment duties, to invite applicants to self-identify in order to benefit from the contractor's affirmative action program for disabled veterans and veterans of the Vietnam era. This approach is consistent with the ADA and the EEOC regulation at 29 CFR 1630.14(b), which provides that an employer may require a medical inquiry after making an offer of employment to a job applicant and before the applicant begins his or her job duties, if all entering employees in the same job category are subjected to such an inquiry regardless of disability.

Paragraphs (d)(2) and (d)(3) provide limited exceptions to the general requirement of paragraph (d)(1). In paragraph (d)(2), contractors are permitted to invite disabled veterans to self-identify before an employment offer has been made only in two limited circumstances: (i) if the invitation is made when the contractor actually is undertaking affirmative action for disabled veterans at the pre-offer stage; or (ii) if the invitation is made under a Federal, state or local law requiring affirmative action for disabled veterans. EEOC's October 10, 1995, "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations" also authorizes pre-employment inquiries in these circumstances. In paragraph (d)(3),

contractors are similarly permitted to make pre-offer invitations to Vietnam-era veterans to self-identify in limited circumstances: (i) if the invitation is made when the contractor actually is undertaking affirmative action for Vietnam-era veterans at the pre-offer stage; or (ii) if the invitation is made under a Federal, state or local law requiring affirmative action for Vietnam-era veterans.

Paragraph (d)(4) of the interim rule requires that the invitation inform the individual that the request to benefit under the contractor's affirmative action program may be made immediately or at any time in the future. This revision will help ensure that the individual is aware that he or she is not precluded from making the request at a later time whether or not an initial request was made. For example, a covered veteran simply may choose not to self-identify before beginning work, but may wish to do so later.

Paragraph (d)(4) also requires that the contractor maintain a separate file on applicants and employees who have identified themselves as covered disabled veterans or Vietnam-era veterans and provide that file to OFCCP upon request. This requirement parallels 41 CFR § 60-741.42(b), and is consistent with separate file requirements already existing under the ADA (42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1)). For many years, the VEVRAA regulations have required contractors to maintain the confidentiality of this information, and the explicit requirement for separate files of such information aids in the protection of the records' confidentiality.

Paragraph (d)(5) of the interim rule mirrors § 60-741.42(c). This provision clarifies that nothing in this section relieves the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor to be disabled veterans or Vietnam-era veterans. The invitation to self-identify is not the only affirmative action requirement under VEVRAA. This provision merely helps to ensure that contractors are not confused about this important point. For example, as stated in current § 60-250.6(b), "[c]ontractors shall review their personnel processes to determine whether their present procedures assure careful, thorough and systematic consideration of the job qualifications of known disabled veteran applicants and Vietnam era veteran applicants for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available."

Paragraph (d)(6) provides that nothing in this section relieves the contractor from liability for discrimination under the Act. This provision is identical to language in the current VEVRAA regulation and to the language in § 60-741.42(d), and is merely organized into its own subparagraph.

The contractor may develop its own invitation for complying with § 60-250.5(d), although an acceptable form of such invitation is set forth in revised Appendix A to Part 60-250. This amended appendix is substantially similar to the current Appendix A, but incorporates a number of changes to the appendix to conform it to the requirements of revised § 60-250.5(d). For instance, amended Appendix A clarifies that the information submitted to the contractor will be used to assist it in placing the individual in an appropriate position and in making appropriate accommodations, and that the information will be used only in accordance with the Act and the regulations. New Appendix A also specifies that the contractor should incorporate into the invitation a brief summary of the relevant portion of its affirmative action program.

Regulatory Procedures

Executive Order 12866

This interim rule is issued in conformance with Executive Order 12866. This interim rule has been determined not to be significant for purposes of Executive Order 12866 and therefore need not be reviewed by OMB. This interim rule does not meet the criteria of Section 3(f)(1) of Executive Order 12866 and therefore the information listed in Section 6(a)(3)(C) of that Order is not required.

This conclusion is based on the fact that this interim rule does not substantively change the existing obligation of Federal contractors to apply a policy of nondiscrimination and affirmative action in their employment of qualified special disabled veterans and veterans of the Vietnam era. Although the rule generally conforms the existing Section 4212 regulation regarding the invitation to self-identify to the new Section 503 rule, it does not significantly alter the substance of the existing provisions.

Regulatory Flexibility Act

The interim rule will retain consistency, and avoid confusion and conflict, between the Section 4212 regulation requiring larger Government contractors to provide an invitation to self-identify and the parallel Section 503 regulation. Moreover, these two

regulations conform to the ADA nondiscrimination requirements applicable to private and State and local government employers with 15 or more employees. In view of this regulatory consistency and because the interim rule does not substantively change existing obligations for Federal contractors, we certify that the rule will not have a significant economic impact on a substantial number of small business entities. Therefore, under the Regulatory Flexibility Act, 5 U.S.C. 605(b), a regulatory flexibility analysis is not required.

Unfunded Mandates Reform Act

This interim rule does not include any Federal mandate that may result in the expenditure by State, local and tribal governments in the aggregate, or by the private sector, of \$100,000,000 or more in any one year.

Paperwork Reduction Act

The interim rule requires those contractors who, for affirmative action purposes, invite applicants and employees to identify themselves as covered disabled veterans or veterans of the Vietnam era to maintain a separate file on such applicants and employees. This recordkeeping provision is the same as that contained in the Section 503 final rule, 41 CFR § 60-741.42(b). Approximately 89,000 Federal service and supply contractors and 100,000 Federal construction contractors are subject to VEVRAA and Section 503.

OFCCP does not believe that this requirement will result in increased recordkeeping burdens for contractors. OFCCP believes that a number of contractors may already have maintained separate files on such applicants and employees in order to implement the VEVRAA confidentiality requirements. In addition, the ADA presently requires employers with 15 or more employees to maintain on separate forms and in separate medical files information obtained regarding the medical condition or history of applicants and to treat this information as confidential medical records (42 U.S.C. 12112(d)(3)(B); 29 CFR 1630.14(b)(1)). Furthermore, because the invitation to self-identify is only required by the interim rule to occur after a job offer has been made, and not to all applicants, there will be fewer records of self-identification being generated than in the past. Therefore, although the recordkeeping language in the interim rule is more expansive than that in the current VEVRAA regulations, OFCCP does not believe it will result in increased recordkeeping burdens.

As noted above, OFCCP believes that by issuing this interim rule to be effective at the same time as the Section 503 regulations, the covered contractors' paperwork requirements will be minimized because there will not be a need to have separate forms, notices and posters for inviting self-identification under VEVRAA and Section 503. Uniformity among the implementing regulations of VEVRAA, Section 503 and the ADA, will also minimize confusion and, therefore, help to ensure the greatest public benefit associated with these Federal programs.

It is also important to note that the interim rule retains a sample invitation in Appendix A to Part 60-250. Thus, the interim rule minimizes the burden on contractors of designing their own invitations, while preserving flexibility for those contractors who currently use, or decide to develop, different but otherwise effective and appropriate forms of invitation.

Information collection under the VEVRAA regulations, and under the Section 503 regulations, is covered by OMB control numbers 1215-0072 and 1215-0163. The interim rule's recordkeeping requirements have been submitted to OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501. OFCCP solicits comments concerning the interim rule's collection of information to: (i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (ii) evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of methodology and assumptions used; (iii) enhance the quality, utility and clarity of the information to be collected; and (iv) minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses. The new recordkeeping requirement in the interim rule is not effective until OFCCP displays a currently valid OMB control number. Upon receipt of that number, which OFCCP anticipates will take between 90 and 120 days, OFCCP will publish a document in the Federal Register.

Request for Public Comments

OFCCP requests public comment on the provisions of the interim rule. OFCCP invites written views from all interested parties, including public and

private disability organizations, veterans representatives, private and State and local government contractors with the Federal Government, Federal contracting agencies, and concerned individuals. OFCCP will consider the public comments in developing a final rule.

List of Subjects in 41 CFR Part 60-250

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Investigations, Reporting and recordkeeping requirements, Veterans.

Signed at Washington, D.C. this 12th day of April, 1996.

Robert B. Reich,
Secretary of Labor.
Bernard E. Anderson,
Assistant Secretary for Employment Standards.
Shirley J. Wilcher,
Deputy Assistant Secretary for Federal Contract Compliance.

For the reasons set forth above, 41 CFR Part 60-250 is amended as set forth below.

PART 60-250—AFFIRMATIVE ACTION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS FOR DISABLED VETERANS AND VETERANS OF THE VIETNAM ERA

1. The authority citation for Part 60-250 is revised to read as follows:

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; Executive Order 11758 (3 CFR, 1971-1975 Comp., p. 841).

2. Section 60-250.5 is amended by revising paragraph (d) to read as follows:

§ 60-250.5 Applicability of the affirmative action program requirement.

* * * * *

(d) *Invitation to self-identify.* (1) Except as provided in paragraphs (d) (2) and (3) of this section, the contractor shall, after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, invite the applicant to inform the contractor whether the applicant believes that he or she may be covered by the Act and wishes to benefit under the affirmative action program.

(2) The contractor may invite disabled veterans to self-identify prior to making a job offer only when:

(i) The invitation is made when the contractor actually is undertaking affirmative action for disabled veterans at the pre-offer stage; or

(ii) The invitation is made pursuant to a Federal, state or local law requiring affirmative action for disabled veterans.

(3) The contractor may invite veterans of the Vietnam era to self-identify prior to making a job offer only when:

(i) The invitation is made when the contractor actually is undertaking affirmative action for veterans of the Vietnam era at the pre-offer stage; or

(ii) The invitation is made pursuant to a Federal, state or local law requiring affirmative action for veterans of the Vietnam era.

(4) The invitation referenced in paragraphs (d)(1) through (3) of this section shall state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future. The invitation also shall summarize the relevant portions of the Act and the contractor's affirmative action program. Furthermore, the invitation shall state that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will not be used in a manner inconsistent with the Act. If an applicant so identifies himself or herself, the contractor should also seek the advice of the applicant regarding proper placement and appropriate accommodation, after a job offer has been extended. The contractor also may make such inquiries to the extent they are consistent with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, (e.g., in the context of asking applicants to describe or demonstrate how they would perform the job). The contractor shall maintain a separate file on persons who have self-identified and provide that file to OFCCP upon request. This information may be used only in accordance with this part. (An acceptable form for such an invitation is set forth in Appendix A of this part. Because a contractor usually may not seek advice from an applicant regarding placement and accommodation until after a job offer has been extended, the invitation set forth in Appendix A of this part contains instructions regarding modifications to be made if it is used at the pre-offer stage.)

(5) Nothing in this section shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor be disabled veterans or veterans of the Vietnam era.

(6) Nothing in this section shall relieve the contractor from liability for discrimination under the Act.

3. Appendix A to Part 60-250 is revised to read as follows:

Appendix A to Part 60-250—Sample Invitation to Self-Identify

Note: When the invitation to self-identify is being extended prior to an offer of employment, as is permitted in limited circumstances under § 60-250.5(d)(2) and (3), paragraph 2(ii) of this appendix, relating to identification of reasonable accommodations, should be omitted. This will avoid a conflict with the EEOC's Americans with Disabilities Act (ADA) Guidance, which in most cases precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

[Sample Invitation to Self-Identify]

1. This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, which requires Government contractors to take affirmative action to employ and advance in employment qualified disabled veterans and veterans of the Vietnam era covered by the Act. If you are a disabled veteran or veteran of the Vietnam era covered by the Act and would like to be considered under the affirmative action program, please tell us. You may inform us of your desire to benefit under the program at this time and/or at any time in the future. This information will assist us in placing you in an appropriate position and in making accommodations for your disability if you are a disabled veteran. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.] Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. Information you submit will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if the condition might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by OFCCP or the Americans with Disabilities Act, may be informed. The information provided will be used only in ways that are not inconsistent with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

2. If you are a disabled veteran or a veteran of the Vietnam era covered by the Act, we would like to include you under the affirmative action program. If you are a disabled veteran it would assist us if you tell us about (i) any special methods, skills, and procedures which qualify you for positions that you might not otherwise be able to do because of your disability so that you will be considered for any positions of that kind, and (ii) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, provision of personal assistance services or other accommodations.

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