



Construction Contractors Subject To New OFCCP Rules

Insights

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Because of a recent court decision, federal construction contractors must comply with several new regulations that many consider burdensome. An effort to exempt construction contractors from some of the new regulations was tossed out by a federal judge. *Associated Builders and Contractors, Inc. v. Patricia A. Shiu, et al.*

Background

Construction contractors with federal contracts or subcontracts have operated for years under somewhat different affirmative-action regulatory-compliance requirements than supply and service contractors. Recently, however, new regulations from the Office of Federal Contract Compliance Programs (OFCCP) applying to disabled and veteran applicants and employees were ruled to apply equally to construction contractors. The regulations took effect March 24, 2014.

Consequently, construction contractors must now gather and track additional information, and begin the process at the applicant rather than new hire stage, in order to document efforts to meet the 7% utilization goal for Individuals with Disabilities (IWDs). The new OFCCP regulations implementing the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), establishing hiring benchmarks (currently 7.2%) and data collection and analysis for various categories of protected veterans will also apply to construction contractors as of March 24, 2014. The new regulations addressing affirmative action obligations for veterans were not challenged in ABC's lawsuit. However, ABC sought clarification by the courts, contending that some of the new disability regulations should not apply to them. They lost.

The ABC's Lawsuit Against the OFCCP

In November of 2013, the Associated Builders and Contractors (ABC) filed a complaint for declaratory and injunctive relief in the federal district court for the District of Columbia requesting that the court find certain provisions of the new affirmative-action regulations related to disabled individuals unlawful.

ABC also requested the court to vacate and enjoin implementation of the data collection and utilization-analysis provisions of the new rules, to the extent they would be applicable to government contractors in the construction industry. The rules were issued on September 24, 2013. The court denied ABC's motion for summary judgment, and dismissed its complaint on March 21, 2014, just three days before the new regulations went into effect.

The new rules expand and broaden the affirmative-action obligations of federal government contractors, particularly for those in the construction industry, which until now had been treated differently because of what ABC described as “a long standing distinction between construction and other industries.” The affirmative-action rules and regulations previously in effect had exempted the construction industry from some types of data collection and analyses required of non-construction supply and service contractors because construction contractors employ a uniquely fluid and temporary workforce.

ABC’s Argument – The Construction Industry Is Different

In challenging the data-collection and utilization-analysis provisions of the new rules, ABC alleged that such obligations for contractors in the construction industry were wasteful and burdensome, and would not increase work opportunities for disabled individuals in the construction industry. ABC also alleged that small businesses, with fewer resources available to address compliance issues, would be especially hard hit; and that there was no reason to reverse the long-standing precedent to exempt construction contractors without an adequate explanation from the agency.

ABC also argued there was no evidence in the administrative record that contractors were currently failing to meet their obligations under Section 503 of the Rehabilitation Act, that the 7% hiring goal was an arbitrary goal, especially for the construction industry, and that there was no statutory authority for OFCCP to impose such burdensome data-collection and analysis requirements which didn’t account for the construction industry’s unique hiring and employment practices.

The Court’s Ruling – OFCCP Wins On Every Point

The court didn’t buy any of ABC’s arguments. It found that OFCCP clearly had rulemaking authority, that its interpretation of the statute was permissible, that the term “affirmative action” encompasses the use of benchmarks to gauge progress as well as tools to gather and analyze data to track such progress, and that the rule was not arbitrary.

The court also found that because construction contractors already gather and utilize similar data for minorities and women under E.O. 11246, it was reasonable for OFCCP to discredit ABC’s argument suggesting an inability to comply with the rule because of the unique circumstances of the construction industry.

The court supported OFCCP’s rejection of arguments that it would be impossible for construction contractors to find enough qualified individuals with disabilities because construction work is uniquely hazardous and physical compared to other industries. The court credited OFCCP’s position that ABC’s argument was “fundamentally based on the flawed notion that individuals with disabilities as a group are incapable of working in these jobs.”

The court noted that many disabilities would have little effect on employment by construction contractors, citing as an example that a person with auditory processing disorder or a stutter would typically not need an accommodation to work as a carpenter or machine operator respectively; all of which led to a conclusion that OFCCP was justified in refusing to exempt construction contractors

which led to a conclusion that OFCCP was justified in refusing to exempt construction contractors. The court also found that OFCCP's methodology for reaching the 7% utilization goal for IWDs was reasonable, and that the new rules would not impose a significant economic burden on businesses.

Based on the court's ruling, all provisions challenged by ABC on behalf of construction contractors became effective on March 24, 2014, along with all other provisions for all other government contractors.

What Must Construction Contractors Do To Comply?

There are some contract clause and language revisions, and some new posting requirements, which are effective immediately. Additionally, beginning at the time of a contractor's next annual AAP review after March 24, 2014, the regulations related to IWDs require federal contractors and subcontractors (including construction contractors) to track disability status using the OFCCP's mandated form. If you fall into this category you must also:

1. Ask applicants at the pre-offer stage to voluntarily self-identify if they have a disability;
2. Ask new hires the same question;
3. Ask your workforce within one year of March 24, 2014 the same question; and
4. Ask your workforce again every 5 years, with at least one interim reminder.

The regulations related to protected veterans are discussed in the Appendix of the federal regulations, but there is no OFCCP-mandated form. The VEVRAA regulations require the employer to:

1. Ask applicants at the pre-hire stage a yes or no question about whether they wish to identify as a protected veteran using the OFCCP-required veteran category definitions;
2. Ask new hires to identify all of the specific categories of veteran to which they believe they belong.

Finally, contractors must annually review their efforts and consider whether they are meeting the 7.2% hiring benchmark for veterans and the 7% utilization goal for IWDs, and to consider and adopt corrective measures if they are not. All records related to these regulations must be retained for three years.

For more information contact your regular Fisher Phillips attorney.

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