January 17, 2012

Debra A. Carr, Director  
Division of Policy, Planning and Program Development  
Office of Federal Contract Compliance Programs  
200 Constitution Ave NW, Room C-3325  
Washington, DC 20210

RE: NPRM 41 CFR Part 60-741; RIN Number 1250 – AA02

Dear Director Carr:

We are a consulting firm, actively involved with government contractor clients. We assist them with preparing and annually updating their affirmative action plans (AAP), assessing their employee movement data and responding to compliance evaluation demands of the Office of Federal Contract Compliance Programs (OFCCP). Our clients range in size from under 100 employees to several thousand employees.

We are submitting this response to OFCCP’s request for comments about its proposed notice of rule making on Section 503 of the Rehabilitation Act of 1973. In doing so, we wish to share some perspective of contractors we know and have worked with over the past 25 years.

To begin our comments it is only appropriate to say we agree with OFCCP’s wish to bring more disabled workers into the American workplace. Contractors also agree with that ultimate program destination. Our response will comment on OFCCP’s specific methods for getting to that destination and what they will cost contractors to comply.

We wish to commend OFCCP for its effective adaptation of provisions made in the Americans with Disabilities Act Amendments Act of 2008 (ADAAA). Since the ADAAA modified Section 503 of the Rehabilitation Act, adopting those changes in this proposal is both appropriate and timely.
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**Opposition #1:** We oppose OFCCP’s proposal that the newly created Pre-Offer Invitation to Self Identify be “voluntary” for applicants. We also oppose the “voluntary” self-identification for employees as presented in this proposal.

**Concerns Regarding Opposition #1:**
- OFCCP proposes that contractors give an invitation to all applicants using a form specified by OFCCP. The agency also proposes adding a mandatory annual employee survey to the current voluntary identification of new hires.
- Tracking applicant and employee disability demographics will only be accurate if applicant and employee identification of disability status is required. Holding contractors accountable for results based on under-reported employee identification is foolish.
- Make no mistake…voluntary identification produces inaccurate numbers.

**Suggestions Regarding Opposition #1:**
- We suggest that it is not possible to set goals/quotas disabled individuals until data accuracy requirements are met by mandating self-identification of job applicants and employees.
- We recommend that adoption of any goals/quota (7% for example) be predicated upon mandatory self-identification for applicants and employees.

**Opposition #2:** We oppose OFCCP’s proposal to set a quota for placement of disabled individuals. Any required objective or goal, which incurs a penalty if it isn’t met, constitutes a quota.

**Concerns Regarding Opposition #2:**
OFCCP has said, the “primary indicator of effectiveness is whether qualified individuals with disabilities have been hired.” OFCCP proposes that corrective measures will be taken with any contractor failing to meet the 7% goal. That means a 7% goal is in reality a quota.\(^1\) OFCCP proposes a percentage based on national numbers. Anyone who works with employment demographics understands that distribution of any group in the workforce will vary based on geography. So, some affirmative action plan establishments may have access to specifically qualified talent that would be in the disabled population while others in different geographies will not. Peaks and valleys in the geographical demographics are leveled out when using national numbers. OFCCP has proposed applying the 7% goal/quota to each individual job group within each AAP establishment. We have serious concerns about the loss of accuracy when the 7% quota is assigned to job group occupational categories. There may be 7% or more qualified candidates for clerical jobs, but not for professional or managerial jobs. Those

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\(^1\) Quota is defined by Miriam Webster.com as “a fixed number or percentage of minority group members or women needed to meet the requirements of affirmative action.” [http://www.merriam-webster.com/dictionary/quota](http://www.merriam-webster.com/dictionary/quota)

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categorical demographics will fluctuate even more wildly than overall geographic numbers for the civilian workforce.

Applying a set placement rate goal to an establishment over all is problematic without accurate applicant and employee data. Extending that goal to job groups, job titles, or any other establishment sub-division will be problematic. The reason has to do with the voluntary nature of the self-identification by both job applicants and employees. Unless OFCCP makes self-identification mandatory, contractors will not have reliable data with which to determine if they have met the goal. If OFCCP is truly desirous of improving the employment of individuals with disabilities, it will do all in its power to make data gathering and analysis as accurate as it should be. Anything less will keep addressing the problem with half-hearted and insincere regulatory commitment. If contractors are to be held accountable for attaining results, they have a right to access accurate applicant and employee data with which to compute those utilization results.

OFCCP requested input about the idea of targeting a goal of 2% placement rate for specific severe disabilities. Trying to “drill down” to specific disability categories in setting quotas will be even more frustrating for both the agency and contractors. Without accuracy for comparison of applicants and employees to the overall 7% quota, there is no possibility of success for quotas applied to specific disability groupings.

Suggestions Regarding Opposition #2:
- We suggest that it is not possible to set quotas for individual disability categories until data accuracy requirements are met by mandating self-identification by job applicants and employees.
- Unless and until self-identification is made mandatory, the idea of measuring utilization of disabled workers in the incumbent group should be abandoned.
- Targeting a specific percentage representation of individual types of disability will be equally as problematic as having an overall goal of representation in the contractor’s incumbent employee group. We suggest that any idea of targeting 2% representation for certain specific disabilities be abandoned until the self-identification process becomes mandatory for applicants and employees.

Opposition #3: We oppose OFCCP’s insistence that contractors provide preferential treatment to disabled individuals through hiring, promotion or other employment action.

Concerns Regarding Opposition #3:
The idea of giving disabled workers priority when making employment selections is truly a worthy one. On the practical level of workability, however, it falls to the bottom of the list. Since 1964, employers in this country have been struggling to get managers and supervisors to recognize and operate according to the rule of “non-discrimination.” We
have told people for decades that preferential treatment, quotas, and set-asides are not legal and should be rooted out of the employment decision making process. Now, OFCCP comes along and insists that disabled people be given preferential treatment, that there be a quota for selection of disabled workers and that managers and supervisors be trained about the “goodness” of that objective.

OFCCP will be encouraging managers and supervisors to behave with bias in their decision making process. Admittedly, the idea is good. It’s the application of it that can’t possibly succeed. Most contractors’ managers and supervisors are operations people. They focus on operational issues. Rules surrounding Human Resource management issues are something they read about in a manual or training guide. If changing human behavior were easy, it might be possible to send OFCCP’s mixed message about parsing the type of condition under which managers and supervisors are permitted to operate with bias.

Since some contractors are still having difficulty getting managers and supervisors to recognize the need for non-discrimination in their hiring, promotion and termination decisions, it is folly to suggest they adopt such practices toward a specific portion of the population.

Providing preferential treatment for the disabled will likely cause disparate impact against other protected groups. OFCCP will eventually point to contractors as causing disparate impact while holding the same contractors responsible for giving preference to the disabled. OFCCP will essentially be placing contractors in another no-win situation.

Any requirement for preferential treatment will validate those who say affirmative action programs are unfair preferential hiring programs. Any progress made in equal employment over the past 40+ years could be eliminated with the implementation of this requirement.

**Suggestions Regarding Opposition #3:**
Abandon any idea of preferential treatment, even though the worthiness of the disabled community may warrant it. Introducing bias-based decision making into the workplace will lead to extensive discrimination against other protected groups placing contractors in an untenable position related to legal requirements.

**Opposition #4:** We oppose OFCCP’s idea of a new annual report calling for submission of demographic data on disability distributions within EEO-1 categories.

**Concerns Regarding Opposition #4:**
Any reporting of representation within EEO-1 categories will depend entirely on mandatory identification of incumbents with disabilities in order to establish any validity.
and usefulness. Inaccurate data can’t be of much use to OFCCP or any other government agency. The VETS-100/VETS-100A is a good example of a report without accuracy because it is based on voluntary identification by employees.

And, overlaying a new report on top of all the other recordkeeping and reporting required by these regulatory proposals will bring additional cost burden to every contractor with no stated benefit when OFCCP receives the report. So, we don’t know what will be done with the data, and we don’t have accurate data without mandatory identification of employee disability status.

Suggestions Regarding Opposition #4:
Abandon the notion of a new report based on EEO-1 categories.

Opposition #5: We oppose OFCCP’s assumption that every federal contractor has a sophisticated electronic data base with all possible data fields represented and instant reporting capabilities.

Concerns Regarding Opposition #5:

Any federal contractor that has a basic Human Resource Information System (HRIS), populated carefully with accurate information, will be able to print reports that offer information about years of service, birthdays, race, gender, current job title and current compensation. Usually, anything beyond those basic fields of data will be gathered and analyzed manually. These basic systems do not offer any historical information retrieval. They only represent data as it currently exists. Every new data entry overwrites the last. Larger contractors often have more sophisticated HRIS programs that can provide more flexible reporting and retain a depth of historical information. Only with that type of data depth can a contractor perform an analysis of trends or reflect on patterns of employee job movement according to characteristics such as race or sex. These contractors are at the top of the size chart. Without such dimensional data bases, and the programs needed to manipulate them, any response to OFCCP’s data demands must be met by manual search of paper records and compilation of data using pencil and paper. The very basic HRIS programs cost from $3,000 to $5,000. Dimensional HRIS programs will exceed $50,000 to $60,000. Large employers have invested millions of dollars in software. OFCCP does not seem to grasp the reality of data tracking mechanisms.

Even the most sophisticated contractors find it is necessary to “re-program” the hard-wired construction of their systems whenever new reporting requirements are thrust upon them. That requires hours of programmer time. Contractors at the small end of the employee-size spectrum have no HRIS at all. When OFCCP demands electronic files, it fails to recognize that producing those electronic files may not be possible for a great many contractors.
Suggestions Regarding Opposition #5:
OFCCP should assess each of its proposals with the presumption that many contractors will have to produce reports through manual compilation methods. Cost assessments should be made considering the manual manipulation of employee information for those contractors. And, with the grasp OFCCP has on its contractor population, it must know what percentage of contractors fall into that category.

Opposition #6: We oppose OFCCP’s estimate of contractor cost burden. It has no basis in reality.

Concerns Regarding Opposition #6:
**OFCCP’s Estimate of Cost:** One-time cost per contractor of $172 and annual costs per contractor of $301. A total estimated cost per contractor of $473 is not believable.

**Request for Self-Identification:**
- Invitation to all applicants using a form specified by OFCCP.
  - The applicant invitation may be different for Internet applicants than for other applicants. OFCCP has been silent on these differences.
  - Roughly 20% to 25% of all applicants are processed manually, not electronically. That amounts to an estimated need for 20 to 60 hours per small contractor per establishment each year.
  - Printing expense, time in handling distribution and collection, then compilation of responses will add more time. We estimate $250 per establishment per year.
  - We estimate small contractors (50 to 500 employees) will spend 25 to 40 hours per year. Larger contractors will be spending proportionally more time.
  - Due to privacy issues, an entirely new data base will be required to track applicant responses to the invitation. This is a new requirement. Data tracking of disabled employees and applicants has not been required until now, with the exception of disabled veterans, a very small percentage of the total disabled group. Existing applicant data bases cannot be used because they are not permitted to link applicant name and other personal information to disability information. The new data base would have to be secured using procedures for maintaining medical information. Expenses involve creating a new data base and managing the input, maintenance, security and reporting from that data base. Cost estimate for building the data base and managing it range from $10,000 to $50,000 per contractor per establishment. (171,275

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*Health Insurance Portability and Accountability Act of 1996 (HIPAA)*

AAP establishments will have to invest $1.71 Billion to $8.56 Billion on this requirement alone.}

- Invitation to all new hires.
  - Handling will be restricted due to medical record-nature of the information.
  - Printing, distribution, tracking responses, following up to be sure all invitations were returned with a valid response, compiling and reporting on that compilation.
  - There is no new cost associated with this invitation because invitations to new hires are made under current requirements.

- Annual Survey and Invitation to All Employees.
  - Handling will be restricted due to the medical record-nature of the information.
  - Printing, distribution, tracking responses, following up to be sure all invitations were returned with a valid response, compiling and reporting on that compilation.
  - We estimate small contractors (50-500 employees) will spend between 20 and 40 hours per year per establishment.

- Our Total Estimate of Contractor Burden for Invitations to Self-Identify
  - Applicant Tracking = 45-100 hours plus cost of new data tracking system of $10,000 to $50,000 per establishment.
  - Employee Survey and Invitations = 20-40 hours plus cost of printing and distribution of $250.
  - Total hours = 65 to 140/establishment/year. ($75/hour = $4,875 to $10,500^4)
  - Total out-of-pocket costs = $10,250 to $50,250 per establishment.
  - Total cost per establishment = $15,125 to $60,750
  - Cost for 171,275 establishments = $2.59 Billion to $10.40 Billion

**Linkage Agreements**

- Establishing Linkage Agreements: This proposal would require contractors to establish linkage agreements specific to each establishment with each of the following types of organizations.
  - State Vocational Rehabilitation Agency (SVRA) serving that establishment.
  - State One-Stop Employment Center serving that establishment.
  - We estimate 2 hours to identify appropriate contacts at each of the three agencies and initiate a relationship. (3 organizations X 2 hours each = 6 hours).

- Managing and Maintaining Linkage Agreements

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^4 OFCCP’s has chosen to use compensation values for managers and clerical personnel that are far below those reflected in the 2011 salary survey results for HR as published in December 2011 issue of HR Magazine. OFCCP has also ignored the cost of benefit loading and the impact it has on total contractor compensation costs.
We estimate 4 hours per year to “stay in touch” and discuss results of referrals from linkage agreement agencies.

We estimate 18 hours per year to provide linkage organizations with on-site tours and detailed information about contractor job content, physical and mental requirements.

We estimate 24 hours per year to analyze and discuss with linkage organizations how job accommodations can be made when they send job candidates for consideration.

**Our Total Estimate of Contractor Burden for Linkage Agreements**

- Total hours = 52 hours/contractor/establishment/year.
- Total cost per establishment = $3,900/year.
- Cost for 171,275 establishments = $668 Million.

**New Annual Report and Written Applicant Feedback**

- **New Report to OFCCP Each Year By EEO-1 Category**
  - Compilation of snapshot data of disabled employees = 5 to 40 hours/year.
  - Cost of new software or data base = $10,000 to $50,000.

- **Written Feedback for every Rejected Applicant with a Disability**
  - Under ADAAA definitions nearly everyone in the workforce has some disability. Assuming half of job applicants can be enticed into revealing their status through an invitation to self-identify, the number of written feedback letters will be in the range of 250 to 10,000 depending on the size of the establishment and the level of employment activity. Each letter will require a management person to spend an average of 30 minutes reviewing the employment decision and preparing the letter’s content. That represents 125 to 5,000 hours per establishment per year.
  - There will be upset and perhaps discrimination complaints generated if some applicants are rejected and don’t receive written feedback because they did not identify themselves as disabled.

- **Our Total Estimate of Contractor Burden for Annual Report and Written Applicant Feedback**
  - Total hours = 130 to 5,040 per year per contractor.
  - Total cost per establishment = $9,750 to $378,000/year.
  - Cost for 171,275 establishments = $1.67 Billion to $64.7 Billion

**Management and Employee Training**

- While management training is conducted currently, there will be an incremental cost added to the program for describing the changes in definitions of disability, persons involved, recordkeeping requirements, and policy. Any change in policy that gives preferential treatment to persons with disabilities will require some serious training time because it is a strict departure from current regulatory requirements. It will be
necessary to address the other protected groups and explain why they are not receiving preferential treatment. Training time per manager will be an estimated 1 hour.

- Materials and Instructor preparation will require from 1 to 5 hours per establishment, depending on the number of instructors who will be presenting the program.
- **Our Total Estimate of Contractor Burden for Management and Employee Training**
  - Total preparation and delivery increase in training costs = $75 to $375/establishment/year.
  - Total additional management time for training participants = 1 hour/manager/establishment/year with 5 to 100 managers per establishment. Cost estimated to be ($75.00^5 \times 5 = \$375) to ($75.00 \times 100 = \$7,500)/establishment/year.
  - Cost for 171,275 establishments = $77.1 Million to $1.35 Billion

**Our Total Estimated Contractor Expenses for Changes in 503 Regulations**

- From $29,150 to $450,150 for each establishment.
- From $4.99 Billion to $77.10 Billion for all 171,275 establishments.

Suggestions Regarding Opposition #6: Re-examine the actual costs contractors can be expected to bear by the requirements OFCCP is overlaying on existing burden. Publish those more honest and realistic estimates for public comment before proceeding with this proposal.

**Opposition #7:** We oppose OFCCP’s new five-year document retention requirement.

Concerns Regarding Opposition #7:
Establishing a recordkeeping requirement for a 5-year period has no foundation in OFCCP administrative procedures. All other retention requirements stop at 2 years. The 503 regulations should be consistent with Veterans affirmative action regulations and requirements for Minorities and Women affirmative action programs.

Suggestions Regarding Opposition #7: Abandon the idea of a five-year record retention requirement and rely on the existing requirement of a one-year or two-year retention period depending upon the size of the contractor’s organization.

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^5 $75.00 per hour (benefit loaded) cost of management time as a national average.

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Opposition #8: We disagree with OFCCP’s projection that recruiting from current source organizations will provide qualified disabled candidates for each type of job content when they are needed.

Concerns Regarding Opposition #8:
Identifying specifically qualified individuals with a disability is difficult. Advocacy groups in the disabled community are unable to specifically provide qualified engineers, or qualified executives, or qualified technicians in response to job opening announcements. They don’t organize people in that way. A national job board is needed where disabled individuals could register with their resume or list of qualifications. There seem to be job boards for every other type of group, why not for disabled workers? Contractors could use it to identify qualified candidates with specific background they need in any given job opening. OFCCP could seek funding for such an effort, or work with the private sector to create such a tool that would help contractors and job candidates. We expect such a job board could bring serious improvement to the actual disability hiring efforts.

Suggestions Regarding Opposition #8: Establish a federally sponsored job board for disabled workers that would serve contractors through identification of qualified candidates for all job requirements.

Thank you for the opportunity to comment on this proposal.

Sincerely,

William H. Truesdell, SPHR