


Labor & Employment **Inner Workings**

## Agenda for Today

- Brief historical backdrop on new Regs
- Overview of the new Regs and identification of compliance deadlines
- Components of a compliant Vets/Disabled Plan
- Highlight review of the new requirements
- Timeline review for implementation – final thoughts

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## HISTORICAL BACKGROUND

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## Historical Background

- **Reminder:** EO11246 (\$10k/\$50k); Section 503 (\$10k/\$50k); and VEVRAA (\$100k/\$100k (since Dec. 1, 2003))
- The Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA") and Section 503 of the Rehabilitation Act ("Section 503") regulations have been in place and unchanged since the 1970's.
- The Obama administration has been actively attempting to advance employment opportunities for veterans and individuals with disabilities ("IWDs").
- The OFCCP followed suit and, in late 2011, issued proposed regulations regarding veterans and IWDs.
- The proposed regulations contained significant obligations as well as "benchmark" requirements for employing veterans and IWDs.

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## Historical Background

- Employers voiced strong opposition to the compliance burdens and costs associated with the proposed rules.
- OFCCP "listened" and modified the proposed rules, attempting to reduce some of the costs to employers, but maintaining benchmarking requirements.
- The "final rules" were announced on August 27, 2013, and published in the Federal Register on September 24, 2013.
  - <https://federalregister.gov/a/2013-21227>
  - <https://federalregister.gov/a/2013-21228>
- The rules carry with them an effective date of March 24, 2014, with a significant exception: Subpart C

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## NEW SECTION 503/VEVRAA REGULATIONS & COMPLIANCE DEADLINES

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## New Section 503/VEVRAA Regulations

- The final regulations are divided into 5 subparts:
  1. **Subpart A:** Preliminary Matters, Equal Opportunity Clause
  2. **Subpart B:** Discrimination Prohibition
  3. **Subpart C:** Affirmative Action Program
  4. **Subpart D:** General Enforcement and Complaint Procedures
  5. **Subpart E:** Ancillary Matters - Recordkeeping

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### New Section 503/VEVRAA Regulations

- **Subpart A** contains:
  - Description of purpose and applicability
  - Definitions
    - **NEW:** Vets/disability definitions that broaden coverage
  - Coverage and exemptions from coverage
  - Equal opportunity clause
    - **NEW:** Required language that must be included in **BOLD font** in all covered contracts, subcontracts, and POs
    - **See §§ 41 CFR 60-300.5(d), 60-741.5(d) for language**

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### New Section 503/VEVRAA Regulations

- **Subpart A (con't):**
  - Mandatory *listing* of job openings w/ state job bank or employment service delivery systems (“ESDS”)
    - State job bank or ESDS (e.g., American Job Exchange) *posts* the opening
    - Exceptions for non-U.S., executive, or internal positions or positions lasting 3 days or less
    - Job listing should be made in the state where the job opening occurs
    - Can use a third-party to satisfy job *listing* requirement BUT will still ultimately be responsible for ensuring that the appropriate information is provided

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## Labor & Employment Inner Workings

### New Section 503/VEVRAA Regulations

- **Subpart A (con't):**
  - Mandatory *listing* of job openings w/ state job bank or employment service delivery systems (“ESDS”) (con't)
    - **NEW:** With the first listing, must provide certain background information. This information must be updated if there are any changes
    - **NEW:** Background information that must be provided:
      - Identification as a federal contractor/subcontractor
      - Desire for priority referrals of protected veterans
      - Identification of each hiring location within the state, and contact information for an official at each location able to answer questions about the listings
      - Contact information for any external job search organizations used to source candidates for jobs (**See §§ 41 CFR 60-300.5(a)**)
    - **NEW:** Listings must be in ESDS accepted format

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### New Section 503/VEVRAA Regulations

- **Subpart B contains:**
  - Description of covered employment activities
  - **NOTE:** Online application systems must be accessible to IWDs or reasonable accommodation processes must be implemented
  - Prohibited acts of discrimination (defining discrimination)
  - Information regarding the direct threat defense; medical examinations and inquiries; compliance with the Drug-Free Workplace Act; and health insurance, life insurance and other benefits

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## New Section 503/VEVRAA Regulations

- **Subpart C** contains:
  - Requirement of Affirmative Action Program (AAP) for contractors with 50 or more employees and a contract of \$50,000 or more (Section 503) or \$100,000 or more (VEVRAA)
  - Requirement that written AAP (absent certain data metrics) be made available to employees or applicants who request it and posting of the location and hours it may be obtained
  - Requirement of an affirmative action policy

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## New Section 503/VEVRAA Regulations

- **Subpart C** (con't):
  - Requirements regarding invitations to self-identify
    - **NEW:** Pre-offer invitation to applicants to self-identify disability and protected veteran status
    - **NEW:** Post-employment invitation to self-identify disability status during first year, and every 5 years thereafter, with intervening reminders about the option to self-identify
    - **NEW:** Required self-id forms, including specific required forms for self-identification of disability status
    - **NEW:** Requires separate file for maintenance of the disability self-ID form

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## New Section 503/VEVRAA Regulations

- **Subpart C (con't):**
  - Required contents of vets/disabled AAP
    - **NEW:** Established a hiring benchmark of 8% (total workforce) for protected veterans and a utilization goal of 7% (each job group/entire workforce) for individuals with disabilities
    - **NEW:** Requires data collection on all job openings and jobs filled, vet/disabled applicants, vet/disabled hires, and total applicant/hires
    - **NEW:** Requires a documented self-assessment of the effectiveness of all good-faith outreach and recruitment efforts

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## New Section 503/VEVRAA Regulations

- **Subpart C (con't):**
  - Required contents of vets/disabled AAP (con't)
    - **NEW:** Requires contractors to identify alternative good faith efforts to be made if the “totality” of current efforts are not effective
  - Reasonable accommodation of disability provisions
    - **NEW:** Requirement to inquire whether performance problems of persons with known disabilities are related to the disability and whether the employee needs an accommodation (requires the implementation of the ADA interactive process)

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### New Section 503/VEVRAA Regulations

- **Subpart C (con't):**
  - Requirements regarding notice of AAP
    - **NEW:** Required written notice to subcontractors and vendors of company AA policy and requesting appropriate action on their part
    - **NEW:** AA Policy statement must reflect support of Company's AAP from the top U.S. executive for the organization
    - **NEW:** Requires notice to remote employees of availability of AAP
  - Required review of personnel processes
  - Periodic review of physical and mental qualifications for jobs

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### New Section 503/VEVRAA Regulations

- **Subpart D contains:**
  - Compliance evaluations
    - **NEW:** requires, as a condition of award of large contracts (\$10MM or more), a possible pre-award compliance review (including an subs with contracts of \$10MM or more) unless OFCCP had conducted a review within prior 2 years
  - Enforcement and complaint procedures
    - Description of compliance evaluation process, complaint procedures, conciliation agreements, show cause notices, enforcement proceedings, available sanctions and penalties for noncompliance
  - Non-retaliation provisions

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## New Section 503/VEVRAA Regulations

- **Subpart E** contains:
  - Recordkeeping requirements
    - Personnel or employment records made or kept by the contractor must be retained for 2 years (or 1 year for smaller employers or contracts)
    - **NEW:** 3-year recordkeeping requirement for: data regarding job openings/filled, vet/disabled applicants, vet/disabled hires, all applicants/hires; the self-assessment associated with all good faith outreach and efforts; and factors used in setting benchmark if alternative benchmark approach is used
  - Description of OFCCP's access to records and responsibilities of the ESDSs

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## Compliance Deadlines

- Subpart structure is important because the deadline for compliance for existing federal contractors depends on which subpart a requirement falls within:
  - Deadline for compliance with the requirements of Subparts A, B, D, and E is **March 24, 2014**.
  - Deadline for compliance with Subpart C (which is the “meat” of the new regulations) depends.

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## Compliance Deadlines

- Subpart C Compliance Deadline:
  - The final rules become effective March 24, 2014, but:
    - At the time the rules were published, the OFCCP exercised its *regulatory* discretion to delay compliance with Subpart C's affirmative action program ("AAP") requirements (§§ 41 CFR 60-300.44, 60-741.44) until the contractor's pre-March 24, 2014 AAP expired.
    - On December 17, 2013, the OFCCP announced that it would exercise its *prosecutorial* discretion to delay compliance with **all** of Subpart C's requirements (not just the AAP requirements) until the contractor's pre-March 24, 2014 expired.
    - On January 12, 2014, the OFCCP clarified that the latest delay of Subpart C's requirements applied only to the "new" requirements in Subpart C.


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## Compliance Deadlines

- Subpart C Compliance Deadline (con't):
  - So, the deadline for compliance with any "new" Subpart C requirements is the date on which the contractor's pre-March 24, 2014 expires.
    - e.g., for contractors with a January 1 AAP start date, the deadline to comply with "new" Subpart C is January 1, 2015.
  - But contractors must comply with the "old" Subpart C rules until they are required to comply with the "new" Subpart C rules.
    - Important to know what is "new" and "old" in Subpart C


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## Compliance Deadlines

- Subpart C Compliance Deadline (con't):
  - On January 16, 2014, the OFCCP announced that it was further exercising its *prosecutorial* discretion to not find contractors' "transition AAP" (*i.e.*, the first AAP prepared after March 24, 2014) out of compliance, **IF** the contractor included the following information in the "transition AAP":
    1. What compliance obligations it had not yet accomplished; and
    2. What efforts it was making to meet those compliance obligations going forward.


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## Compliance Deadlines

- Other Compliance Deadline Issues:
  - Compliance is required only at the time a covered transaction occurs.
    - Ex. 1: New EEO clause language (Subpart A) must be included in covered contracts/subcontracts at the time the contract is newly entered into, modified, renewed, or extended; not required to go back and include the language in currently existing contracts
    - Ex. 2: New self-id information (Subpart C) must be solicited at the time of the first opening that occurs after the start date of contractor's transition AAP
      - For contractors with a January 1 AAP start date, new self-id forms must be used and information must be solicited for the first job opening that occurs on or after January 1, 2015.

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## Compliance Deadlines

- Other Compliance Deadline Issues:
  - Contractors may choose to comply with the new regulations earlier than March 24, 2014, except for:
    1. Pre-offer invitation to self-identify disability status; and
    2. Post-employment invitations to self-identify disability status.
      - These include the first year invitation, five-year interval invitation, and intervening reminder.
  - This is due to the ADA's current prohibitions on pre-offer disability inquiries and post-employment disability inquiries.

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## Compliance Deadlines

- Other Compliance Deadline Issues:
  - There may be good reasons to delay implementation until compliance is required (though your preparations should not be delayed)
    - OFCCP has clarified expectations several times already
    - Additional forms or recommended language may yet be published
  - Also, may want to consider a change in AAP year if you want/need to delay compliance
    - Contractors may unilaterally change their plan year with no notice to the OFCCP
    - Can also have different plan years for minority/female v. vets/disabled plans

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## Compliance Deadlines

- Other Compliance Deadline Issues:
  - Changing a 2014 plan year from June 1 to March 1 would result in the following AAP compliance/enforcement periods:
    - March 1, 2014 – February 28, 2015 = “old” AAP (no new requirements apply)
    - March 1, 2015 – February 28, 2016 = “transition” AAP (safe harbor “transition AAP” requirements apply)
    - March 1, 2016 – February 28, 2017 = first AAP for which the OFCCP will require the contractor to comply with all new Subpart C requirements for AAPs
  - OFCCP acknowledges that change will not be “overnight.”

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## NEW VETERANS/INDIVIDUALS WITH DISABILITIES AFFIRMATIVE ACTION PLAN REQUIREMENTS

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## Components of Vets/Disabled AAP

1. Policy Statement
2. Review of Personnel Processes
3. Physical and Mental Qualifications
4. Reasonable Accommodation
5. Anti-Harassment Procedures
6. External Dissemination of Policy, Outreach, and Positive Recruitment

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## Components of Vets/Disabled AAP

7. Internal Dissemination of Policy
8. Audit and Reporting System
9. Responsibility for Implementation
10. Affirmative Action Training
11. Data Collection and Analysis
12. Benchmarks for Hiring

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## Components of Vets/Disabled AAP

- **Policy Statement (41 CFR §§ 60-300.44(a), 60-741.44(a)):**
  - Must include EEO policy statement in AAP
  - Must contain certain required statements regarding nondiscrimination, non-harassment, and non-retaliation
  - Must provide for an audit and reporting system
  - Must assign overall responsibility for the AAP's implementation
  - **NEW:** Must state that the contractor's top U.S. executive (e.g., CEO) supports the AAP

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## Components of Vets/Disabled AAP

- **Review of Personnel Processes (41 CFR §§ 60-300.44(b), 60-741.44(b)):**
  - No changes; all are existing obligations
    - Must periodically review personnel processes to ensure that protected veterans and IWDs have equal opportunities in hiring, promotions, training, etc.
    - Must develop procedures to enable this review and make modifications to processes as necessary to ensure EEO
    - Must include a description of review and modifications in AAP

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## Components of Vets/Disabled AAP

- **Physical and Mental Qualifications (41 CFR §§ 60-300.44(c), 60-741.44(c)):**
  - No changes; all are existing obligations
    - Must identify a schedule for reviewing all physical and mental job qualifications to ensure that they are job related and/or do not screen out qualified individuals with disabilities or disabled veterans
    - Must be able to demonstrate to the OFCCP that this periodic review has taken place
      - **NEW:** while requirements are not new, OFCCP enforcement may increase with heightened focus on veterans and individuals with disabilities

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## Components of Vets/Disabled AAP

- **Reasonable Accommodation (41 CFR §§ 60-300.44(d), 60-741.44(d)):**
  - Must provide reasonable accommodations to qualified disabled veterans and IWDs unless the accommodation poses an undue hardship (already required by the ADA)
  - **NEW:** If an employee, who is a known disabled veteran or other known IWD, is having performance difficulties, the contractor must:
    - Confidentially inform the employee about the performance issue;
    - Ask the employee if the problem is related to a disability; and
    - Inquire whether the employee may need an accommodation.
    - This is essentially a codification of the ADA interactive process requirement

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## Components of Vets/Disabled AAP

- **Reasonable Accommodation (41 CFR §§ 60-300.44(d), 60-741.44(d)):**
  - **NEW:** Development of written reasonable accommodation policies is recommended (not required) as a “best practice”
    - Will not be considered a violation to not have a written policy
    - OFCCP guidance regarding contents for such a policy are contained in Appendix B of the regulations

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## Components of Vets/Disabled AAP

- **Anti-harassment Procedures (41 CFR §§ 60-300.44(e), 60-741.44(e)):**
  - No changes; all are existing obligations
    - Required to develop and implement anti-harassment procedures to prevent discrimination against protected veterans and individuals with disabilities

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## Components of Vets/Disabled AAP

- **External Dissemination of Policy, Outreach, and Positive Recruitment (41 CFR §§ 60-300.44(f), 60-741.44(f)):**
  - **NEW:** Must send written notice of EEO/AA policy to all subcontractors and request appropriate action
    - Should keep documentation demonstrating that the required notice has been provided
  - **NEW:** Must engage in outreach and recruitment efforts “reasonably designed to recruit” protected veterans and IWDs and must conduct an annual review of the effectiveness of these efforts

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## Components of Vets/Disabled AAP

- **External Dissemination of Policy, Outreach, and Positive Recruitment (41 CFR §§ 60-300.44(f), 60-741.44(f)):**
  - **NEW:** Must document all outreach and recruitment activities, plus annual review of these activities, and retain this documentation for three years
    - Documentation of annual review must include at minimum: (i) the criteria used to evaluate effectiveness; and (ii) conclusion regarding effectiveness of each effort made.
  - **NEW:** Regulations include an expanded list of recommended outreach and recruitment resources and activities

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## Components of Vets/Disabled AAP

- **Internal Dissemination of Policy (41 CFR §§ 60-300.44(g), 60-741.44(g)):**
  - **NEW:** Must include affirmative action policy in employee handbook/policy manual or otherwise make it available to employees
  - **NEW:** If a party to a collective bargaining agreement, must provide notice to union officials regarding the affirmative action policy and request union cooperation
  - **NEW:** Encouraged to make provide additional notice of policy via employee notices, in meetings with management, during orientation and training presentations, in internal newspapers and eblasts

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## Components of Vets/Disabled AAP

- **Audit and Reporting System (41 CFR §§ 60-300.44(h), 60-741.44(h)):**
  - **NEW:** Must create and implement a self-audit and reporting system to:
    - Measure the effectiveness of the AAP;
    - Identify any need for remedial action;
    - Determine the degree to which the AA objectives have been met;
    - Determine whether protected veterans and IWDs have had the opportunity to participate in all company educational, training, recreational, and social activities; and
    - Measure compliance with AAP's specific obligations.
  - **NEW:** Must document all actions taken to comply with the above audit and reporting requirements and retain these records for two years

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## Components of Vets/Disabled AAP

- **Responsibility for Implementation (41 CFR §§ 60-300.44(i), 60-741.44(i)):**
  - No changes; all are existing obligations
    - Must designate an official responsible for implementation of the AAP
    - His or her name should appear on all internal and external communications regarding the company's AAP

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## Components of Vets/Disabled AAP

- **Affirmative Action Training (41 CFR §§ 60-300.44(j), 60-741.44(j)):**
  - No changes; all are existing obligations
    - Must provide EEO and affirmative action training for all employees involved in the recruitment, screening, selection, promotion, and disciplinary processes
    - Of note, however, is that this requirement includes training on the new obligations under the new regulations as well

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## Components of Vets/Disabled AAP

- **Data Collection and Analysis (41 CFR §§ 60-300.44(k), 60-741.44(k)):**
  - **NEW:** Must annually document the following data and retain for 3 years:
    - Number of applicants who self-identified as protected veterans pre-offer or who are otherwise known as protected veterans;
    - Number of applicants who self-identified as IWDs pre-offer or who are otherwise known as IWDs;
    - Total number of job openings;
    - Total number of jobs filled;
    - Total number of applicants for all jobs;
    - Number of protected veteran applicants hired;
    - Number of disabled applicants hired; and
    - Total number of applicants hired.

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## Components of Vets/Disabled AAP

- **Benchmarks for Hiring and Utilization Goals (41 CFR §§ 60-300.45, 60-741.45):**
  - **NEW:** Must establish and document an annual hiring benchmark for protected veterans by:
    - Using the national percentage of veterans in the civilian labor force (currently 8%); OR
    - Using five factors outlined in the regulations at 41 CFR § 60-300.45(2).
      - If this 5-factor approach is used, must document consideration of each factor and the significance of each factor & retain the documentation for 3 years.
  - **NEW:** Must then apply the benchmark to each AAP establishment.

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## Components of Vets/Disabled AAP

- **Benchmarks for Hiring and Utilization Goals (41 CFR §§ 60-300.45, 60-741.45):**
  - **NEW:** Must apply a utilization goal of 7% for employment of qualified IWDs for each job group in the workforce
    - Contractors with 100 or less employees may apply the 7% utilization goal to the workforce as a whole instead of by job group
  - **NEW:** Must annually evaluate utilization of IWDs in each job group (or, where applicable, the entire workforce) and, if the % of IWDs is less than 7%, must take steps to determine whether barriers to equal employment exist for IWDs

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## Components of Vets/Disabled AAP

- **Benchmarks for Hiring and Utilization Goals (41 CFR §§ 60-300.45, 60-741.45):**
  - **NEW:** Must develop and make good-faith efforts designed to correct any identified problem areas
  - Failure to achieve the 8% hiring benchmark or 7% utilization goal is not an admission of discrimination or a violation of the regulatory requirements.
  - **Neither the hiring benchmark for protected veterans nor the utilization goal for qualified IWDs may be used as a quota or as a ceiling.**

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# TOOLS AND FORMS FOR COMPLIANCE

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## Tools and Forms for Compliance

- To further implementation, the regulations identify specific forms and tools needed to support compliance:
  1. External notices;
  2. Internal notices;
  3. Advertising tag line;
  4. EEO clauses incorporated into contracts;
  5. Self-identification forms and processes;
  6. Data compilation and tracking forms; and
  7. Self-assessment and other evaluation tools.

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# Tools and Forms for Compliance

- **Required External Notices:**
  1. Notice to Union (41 CFR §§ 60-300.5(a)(10), 60-741.5(a)(5))
    - Existing obligation with updated language requirements.
  2. Notice to Subcontractors and Vendors (41 CFR §§ 60-300.44(f), 60-741.44(f))
    - **NEW** obligation to provide written notice of affirmative action policy and request support
  3. Required Listing of Jobs with ESDS (41 CFR § 60-300.5(a))
    - Existing obligation w/ **NEW** requirements re: info to be provided

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# Tools and Forms for Compliance

- **Required Internal Notices:**
  1. Posting of Rights for Protected Veterans & IWDs (41 CFR §§ 60-300.5(a)(9), 60-741.5(a)(4))
    - **NEW** obligation with specific OFCCP-prescribed form required
    - OFCCP form is not yet available
  2. Notice of Availability of AAPs (41 CFR §§ 60-300.41, 60-741.41)
    - **NEW** obligation
  3. Posting of AAP Policy Statement (41 CFR § 60-300.44(a), 60-741.44(a))
    - Existing obligation w/ **NEW** requirement re: top executive support

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## Tools and Forms for Compliance

- **Required Advertising Tag Line:**
  - 41 CFR §§ 60-300.5(a)(12), 60-741.5(a)(7)
  - Existing obligation with **NEW** required language
  - Must specifically mention veterans and individuals with disabilities
    - OFCCP's preferred shorthand: "vet" and "disabled"

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## Tools and Forms for Compliance

- **Required EEO Clause for Subcontracts and Purchase Orders:**
  - 41 CFR §§ 60-300.5(a)(ii), 60-741.5(a)(6)
  - Existing obligation with **NEW** required language
  - Can still incorporate by reference BUT must specifically include language set forth in the regulations, and it must be in bold typeface

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## Tools and Forms for Compliance

- **Required Self-Identification Forms and Processes:**
  - 41 CFR §§ 60-300.42 and Appendix B, 60-741.5(a)(6)
  - Existing obligation with **NEW** required language, forms, and timing
  - Can use OFCCP's sample forms for self-identification of veteran status or create own forms that contain the required content (must contain exact required content, including typeface requirements) (recommend use OFCCP form)
  - **MUST** use OFCCP's required form for self-identification of disability
  - May incorporate new Form for on-line application process; but, must meet form and font requirements

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## Tools and Forms for Compliance

- **Data Compilation and Tracking Tools:**
  - 41 CFR §§ 60-300.44(k), 60-741.44(k)
  - **NEW** obligation to track data and maintain records
  - Can use OFCCP's sample format or create own forms that contain the required content
- **Self-Assessment & Evaluation Tools:**
  - 41 CFR §§ 60-300.44(b) and Appendix C, 60-741.44(b)
  - Existing obligation to review processes and assess good faith efforts but **NEW** obligation to document review/evaluation and maintain records
  - Can use OFCCP's sample forms or create own forms

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## REVIEW OF TIMELINE FOR IMPLEMENTATION

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## Timeline for Implementation

- **To Be Implemented on (or before) March 24, 2014:**
  - Notice to employees and applicants regarding vets/disabled affirmative action rights (BUT currently waiting for OFCCP to publish the required notice)
  - Online application systems must be accessible to IWDs or reasonable accommodation processes must be implemented
  - New advertising taglines referencing vets/disabled
  - Compliance with ESDS job listing and notification requirements
  - New EEO clause language in subcontracts and purchase orders
  - Notice to unions regarding AA obligations

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## Timeline for Implementation

- **To Be Implemented on First Day After Pre-March 24, 2014 AAP Expires:**
  - AA policy modifications to incorporate reference to support from top U.S. executive
  - Notices to subcontractors/vendors
  - Posting/Notices to employees (including remote employees) regarding affirmative action plan and access for review
  - New self-identification forms and processes

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## Timeline for Implementation

- **To Be Implemented on First Day After Pre-March 24, 2014 AAP Expires (con't):**
  - New vets/disabled plan requirements (subject to “transition AAP” rule) including:
    - Benchmark for protected veterans and utilization goal for IWDs
    - Documentation of outreach and recruiting efforts
    - Documented evaluation of personnel processes
    - Documented evaluation and self-assessment of outreach efforts and related 3-year record maintenance
    - Data collection related to vets/disabled applicants and hires, job openings, and jobs filled and related 3-year record maintenance

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## Questions?

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