On August 27, 2013, the Department of Labor (“DOL”) and the Office of Federal Contract Compliance Programs (“OFCCP”) published two final rules that significantly increase the affirmative action requirements under both the Vietnam Era Veterans’ Readjustment Assistance Act (“VEVRAA”) and Section 503 of the Rehabilitation Act (“Section 503”). In recent years, the federal government has placed an increasing emphasis on the hiring of individuals with disabilities and veterans. A recent study by the federal government revealed that male workers with a disability earn 23 percent less than their counterparts without a disability. Women with a disability earn 20 percent less than their female counterparts without a disability. In addition, male veterans earn nearly 3 percent less than their non-veteran counterparts. Female veterans, similarly, earn more than 6 percent less than their non-veteran counterparts.

The purpose of the new rules is to remedy these inequities by encouraging the recruitment and hiring of individuals with disabilities and protected veterans. The new requirements, however, may impose additional administrative obligations and costs upon contractors, and expose construction contractors, in particular, to new affirmative action obligations. The regulations become effective March 24, 2014, and contractors should begin reviewing their policies now to ensure that they will be ready to comply.
Previously, compliance with Section 503 and VEVRAA required contractors to take certain steps aimed at facilitating the hiring of individuals with disabilities and protected veterans. These new rules, originally proposed back in 2011, now require federal contractors to take additional steps to reach their affirmative action goals. These steps include the implementation of new hiring “benchmarks”, more stringent record retention policies, and changes to outreach and recruitment efforts.

**Utilization Goals**

The new regulations impose certain utilization goals that contractors are encouraged to meet in connection with the hiring of individuals with disabilities and protected veterans. For individuals with disabilities, contractors are encouraged to meet a 7 percent workforce utilization goal. Contractors are also required to implement concrete hiring “benchmarks” for the employment of protected veterans. A contractor’s hiring benchmark for protected veterans can be established in one of two ways. First, a contractor may establish a benchmark equal to the national percentage of veterans in the civilian labor force, which is currently set at 8 percent by OFCCP. In the alternative, a contractor may establish its own benchmark by taking into account the following five factors:

1. the average percentage of veterans in the civilian labor force in the state where the contractor is located over the preceding three years, as posted in the Benchmark Database on the OFCCP website;

2. the number of veterans, over the previous four quarters, who participated in the employment service delivery system in the state where the contractor is located, as posted in the Benchmark Database on the OFCCP website;

3. the applicant and hiring ratios for the previous year;

4. the contractor’s recent assessments of the effectiveness of its outreach and recruitment efforts; and

5. any other factors, such as the nature of the job or its location, that would affect the availability of qualified protected veterans.

If a contractor chooses to establish its own benchmark based on these five factors, the contractor is required to document each of the factors that were considered and the relative significance of each factor.
OFCCP makes clear that a failure to meet these goals is not a violation of the regulations. Instead, the goals are meant to serve as a management tool to inform decision making and provide accountability. While failing to meet the benchmark in any given year does not necessarily expose a contractor to liability, multiple failures can be indicative of general shortcomings that can lead to OFCCP enforcement. Accordingly, contractors are required to monitor their progress in meeting these goals. Where the goals are not met, the regulations now require contractors to review their policies to determine if there are any shortcomings in outreach and recruitment efforts to individuals with disabilities and protected veterans. If problems are found, contractors are required to identify and implement new efforts.

Notably, when the proposed rule was published, several commenters expressed concern that these goals were unconstitutional “quotas.” The Final Rule makes clear that these benchmarks are not strict quotas but instead grant contractors significant flexibility. Moreover, from a constitutional perspective, these benchmark requirements are subject only to rational basis scrutiny.

**New Requirements Related to Contractor Outreach and Recruitment Efforts**

The regulations also implement several new requirements related to a contractor’s outreach and recruitment efforts. These new requirements impose new protocols at the pre-offer stage and new recordkeeping requirements to increase documentation and accountability related to the recruitment and hiring of individuals with disabilities and protected veterans.

With respect to the recruitment of individuals with disabilities, the new regulations impose additional requirements upon a contractor to provide a necessary reasonable accommodation to its electronic job application system to ensure that a qualified individual with a disability who is not able to utilize the system is provided with an equal opportunity to apply for and be considered for all jobs. Contractors are also encouraged to voluntarily develop and implement written reasonable accommodation procedures.

As part of its recruitment efforts, contractors are also now required to invite applicants to self-identify as an individual with a disability at the pre-offer stage. In addition, a contractor must invite an employee to self-identify every five years, and, between formal invitations, must remind employees that they can self-identify as an individual with a disability at any time.

Similarly, contractors are also now required to invite applicants for employment to self-identify as a member of the class of
veterans for which the contractor must report on its VETS100 form at the pre-offer stage. This self-identification data is for use by the contractor—and the OFCCP—when determining if hiring benchmarks and recruitment efforts have been met. This invitation to self-identify must further state that the contractor is required, by law, to take affirmative action on behalf of protected veterans.

In addition to these obligations, contractors are also required to notify its subcontractors and vendors of its policy related to its affirmative action efforts and request their cooperation. Contractors must also conduct an annual self-assessment of their outreach efforts and document the review. If the assessment indicates that the contractor’s efforts are not effective (upon reasonable determination by OFCCP), the contractor must identify and implement alternative efforts for recruitment and outreach. This requirement places new accountability on contractors to ensure that they are not simply going through the motions with outreach and recruitment, but instead that their efforts are effective.

**New Record Keeping Requirements**

Additionally, contractors must comply with new record-keeping obligations pertaining to the disability and/or veteran status of applicants and employees. The new rule also states that some provisions are subject to a three-year record keeping requirement, instead of the two year requirement that applies to the remaining regulations.

As part of the new three-year record keeping requirement, contractors must collect and maintain, on an annual basis, the following information for three years:

1. The total number of applicants for employment who self-identify as, or are otherwise known to be, individuals with disabilities and/or protected veterans;
2. The total number of job openings and total number of jobs filled;
3. The total number of applicants for all jobs;
4. The total number of individuals with disabilities and/or protected veterans hired; and
5. The total number of applicants hired.

Contractors are also required to grant OFCCP greater access to retained records. Specifically, contractors are required to provide off-site access to materials if requested by OFCCP and specify to OFCCP all formats in which its records are available, including
electronic formats, and provide records to OFCCP in the format(s) it selects.

**Conclusion**

The OFCCP regulations impose several new requirements upon contractors for the recruitment and hiring of individuals with disabilities and protected veterans. These new regulations are intended to both provide OFCCP with better information regarding the effectiveness of the regulations and to impose greater accountability upon contractors to achieve the goals of the regulations. Particularly for construction contractors, the new regulations represent a significant departure from current requirements and obligations related to affirmative action. In order to prepare for the rule changes, contractors should undertake a review of the new requirements and, if necessary, seek outside resources early to ensure that new protocols are put in place to meet the requirements.