



The University of North Carolina

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Agricultural and
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North Carolina
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North Carolina
State University
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University of
North Carolina
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North Carolina
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North Carolina
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North Carolina
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North Carolina
at Wilmington

University of
North Carolina
School of the Arts

Western Carolina
University

Winston-Salem
State University

Constituent High School
North Carolina
School of Science
and Mathematics

An Equal Opportunity/
Affirmative Action
Employer

Statement by Thomas C. Shanahan
Vice President for Legal Affairs and General Counsel
The University of North Carolina

Before the

House Education and the Workforce Committee
Subcommittee on Workforce Protections

Hearing on

Examining Recent Actions by the Office of Federal Contract Compliance
Programs

December 4, 2013

Chairman Walberg, Ranking Member Courtney, and members of the Subcommittee. My name is Tom Shanahan. I am Vice President for Legal Affairs and General Counsel of the 17-campus University of North Carolina System. I am testifying today about the costs and institutional compliance requirements associated with OFCCP regulation and enforcement and the impact of those costs and requirements on the educational mission and operation of the University of North Carolina.

I serve as the University of North Carolina system's senior legal officer, providing advice and counsel to the president, the University system's Board of Governors, and senior University staff on all legal and policy issues affecting the University. In addition, I oversee the development and implementation of policies and procedures to promote University-wide awareness of and compliance with applicable federal, state, and local laws, regulations, and administrative requirements. Prior to becoming Vice President and General Counsel, I was Associate Vice President for Legal Affairs, responsible for the University system's employment and benefits law matters. Before joining the University in 2010, I served for 10 years as an attorney and manager with the U.S. Department of Labor. During my career with the Labor Department, I handled and supervised OFCCP-related litigation as a trial attorney and as Deputy Regional Solicitor in the Atlanta region of the Office of the Solicitor. I also served as Deputy Regional Director for the Employee Benefits Security

In my statement today, I will describe UNC's commitment to equal opportunity in employment and then discuss the context in which we seek to meet that commitment, with reference to the regulatory and compliance costs faced by institutions of higher education. I will conclude by offering some specific thoughts on the recently enacted OFCCP final regulations associated with hiring protected veterans and individuals with disabilities and their expected impact on UNC.

The University of North Carolina is Committed to Equal Opportunity in Employment

The University of North Carolina is a multi-campus public university composed of 17 institutions,¹ including the nation's first public residential high school for students gifted in mathematics and science, and six historically minority institutions. The 32-member UNC Board of Governors and President Tom Ross, along with the boards of trustees and chancellors of the constituent institutions, guide the mission and work of this important asset of the State of North Carolina. The University currently enrolls more than 220,000 undergraduate, graduate, and professional students. Each component of UNC shares in the overall mission to discover, create, transmit, and apply knowledge to address the needs of individuals and society. Employing approximately 55,000 people in hundreds of occupational categories, UNC accomplishes its mission through instruction, research, and public service, which contributes to solving societal problems and enriches the quality of life in North Carolina.

Our mission is rooted in the Constitution of the State of North Carolina, which provides for the establishment of the University and instructs that the benefits of the University of North Carolina are, as far as practicable, to be extended to the people of the State free of expense. In the fulfillment of this important mission, UNC seeks to develop and support the talents of all members of the UNC community and the citizens of North Carolina. Accordingly, UNC is committed to ensuring equality of opportunity in employment and promotion throughout the University and all of its constituent institutions, and supports the goal of improving outreach to and employment opportunities for qualified individuals in all occupational categories.

The University's Board of Governors has affirmed its commitment to equality of opportunity in *The Code* of the University, which provides that admission to,

¹ The University of North Carolina consists of the following institutions: The University of North Carolina at Chapel Hill; North Carolina State University; Appalachian State University, East Carolina University; Elizabeth City State University; Fayetteville State University; North Carolina Agricultural and Technical State University; North Carolina Central University; UNC Asheville; UNC Charlotte; UNC Greensboro; UNC Pembroke; UNC Wilmington; University of North Carolina School of the Arts; Western Carolina University; Winston-Salem State University; and the North Carolina School of Science and Mathematics, a residential high school for gifted students.

employment by, and promotion in the University of North Carolina and all of its constituent institutions shall be on the basis of merit, and that there shall be no discrimination against any person on the basis of race, color, religion, sex, national origin, age, disability, or veteran status. This commitment is reflected and repeated in the policies, operations, and practices of each of the constituent institutions.

As part of its commitment to equal opportunity, UNC seeks to recruit, employ, and promote individuals with disabilities, military service members, and protected veterans. We support, without reservation, the goal of improving outreach to and employment opportunities for these individuals in all parts of the University. Indeed, the University continues to seek every opportunity to enhance its outreach and accomplish these goals through partnerships within and outside North Carolina. North Carolina is home to Fort Bragg, the Nation's largest Army post, and Marine Corps Base Camp Lejeune. North Carolina also hosts service members stationed at Cherry Point, New River, Seymour Johnson Air Force Base, Coast Guard Station Elizabeth City, and with the North Carolina National Guard. North Carolina is home to 106,461 active duty service members and their 144,718 spouses and children. North Carolina's National Guard and Reserve population is 24,093. According to the Veterans Administration, 771,654 veterans reside in North Carolina. The individuals with disabilities and protected veterans who attend and are employed by UNC institutions are integral to UNC's mission of teaching, research, and service.

UNC Institutions Face Increasing Regulation and Significant Compliance Costs

As components of a system of public higher education, UNC institutions are part of one of the most regulated industries in the United States.² Like other institutions in the higher education sector, UNC campuses are subject to law and regulation by the federal and state governments. In addition to government regulations, our institutions must also understand and comply with rules, policies, regulations, and requirements of many other educational, research, and accrediting organizations.

Viewed in context, the laws and regulations within OFCCP's enforcement and regulatory authority are among the hundreds of laws, regulations, agency guidelines, and other requirements applicable to universities that exist at the federal level alone.³ The laws and regulations at the federal level have, for the most part, been enacted over the last 60 years, to serve a variety of purposes and interests. Some of the laws and

² See, Stephen S. Dunham, *Government Regulation of Higher Education: The Elephant in the Middle of the Room*, 36 J.C. & U.L. 749, 751 (2010).

³ For a partial list of federal laws, regulations, circulars, executive orders and other requirements applicable to higher education institutions, see <http://counsel.cua.edu/fedlaw/index.cfm>, which is part of the Campus Legal Information Clearinghouse (CLIC), a collaborative effort of The Catholic University of America's Office of General Counsel and the American Council on Education (ACE).

executive agency regulations are specific to higher education, and are designed to ensure accountability and transparency in areas such as financial aid, research, and student affairs matters. Others exist primarily to define and protect the interests of the federal government as a research funder, granting entity, or purchaser of services. Other laws, executive orders, and regulations, such as those enforced by OFCCP, the Equal Employment Opportunity Commission, the Department of Labor, and the Department of Homeland Security, are not intended specifically for the higher education sector, but apply across all industries and sectors in order to support and address important societal interests and goals, such as equality of employment opportunity and nondiscrimination.

Regardless of the purposes and sources of federal law and regulation in the higher education sector, public colleges and universities face substantial regulatory burdens that carry significant costs. I offer three observations about these burdens and costs that apply to the University of North Carolina in particular and to higher education institutions in general, in order to set the context for my remarks about OFCCP's regulatory and enforcement efforts.

First, the number and complexity of laws and regulations applicable to public systems of higher education have continued to increase over time, especially since the middle of the 20th century. There has been no period that I am aware of when regulations have been reduced. Each year brings additional legislative mandates, which are then meticulously detailed by the regulatory authority and activity of executive branch agencies, including the Departments of Education, Labor, Health & Human Services, and Homeland Security, among many others.

Second, the scope and complexity of our institutions have continued to expand, along with the expectations of students, taxpayers, and government oversight entities as to the results our institutions should deliver in the areas of teaching, research, and service. Major public colleges and universities, like those in the UNC system, educate and house tens of thousands of undergraduate, graduate, and professional students, engage in major groundbreaking and innovative research, deliver life-saving medical care, operate police departments with full law enforcement authority, and develop and transfer technology and intellectual property for commercialization and other uses. Each of these functions is subject in one way or another to regulation by federal and state entities.

Third, the expansion of regulatory and legal oversight of higher education institutions in recent decades has necessitated the development of administrative structures and staffing within colleges and universities that are focused almost solely on institutional compliance with the range of applicable laws, regulations, policies, and guidance. Major public higher education institutions now require staffs of specialists skilled in the complexities of regulatory compliance across numerous areas, including athletics, financial aid, human resources, equal opportunity, student affairs, research

compliance, international law, export law, copyright, patent law, environmental rules, and taxation, to name a few, in order to meet the expectations associated with the various laws and rules and also to avoid the sometimes significant costs associated with noncompliance.

The University of North Carolina Must Carefully Allocate Limited Resources to Regulatory Compliance

The staffing structures of the 17 UNC institutions reflect the demands imposed on them by voluminous, multi-layered and sometimes conflicting federal regulation. Like other institutions, we employ attorneys, compliance specialists, auditors, and other professionals throughout our operations in order to understand and meet the regulatory requirements that have been imposed. Moreover, our costs in terms of personnel and other resources needed to comply with both existing and new regulation and enforcement have continued to increase, as might be expected in proportion to the legal and regulatory activities of the federal government.

The University of North Carolina receives much of its financial support from the State of North Carolina. As a result, the costs of compliance and oversight associated with heavy regulation have imposed even greater challenges in recent years, as the legislature in North Carolina responded to the effects of the global recession. By necessity, the budgets adopted by North Carolina's General Assembly over the last five (5) years contained significant reductions in appropriations to the University of North Carolina, as the State took steps to prudently manage resources and address State priorities in the face of declining revenues. As a result, UNC has seen cumulative reductions in appropriations per student in excess of twelve percent (12%) over that time period and other cuts in excess of \$500 million. Throughout this period, UNC responded by prioritizing core academic and teaching programs, sought to allocate cuts primarily to operational areas, and continued its efforts to improve efficiency throughout its operations.

Given these real and significant pressures, UNC institutions face a two-fold challenge. First, at the same time that federal agencies continue to increase their regulatory requirements and step up enforcement efforts, campuses have been addressing cuts to State appropriations by attempting to protect academic and mission-related functions wherever possible. This prioritization means that campuses have had to cut or leave unfilled many nonacademic and operational positions, including compliance-related positions, which would help them meet the ever-increasing regulatory burden. Second, when it becomes essential to fill compliance-related positions or incur compliance costs, campuses face the difficult choice of allocating scarce resources to compliance and operational activities, rather than to teaching, research, or service.

These factors provide the context for my comments regarding OFCCP's current regulatory and enforcement activities and the new requirements that will be imposed by the final regulations implementing Section 503 of the Rehabilitation Act of 1973 and the final regulations promulgated under Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA).

University Institutions Devote Significant Resources to OFCCP Compliance

UNC system campuses rely on systems, processes and skilled employees to comply with multiple legal obligations and regulatory requirements within OFCCP's enforcement authority. For example, UNC campuses and other institutional components of the UNC system are responsible for and already perform the following activities:

- Prepare and update an affirmative action plan in compliance with federal and state requirements.
- Conduct analyses of hiring, promotion, and termination practices and take corrective action where appropriate. Take affirmative action to recruit and place females, minorities, Vietnam-era veterans and the disabled, and document those steps. Identify areas of underutilization and make good faith efforts to increase representation.
- Document steps taken to recruit minorities/females.
- Notify suppliers and vendors of the institution's government contractor status and that the supplier/vendor may be covered by applicable affirmative action requirements.
- Submit annual EEO data to the Integrated Postsecondary Education Data System (IPEDS), the core postsecondary education data collection program for the National Center for Education Statistics at the Institute for Education Services within the U.S. Department of Education.
- File annually the Vets-100 Report.
- List all job openings as required with the local Employment Security Commission office.
- Post notices as required, and include the equal employment opportunity language in advertisements for employees.
- Comply with record retention requirements with respect to materials related to hiring, assignment, promotion, demotion, transfer, layoff,

termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, or other records having to do with requests for reasonable accommodation, the results of any physical examination, job advertisements and postings, applications and resumes, tests and test results, and interview notes.

- Conduct audits of compensation systems.

The University of North Carolina already employs as many as 30 individuals across its campuses and components whose primary duties involve the actions described above, along with other efforts to comply with Executive Order 11246, as amended (EO 11246), Section 503 of the Rehabilitation Act of 1973, as amended (Section 503), 29 U.S.C. 793; and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA), 38 U.S.C. 4212. Our estimate does not include the efforts of academic administrators, hiring committee members, and other staff whose work includes tasks that are tied to requirements found in EO 11246 and the statutes enforced by OFCCP. Moreover, the estimate includes personnel only. It does not account for information technology systems, forms, and business processes that have been purchased, modified, and improved over time in order to perform OFCCP-related compliance functions in the most efficient and effective manner possible.

Responding to OFCCP Compliance Evaluations Requires Additional Resources

In recent years, a small number of UNC campuses have undergone compliance evaluations by OFCCP. In each instance, campuses have endeavored to respond to OFCCP's scheduling letters and any subsequent requests for information in a prompt and comprehensive manner. The responsible personnel at each campus have found that they generally are able to establish positive working relationships with OFCCP investigators and supervisory personnel during the evaluation, which enable the agency and the campus to complete their work as expected by OFCCP. Our experience has been that OFCCP investigators are knowledgeable with respect to applicable regulatory requirements, and professional in their conduct.

We also find, however, that the process of preparing for and responding to OFCCP compliance evaluations is lengthy, time consuming and resource intensive. The time from the beginning of a review until its conclusion can extend for two years or more. During that time, thousands of hours of UNC staff time are consumed in responding to requests for information and documents from OFCCP, and organizing it in the particular format requested by the agency. At some campuses, OFCCP compliance evaluations have consumed one or more full time employees for extended periods of time. The work that would have been performed by those employees must be assigned to others or deferred until OFCCP concludes its evaluation.

OFCCP's compliance evaluations typically include multiple requests for information and documents. In some instances, once the campus provides information to OFCCP, weeks or months will pass with no response from the agency, perhaps due to the investigator's workload or other factors. In some instances, OFCCP replaces or reassigns an investigator during a compliance evaluation. UNC campuses have found that such reassignments often result in additional requests for records and information that largely duplicate previous requests that have already been fulfilled or additional time delays while the new investigator reviews the materials already provided. While campuses always work diligently to fulfill those requests and recognize the legitimate need of the investigator to have access to necessary information, such duplicative requests add yet more cost and time to the compliance process.

UNC campuses have discovered that some OFCCP audits, while lengthy with long periods of inactivity on the part of OFCCP, are punctuated by requests from the agency for large volumes of information and records, with short response deadlines. These periods of intense activity appear at times to be driven by OFCCP's internal performance and accountability metrics, including deadlines for quarterly and year-end enforcement results reporting and case age statistics. Such factors require campuses to devote yet more resources to ongoing evaluations in order to ensure that OFCCP receives the correct data as requested.

Finally, UNC campuses undergoing compliance evaluations by OFCCP have faced the challenge of explaining some of the unique characteristics and organization of university employment and organization to OFCCP investigators. OFCCP staff is generally not familiar with important concepts of faculty-shared governance or the faculty recruitment, promotion, and tenure processes that prevail on most university campuses and are required as part of our accreditation standards. For example, campus compliance personnel must explain to OFCCP personnel that the promotion of a tenured or tenure-track faculty member from assistant professor to associate professor is not the same either in concept or in practice as a competitive promotion event might be in other industries. In addition, campus personnel must explain why people that appear to have similar job titles do not necessarily fall within the same categories or salary ranges. A "Director" in Alumni relations, for example, is very different than a "Director" of the Nuclear Plant on a campus.

The Final Rules Implementing Section 503 and VEVRAA Will Increase Compliance Costs

Based on input from UNC's constituent institutions and affiliated entities, the multiple new and enhanced recordkeeping, data collection, and compliance requirements contained in the Section 503 and VEVRAA final rules promulgated by OFCCP will require hundreds of hours of staff time across the UNC system, ranging from one hundred or more hours at the smallest establishments and institutions, to several hundred hours at UNC's larger research institutions. UNC institutions will also face the need to purchase or upgrade existing management information systems, alter

recordkeeping practices, and revise current operational procedures or create new ones, resulting in several thousand dollars in additional costs.

UNC's commitment to ensuring equality of opportunity in employment and promotion throughout the university system is central to its mission. Consistent with their commitments, UNC constituent institutions and affiliated entities utilize a variety of approaches, tailored to their specific missions and job categories, to identify, hire, retain, and promote the best qualified people, including individuals with disabilities. With these goals in mind, several UNC entities have reviewed OFCCP's adoption of a national utilization goal for employment of individuals with disabilities and the establishment of benchmarks for employment of protected veterans. The University believes that the new rules provide little support or assistance in their outreach and employment efforts with respect to individuals with disabilities and protected veterans, but that the data collection and tracking processes required by both rules will substantially increase costs.

As others have noted, OFCCP's decision to establish a single national utilization goal has at least two problems. First, the target percentage is based primarily on disability data collected from responses to brief questions that are part of the Census Bureau's American Community Survey (ACS). There is no apparent relationship between the ACS questions and the definition of "disability" that OFCCP and the Equal Employment Opportunity Commission (EEOC) enforce under Section 503 of the Rehabilitation Act and the Americans with Disabilities Act, as amended. Moreover, OFCCP has focused on contractor obligations with respect to those employees who *voluntarily* choose to *self-identify* as individuals with disabilities. Like other employers, UNC recognizes that individuals with disabilities often prefer not to share information concerning their disability status. It is far from clear that the utilization goal selected by OFCCP will approximate in any meaningful way the availability of individuals with disabilities in the national workforce.

OFCCP's decision to require a national utilization goal and apply it to each job group essentially presupposes that individuals with disabilities are available in equal proportions in all occupational categories, regardless of geographic location or industry. UNC's constituent institutions and affiliated entities employ individuals in hundreds of occupational categories, ranging from housekeepers and craft workers to specialized professors and researchers. We do not see that a national utilization goal is useful or appropriate for organizations of the size, complexity, and multiple occupational categories that we see in higher education generally, or in the UNC system. As a practical matter, UNC institutions report that they expect to derive no benefit or assistance at all to their recruitment, hiring, and utilization goals as a result of a single national utilization goal. As a result, UNC institutions will be required to shoulder the substantial regulatory requirements associated with gathering and keeping information necessary to compare our workforce to the utilization goal, while potentially deriving little to no practical utility from such efforts.

Similarly, the final VEVRAA rule requires University of North Carolina institutions to establish annual hiring benchmarks, either based on the national percentage of veterans in the workforce (currently eight percent(8%)), or based on the best available data and factors, as specified in the regulations. As with the Section 503 rule, UNC institutions will be required to document, track, analyze, and update annually several quantitative comparisons for the number of individuals who apply for jobs and the number of individuals with disabilities and protected veterans they hire. In addition, both the VEVRAA and Section 503 rule require pre- and post-offer invitations to self-identify, with attendant documentation requirements, as well as documentation of outreach and recruitment efforts.

UNC appreciates that OFCCP adjusted its total annual compliance cost and effort estimates based on comments received during the rulemaking process for the Section 503 and VEVRAA rules. Nonetheless, UNC projects that it will need to devote an estimated twenty (20) additional full-time equivalent personnel to revising systems to comply with the new regulations and to complying with the new requirements once the new systems are established. In addition, UNC expects that the new requirements will require expenditure of additional funds to reprogram or purchase existing systems to meeting compliance requirements. As described in my earlier comments, these costs are difficult for UNC institutions to absorb, given adjustments in state appropriations and the mission-critical needs surrounding teaching, research, and services.

Conclusion

The University of North Carolina supports efforts to increase employment and promotional opportunities for individuals with disabilities and protected veterans. Moreover, in keeping with its mission for and on behalf of the people of the State of North Carolina, the University remains committed to ensuring that employment opportunities are extended to individuals without regard to race, gender, disability, protected veterans status or other discriminatory bases. The University will continue to seek opportunities to partner with public and private organizations to identify the best-qualified individuals for the University workforce, and will thereby work to achieve the outcomes that we understand OFCCP hopes to achieve through its regulatory and enforcement agenda. It is far from clear, however, that the substantial data collection, record-keeping, and other process requirements prescribed by OFCCP in the Section 503 and VEVRAA provide the best way to achieve these desired outcomes.

The University of North Carolina joins with other contractors in urging appropriate review and oversight of OFCCP's regulatory and enforcement activity. The University of North Carolina seeks to advance the nondiscrimination goals of Section 503, VEVRAA, and EO-11246, but is hampered in doing so when agency rules do not take account of the nature of our workforce and the significant compliance and cost pressures we face as a public system of higher education.