

TESTIMONY

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UNITED STATES DEPARTMENT OF LABOR**

**BEFORE THE
HOUSE COMMITTEE ON EDUCATION AND THE WORKFORCE
SUBCOMMITTEE ON WORKFORCE PROTECTIONS**

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Introduction

Good morning Chairman Walberg, Ranking Member Courtney, and distinguished Members of the Subcommittee. Thank you for the opportunity to testify before you today on the critical work the Department of Labor's ("Department") Office of Federal Contract Compliance Programs ("OFCCP") is doing to protect and promote equal employment opportunity for America's workers.

As you know, OFCCP is a worker protection agency, responsible for enforcing the civil rights of nearly one-quarter of American workers. OFCCP's mission is to protect workers and promote diversity through equal employment opportunity laws in Federal contractors' and subcontractors' workforces. OFCCP has jurisdiction over 170,000-plus establishments that profited from approximately \$700 billion in government contracts in 2012. These companies are held to the fair and reasonable standard that discrimination must never be a factor in their hiring, promotion, termination, compensation, and other employment decisions.

With jurisdiction over so many employees and companies, the work OFCCP does to level the playing field has a ripple effect across the entire labor market and affects the lives of thousands of women, minorities, individuals with disabilities, protected Veterans, and their families. Over the past five years, OFCCP has reviewed the employment practices of facilities that employ nearly 9 million workers; negotiated \$57 million in back wages and interest and almost 10,000 potential job offers on behalf of 90,000 workers affected by discrimination; and signed over 4,000 conciliation agreements with contractors.

Background on OFCCP

OFCCP is a critical part of the Federal Government's efforts to enforce civil rights, including Veterans' rights. The Agency enforces, for the benefit of job seekers and wage earners, the contractual promise of equal employment opportunity (both nondiscrimination and affirmative action) required of those who do business with the Federal Government. This is consistent with the Secretary's vision of promoting and protecting opportunity. OFCCP executes its mission as an enforcement agency by administering and enforcing three legal authorities that require equal employment opportunity and affirmative action: (1) Executive Order 11246, as amended ("the Executive Order" or "EO 11246"); (2) Section 503 of the Rehabilitation Act of 1973, as amended ("Section 503"), 29 U.S.C. 793; and (3) the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended ("VEVRAA"), 38 U.S.C. 4212.

EO 11246 prohibits Federal contractors and Federally-assisted construction contractors and subcontractors (hereafter, "contractors") who have a contract of at least \$10,000 with the Federal Government from discriminating in employment on the basis of race, color, religion, sex, or national origin. This includes discrimination in rates of pay or benefits, among other things. For contractors with 50 or more employees and a Federal contract of at least \$50,000, the Executive Order also requires contractors to develop, maintain, and implement an affirmative action program to ensure that that job applicants and employees are treated fairly in all aspects of the employment process.

Section 503 protects the employment rights of individuals with disabilities. Like the Executive Order regulations, Section 503 regulations require Federal contractors with Government contracts of at least \$50,000 and 50 employees to develop, maintain, and implement affirmative action programs to ensure that qualified individuals with disabilities are afforded equal employment opportunity in all aspects of employment.

VEVRAA sets forth the requirements for nondiscrimination against Veterans by Federal contractors. Section 4212(a) (1) prohibits Federal contractors from discriminating against specified categories of Veterans and requires contractors to take affirmative action to employ, and advance in employment, those Veterans. Federal contractors with a contract of at least \$100,000 and 50 or more employees are required to develop, maintain, and implement affirmative action programs to employ and advance in employment protected Veterans.

Over the past few years, OFCCP has focused on three priorities:

- improving the efficiency, effectiveness, and transparency of enforcement activities;
- implementing long-needed regulatory reform; and
- broadening outreach to agency stakeholders.

Enforcement

Over the past several years, the Department has taken a number of important steps to improve its enforcement efforts, including updating enforcement and evaluation protocols, updating the Federal Contract Compliance Manual, modernizing the Directive System, strengthening the Functional Affirmative Action Program, and providing quality training and technical assistance to contractors. These initiatives clarify, update, or otherwise improve the tools that OFCCP's compliance officers use to conduct desk audits, onsite investigations, and focused reviews; to pursue remedies for employees or applicants who suffer discrimination; and to conduct stakeholder education. All initiatives thus work to the benefit of the contractors that we regulate, the workers we protect, and the government we serve.

Outreach

With regard to outreach to stakeholders, OFCCP spends thousands of hours each year providing training and technical assistance to Federal contractors and subcontractors. This is done to facilitate their successful compliance with their obligations under the law. In FY 2012, OFCCP hosted 874 compliance assistance events that provided contractors with the tools to understand and comply with the laws it enforces. Because small businesses and first-time Federal contractors are less likely to have knowledge about OFCCP's requirements or the resources to acquire that knowledge, this year we chose to focus compliance assistance on those groups, with the result that more than a third of our FY 2012 compliance assistance events were directed specifically at small businesses and first-time Federal contractors.

In addition, through extensive outreach efforts, OFCCP seeks to ensure input from stakeholders on the entire range of OFCCP activities, from policy development to enforcement methodologies to legal interpretations. An example is our regular engagement with the leadership of both the National Industry Liaison Group (NILG) and the various regional industry liaison groups throughout the country. NILG is one of the premier employer associations on affirmative action and equal employment opportunity in the United States, with improving communications between OFCCP and its members (comprised of small, mid-size and large Federal contractors and employers across the country) as one of its main purposes.

Outreach is also undertaken to make sure that workers understand OFCCP is available as their resource. At both the national and local levels, OFCCP proactively reaches out to community-based groups, Veterans' service organizations, labor unions, employer associations, civil rights leaders, contractors, subcontractors, and the workers directly affected by its protections. In FY 2012, OFCCP hosted more than 1,200 outreach events, engaging thousands of stakeholders.

Regulatory Reform: Final Rules Under VEVRAA and Section 503

When I first began as OFCCP Director, our office's regulations under VEVRAA and Section 503 were badly in need of updating. For example, the VEVRAA regulations were not responsive to the high levels of post-deployment Veterans returning from Gulf War-era II engagements; the Section 503 regulations did not reflect changes made by the Americans with Disabilities Act Amendments of 2008.

Moreover, these laws have not always worked as intended. People with disabilities, who have an enormous contribution to make to our economy, are still disproportionately represented among the unemployed and those out of the workforce entirely. Meanwhile, post-9/11 Veterans, who have risked life and limb on our behalf, are more likely to be unemployed than non-Veterans. Updating these regulations to increase their chances of finding meaningful work is critical to fulfilling what Vice President Biden called our "sacred obligation" to our returning Veterans, and especially Veterans with disabilities, who have sacrificed so much for our country.

Employment discrimination contributes to the underutilization of qualified workers, such as individuals with disabilities and Veterans, and contributes to broader societal problems such as income inequality and poverty. The median household income for "householders" with a disability, aged 18 to 64, was \$25,420, compared with a median income of \$59,411 for households with a householder who did not report a disability.¹ Data show that individuals with disabilities are more likely to be below the poverty threshold with 28.8 percent of individuals, ages 18 to 64, with a disability in poverty in 2011 compared to 12.5 percent of those individuals

¹ *Income, Poverty and Health Insurance Coverage in the United States: 2011*, Current Population Reports, issued September 2012, <http://www.census.gov/prod/2012pubs/p60-243.pdf> (last accessed July 8, 2013), p. 10. A "householder" is the person (or one of the people) in whose name the home is owned or rented and the person to whom the relationship of other household members is recorded. Typically, it is the head of a household. Only one person per household is designated the "householder." The changes in household real median income for the two groups between 2011 and 2012 were not statistically significant. The median income for households with disabilities was \$25,974 compared to \$61,103 for householders without a disability.

without a disability.² These data are not statistically different in 2012.³ Controlling for age and race, we found that private-sector workers with a disability, on average, earn less than their counterparts without a disability. The mean hourly wage of those with a disability is \$17.62 (with a median of \$13.73) compared to \$21.67 (median \$16.99) for those without a disability.⁴

As for employment of Veterans, although progress has been made, the number of unemployed Veterans still remains too high, and substantial disparities in unemployment and pay rates continue to persist, especially for some categories of Veterans. We ask so much of these men and women: to put their careers on hold, leave their loved ones behind and embark on dangerous missions around the world. The men and women that serve this Nation do so willingly and without hesitation. They are a shining example of America at its best and deserve a hero's welcome and, at the very least, a good job when they return home.

Yet many Veterans face substantial obstacles in finding employment once they leave the military. This is particularly true for more recent Veterans. According to the Bureau of Labor Statistics (BLS), the annual unemployment rate for post-September 2001 Veterans, referred to as "Gulf War-era II Veterans," is higher than the rates for all Veterans and for non-Veterans. BLS data on the 2012 employment situation of Veterans show that about 2.6 million of the nation's Veterans had served during Gulf War-era II.⁵ In 2012, the unemployment rate for Gulf War-era II Veterans was 9.9 percent compared to non-Veterans at 7.9 percent.⁶ However, the unemployment rate, in the same year, for male Gulf War-era II Veterans age 18 to 24 was 20.0 percent, higher than the rate for non-Veterans of the same age group (16.4 percent).⁷

OFCCP is working to address these problems by ensuring individuals have an equal opportunity to find and secure good jobs that will lead to lasting careers. To address the intractable barriers facing many Veterans and people with disabilities, in September, OFCCP issued final rules under Section 503 and VEVRAA. These rules are designed to increase dramatically the effectiveness of OFCCP's efforts, and those of Federal contractors, to eliminate workplace discrimination against people with disabilities and protected Veterans and to increase their employment opportunities.

As Secretary Perez has said, the steps we are announcing will ensure that qualified workers have more meaningful opportunities to find, secure and keep good jobs. By strengthening

²*Income, Poverty and Health Insurance Coverage in the United States: 2011*, Current Population Reports, issued September 2012, Table 3: People in Poverty by Selected Characteristics: 2010 and 2011, <http://www.census.gov/prod/2012pubs/p60-243.pdf> (last accessed July 8, 2013).

³*Income, Poverty and Health Insurance Coverage in the United States: 2012*, Current Population Reports, issued September 2013, Table 3: People in Poverty by Selected Characteristics: 2011 and 2011, <http://www.census.gov/prod/2013pubs/p60-245.pdf> (last accessed Sept. 2013).

⁴To derive these figures, OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

⁵U.S. Bureau of Labor Statistics, Economic News Release, "Employment Situation of Veterans Summary 2012," March 20, 2013, <http://www.bls.gov/news.release/vet.nr0.htm> (last accessed Aug. 8, 2013).

⁶*Id.*, "Table A: Employment situation of the civilian non-institutionalized population 18 years and over by Veteran status, period of service, and sex, 2011-2012 annual averages."

⁷*Id.*

longstanding regulations under VEVRAA and Section 503, the new rules will ensure that qualified individuals with disabilities and Veterans have more meaningful opportunities to find, secure and keep good jobs. Moreover, both rules apply to protected Veterans with disabilities.

For the first time, these rules provide metrics – management tools that inform decision-making and help contractors measure their progress toward achieving equal opportunity for people with disabilities and protected Veterans. We are clarifying expectations, making legal requirements more effective, and facilitating compliance with the law.

These new rules are a win-win:

- They will benefit Veterans and people with disabilities, who belong in the economic mainstream of the nation but have faced unfair barriers in the job market. In fact, if Federal contractors reached the Section 503 goal and the benchmark in VEVRAA in the first year, they could employ an additional 205,500 protected Veterans under the VEVRAA rule and an additional 594,580 individuals with disabilities under the Section 503 rule. Eliminating the overlap between these two populations, it is estimated that the overall number of hires across both rules would be over 700,000.
- In addition, the new rules will benefit employers who do business with the Federal Government, increasing their access to a large, diverse pool of qualified workers. The tangible and intangible benefits of investing in the recruitment and hiring of individuals with disabilities and Veterans also include access to new markets by developing a workforce that mirrors the general customer base; lower turnover based on increased employee loyalty; lower training costs resulting from lower turnover; and increased productivity by hiring the best qualified person for the job.

The final rules were lauded by a number of groups, including the National Organization on Disability, Easter Seals, the American Association of People with Disabilities, Health & Disability Advocates, and the National Council on Disability.

Given a fair opportunity, Veterans and people with disabilities, including Veterans with disabilities, can work, can be productive citizens, can contribute as taxpayers and can advance economically. These outcomes benefit not only our workplaces, our Veterans, and people with disabilities themselves, but also our communities, and ultimately our national economy.

Finally, of course, the new rules will benefit the entire nation, as they help us fulfill the American promise of equal opportunity for all. With this general backdrop, I will touch upon several key provisions of the Section 503 and VEVRAA regulations.

Section 503 of the Rehabilitation Act of 1973: Discrimination Based on Disability

The new regulations, published in the Federal Register on September 24, 2013, reflect some of the best thinking of both the disability rights community and Federal contractors. The regulations resulted from a collaborative process that included:

- Multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, and other interested parties to understand the features of the Section 503 regulations that worked well, those that could be improved, and possible new requirements that could help to effectuate the overall objective of increasing employment opportunities for individuals with disabilities with Federal contractors;
- An Advanced Notice of Proposed Rulemaking (ANPRM), published in the Federal Register on July 23, 2010, requesting public comment regarding potential ways to strengthen the Section 503 affirmative action regulations;
- A Notice of Proposed Rulemaking (NPRM), published in the Federal Register on December 9, 2011, seeking comment on a number of specific proposals that would strengthen the regulations implementing Section 503. The NRPM was published for a 60-day public comment period;
- A 14-day extension of the public comment period in response to stakeholder requests; and
- Numerous meetings with OFCCP and Administration officials afforded interested stakeholders an opportunity to provide input pursuant to the regulatory process.⁸

OFCCP received and considered more than 400 comments from the public in developing the final Section 503 regulations. The final regulations remain true to the agency's core objectives as they existed almost three years ago when we first began this rulemaking process:

- The regulations provide contractors the ability to conduct meaningful self-assessments of their employment practices by requiring that they collect data and analyze it to improve their policies and practices. This includes requiring contractors to invite applicants to voluntarily self-identify as an individual with a disability at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to voluntarily self-identify after receiving a job offer, and collecting data on who applied for jobs and the number of individuals with disabilities they hire in order to create greater accountability for employment decisions and practices;
- The regulations support awareness and voluntary compliance. Contractors are required to provide their subcontractors notice of their nondiscrimination obligations and the need to take affirmative steps to recruit and hire a diverse, qualified workforce; and
- The regulations incorporate existing disability law; specifically, the regulations implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008. The ADAAA amended the definition of disability in Section 503 to the same extent that it amended the ADA, and became effective on January 1, 2009.

⁸ These meetings are documented through OMB's ROCIS system, and further information on these meetings is available at http://www.whitehouse.gov/omb/oira_1250_meetings.

In addition, the regulations assist contractors in measuring their ongoing progress through the use of a yardstick, in this case a 7 percent utilization goal for individuals with disabilities. The 7 percent goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of a particular group. Quotas are expressly forbidden. Instead, the goal is a management tool that informs decision-making and provides for accountability. Failing to meet the disability utilization goal, alone, is not a violation of the regulation and it will not lead to a fine, penalty, or sanction.

We used the NPRM as a vehicle for obtaining feedback and ideas on a range of approaches for improving the Section 503 regulations. At the final rule stage, OFCCP adopted a strategic, focused, and practical approach that weighed the potential benefits of some provisions against the estimated cost and burden of compliance associated with them.

First of all, to ensure that contractors have adequate time to make changes to their business systems and processes that place them in a position to optimize the employment prospects of both Veterans and people with disabilities, these rules will become effective 180 days after publication. In addition, both rules also provide a phase-in period of up to 12 months for current contractors to develop affirmative action programs (AAPs) in compliance with the new regulatory requirements.

We also eliminated or modified a number of proposals that were in the NPRM, and to which commenters had objected, in order to provide contractors with greater flexibility and to reduce the estimated cost of compliance. For example, we created flexibility both in the recruitment options available to contractors and in various personnel policies related to complying with their affirmative action and nondiscrimination obligations.

In addition, the agency added a provision to reflect sensitivity to the concerns of smaller contractors about meeting the aspirational goal due to the small size of their workforce. The final regulations provide small contractors, those with 100 or fewer employees, the option of using the 7 percent goal at the workforce level instead of at the job-group level. This minimizes the burden on small contractors, while still providing them with a yardstick by which to measure the effectiveness of their efforts to recruit and hire individuals with disabilities.

*Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA):
Discrimination Against America's Veterans*

As with our Section 503 rulemaking, the final VEVRAA rule resulted from a collaborative process that included:

- Multiple town hall meetings, webinars, and listening sessions;
- A NPRM published in the Federal Register on April 26, 2011, with a 60-day public comment period;

- A 14-day extension of the public comment period in response to stakeholder requests; and
- Numerous meetings with OFCCP and Administration officials afforded interested stakeholders an opportunity to provide input pursuant to the regulatory process.⁹

OFCCP received more than 100 comments on the NPRM, covering a broad range of issues. The new regulations, published in the Federal Register on September 24, 2013, reflect a consideration of comments of all our stakeholders. Because the two rules substantially parallel each other, most of the NPRM proposals eliminated in the Section 503 Final Rule were also eliminated in the VEVRAA Final Rule. The Final Rule also eliminated the requirement that contractors affirmatively ask disabled Veterans if they require a reasonable accommodation, retaining the requirement in the existing rule that contractors must take part in an interactive process regarding accommodation and should, but are not required to, seek the advice of the applicant regarding such accommodation.

The VEVRAA Final Rule focuses on provisions that strengthen the obligation of covered Federal contractors to take affirmative measures to recruit, hire and promote qualified Veterans. Among the most important provisions in the Final Rule is the provision creating a national hiring benchmark against which contractors can measure the effectiveness of their recruitment and outreach efforts. Contractors may still, as proposed in the NPRM, use an alternative approach of creating their own annual hiring benchmark that reflects their unique hiring circumstances. We believe that offering this alternative approach toward the use of benchmarks provides contractors a greater degree of flexibility. Specifically, the final VEVRAA rule:

- Assists contractors in measuring their progress in recruiting and employing Veterans through the use of a yardstick, in this case either an 8 percent benchmark in the first year or, at their option, a self-set goal based on available and relevant data;
- Creates greater accountability through meaningful self-assessment for employment decisions and practices by requiring that contractors maintain several quantitative measurements and comparisons for the number of Veterans who apply for jobs and the number of Veterans they hire. Having this data will also assist contractors and OFCCP in measuring the effectiveness of contractors' outreach and recruitment efforts.
- Opens doors to increased job opportunities by providing knowledge and support to Veterans seeking jobs. This is achieved by improving the effectiveness of the VEVRAA requirement that contractors list their job openings with the appropriate state employment service agency – first, by requiring that contractor job listings be provided in a format that the state agency can access and use to make the job listings available to job seekers; and second, by clarifying the relationship between the contractor, its agents, and the state employment services that provide priority referral of protected Veterans.

⁹ These meetings are documented through OMB's ROCIS system, and further information on these meetings is available at http://www.whitehouse.gov/omb/oira_1250_meetings.

- Provides knowledge of, and supports voluntary compliance by subcontractors with their obligations by requiring prime contractors to include specific, mandated language in their subcontracts alerting subcontractors to their responsibilities as Federal contractors.
- Creates flexibility for contractors when they are establishing formal relationships with organizations that provide recruiting or training services to Veterans. The relationships or “linkage agreements” can be established to meet the contractors’ specific needs, while assuring outreach to Veterans seeking employment.
- Repeals outdated and obsolete regulations at 41 CFR Part 60-250 that apply to contracts entered into before December 1, 2003, that do not meet the coverage threshold of Part 60-300 and have not been modified since. OFCCP believes that all such contracts have either expired or been modified, and that there is, therefore, no longer a need for the Part 60-250 regulations.

Next Steps

In the coming year, OFCCP will continue implementing its three strategies to ensure compliance among Federal contractors: effective enforcement, implementing regulatory reform, and external engagement. These strategies are part of an ongoing effort to facilitate the success of contractors in complying with our existing and new regulations. Stakeholder relationships are even more important as the agency begins its transition from rulemaking to rule implementation in the Section 503 and VEVRAA programs. We anticipate extensive further engagement with the stakeholder communities in connection with implementation of the Section 503 and VEVRAA rules, and specifically will provide contractor training and technical assistance to facilitate success under these new regulations, both leading up to as well as after the rules become effective. In addition, we will engage with the Federal Acquisition Regulatory Council to have the newly revised VEVRAA and 503 regulations incorporated into the Federal Acquisition Regulation to ensure contractor awareness and compliance.

In this vein, building upon the results of our ongoing customer service initiative, we will focus on providing ongoing compliance assistance and training and support to the contractors that we regulate. We are also committed to continuing collaboration with these stakeholders as we do so.

Conclusion

Workers are our nation's greatest resource. The United States has among the most talented, most innovative, and most hard-working people in the world, and they are the engine of our economic recovery. That is why the Department of Labor and OFCCP are so fully committed to ensuring that American workers are afforded the opportunities and working conditions that will allow them and their employers to flourish.