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60 DLR A-11

OFCCP

'Two-Way Conversation' Still Needed In Section 503 Phase-In, OFCCP's Shiu Says



By John Herzfeld

March 30 — A “two-way conversation” between regulators and contractors remains necessary a year after the effective date of an Office of Federal Contract Compliance Programs final rule on employing people with disabilities, as its phased-in provisions are implemented, OFCCP Director Patricia A. Shiu said March 27.

Speaking at a Cornell University program in New York, Shiu said while the agency and the contractors it regulates are moving ahead with implementation, the rule was set up with phased-in compliance dates specifically to allow a “process” of cultural change to unfold.

The rule, which amended Labor Department regulations under Section 503 of the Rehabilitation Act, strengthened affirmative action requirements and set a 7 percent utilization goal for qualified individuals with disabilities. It took effect March 24, 2014, and later survived a legal challenge by construction contractors (239 DLR AA-1, 12/12/14).

In drafting the Section 503 rule, Shiu said, the agency recognized that it would take time to “create a culture of inclusion” in the workplace. Rather than a “check the box exercise,” she said, it requires “a major cultural change in how to integrate people into the workplace.”

The rule's requirements are “no longer just a mandate,” but involve a dialogue that continues as implementation goes forward, Shiu said.

“We are here to listen to your processes and your plans,” she told an audience consisting mostly of employer representatives and civil rights advocates. “These rules require a lot of thinking ahead.”

Shiu pointed to outreach and recruitment provisions as tools to help build up the “robust applicant pool” needed to address employer concerns about meeting the 7 percent goal. While retaining contractor flexibility, the provisions are intended to ensure that outreach and recruitment are given as much importance as any other business process, she said.

'Failure to Try' Violates Law

The rule's 7 percent utilization goal, if not met, would trigger a determination whether impediments to equal employment opportunity exist and lead to steps to address any problems identified, Shiu said.

Failure to meet the goal, however, isn't a violation and carries no penalties, she continued. “That's why it's not a quota,” she said. “Failure to try, though, is a violation.”

The agency's rules under the Vietnam Era Veterans' Readjustment and Assistance Act, which took effect the same time as the Section 503 rule, shares many similar provisions, Shiu said.

In the six years since President Barack Obama took office, the agency has grown more “responsive and pragmatic” and better positioned to “work with all our stakeholders to facilitate success in the workplace,” she said.

Now the challenge is to continue the dialogue over “the hard work of compliance,” moving beyond “the conversation of two years ago,” Shiu said. In 2013, the Section 503 project was met with the legal challenge by construction contractors, as well as inquiries by House Republicans.

In a panel discussion following Shiu's presentation, John P. Furfaro, a management attorney with Skadden Arps Slate Meagher & Flom LLP in New York, said that employers have concerns about the Section 503 and VEVRAA rules' treatment of employee self-identification issues but may have “gotten to the notion that it's workable.”

Audit Risk?

Employers remain concerned that failing to meet a utilization goal or hiring benchmark may trigger a full-blown audit, “despite OFCCP assurances,” Furfaro said.

Speaking of another concern—whether pre-offer requirements for employee self-identification would violate the Americans with Disabilities Act—he said that employers “have gotten enough comfort on this that it's not a violation” and indeed are getting “more comfort all the time.”

The newly reduced reporting requirements in the VEVRAA rules, which phased out the VETS-100 Report and introduced a new VETS-4212 Report (185 DLR A-10, 9/24/14), make the reporting form "a much easier, much simpler and more workable document," Furfaro said.

Lisa Bornstein, legal director of the Leadership Conference on Civil and Human Rights, gave the Section 503 rule a positive reception in general but said rights advocates still have concerns about aspects of the rule.

Among her criticisms were that the rule should have required more specific reporting broken down by types of disability, mandated online application systems and called for more frequent compliance disclosure.

She also questioned the rule's exemption of contractors with 100 employees or fewer from the requirement of applying the 7 percent goal to job groups, as opposed to their entire workforce.

The session was sponsored by the Cornell Industrial and Labor Relations School's Labor and Employment Law program, in conjunction with Cornell Law School.

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