503/VEVRAA Revised Requirements Frequently Asked Questions (FAQs)

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INTRODUCTION

The revised 503 and VEVRAA regulations have resulted in many questions. This list of Frequently Asked Questions was compiled to address common concerns with interpreting the regulations. The information in this document and the related DCI Consulting information are provided for general information purposes only. These materials and the presentation are not intended to provide legal advice. These copyrighted materials may not be reproduced, copied or used without prior permission from the authors.

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FREQUENTLY ASKED QUESTIONS

SELF-IDENTIFICATION QUESTIONS

1. What if an employee or applicant self-identifies as a disabled veteran on the VEVRAA form, but then self-identifies as "No, I don't have a disability" on the disability form?

   It is a voluntary self-identification process. The recommended approach would be to maintain the original self-identification responses without modification.

2. If my selection process allows for employees to apply for open positions (i.e., internal applicants), do I have to solicit self-identification for protected veteran and disability status again?

   It is recommended to have internal applicants complete the forms again, as disability can change from one point in time to another. Additionally, most ATS and HRIS systems do not communicate; thus, disability status will need to be asked again to have it with the applicant data.

3. Contractors are required to invite employees to voluntarily self-identify during the 1st year after the effective date of Subpart C and then again every 5 years thereafter. Contractors are also required to distribute a reminder to the entire workforce at least once in the intervening years. In what manner can contractors send out this reminder? Do they have to use the same voluntary self-identification form?

   There is no specific requirement from OFCCP regarding the manner in which the reminder may be disseminated. The OFCCP FAQs outline several acceptable options, emphasizing that contractors should choose a method or methods that are reasonable and likely to be effective given those particular circumstances. Thus, it is recommended that contractors invite employees to voluntarily self-identify as disabled through a means reasonable to the contractor (e.g., electronic notification to employees with a link that allows them to review and update their information, linking to the form via company intranet, or physically posting and distributing copies).

4. What if I survey my workforce and there is a low response rate (e.g., 50% do not reply)?

   It is a voluntary self-identification process. A best practice approach would be to develop a communication plan and education initiative prior to surveying your workforce. Also, be sure to program the HRIS to track a response of "did not reply" when an employee does not reply to the voluntary self-identification survey. Finally, ensure that appropriate records are maintained in order to demonstrate compliance with the requirement to invite self-identification.

5. Are contractors allowed to add their own language with regard to the disability form? In other words, is it acceptable to add information before or after the required language of the form?

Contractors are permitted to develop their own lead in page or page following the form, but the form itself cannot be altered. So, it would be acceptable to have your own introduction on a separate page, before the form, but it would not be ok to add your introduction to the one already prescribed in the form. Similarly, it is acceptable to include additional information about your accommodations process on a page following the form, but not within the form itself. Contractors are encouraged to take actions that they feel will aid in creating a safe environment for applicants and employees to complete the form. Towards that end, it is important to emphasize both the voluntary and confidential nature of the information provided, as well as the assurance that responses will not be used in any employment decisions.

6. How aggressively should contractors be encouraging applicants and employees to complete the self-identification forms? Should this be required?

Contractors are required to provide the forms to applicants and employees; however, self-identification is voluntary. Contractors should ensure they can demonstrate that all applicants are receiving the invitations as required. If applicants or employees are not completing the form, it may be helpful to examine when and how the forms are being distributed, to determine if an adjustment in timing or method of distribution may improve completion rates. For example, consider a situation where forms are being mailed to all post-offer applicants, but completion rates are low. In this instance, contractors may consider providing the forms when the new hires report for their first day of work, as long as they are provided the opportunity before beginning actual work duties. Contractors should work to create a safe environment that encourages applicants and employees to provide the information (i.e., assurance of confidentiality, information not used in employment decisions).

7. Are contractors allowed to ask applicants and/or employees to voluntarily self-identify as a veteran in general or as active duty military (i.e., categories that are not covered under VEVRAA)?

Yes, contractors have flexibility in designing the VEVRAA form to request applicants to voluntarily self-identify as a protected veteran. This means that contractors can include a general "other" veteran category or active duty category, if desired. However, only the four protected categories should be used in reporting numbers for the AAP and VETS-4212 report .

8. In light of the changes to the old VETS-100A report, now VETS-4212, should contractors continue requesting the specific categories of protected veteran status post-offer, or should contractors only ask for general protected veteran status?

OFCCP has provided guidance that specific protected veteran categories are no longer required to be reported. However, the same guidance states that contractors are allowed to still request the specific categories of protected veteran in the post-offer form. This guidance means that contractors may consider a variety of options in collecting this information. At a minimum, contractors must ask individuals to self-identify as a protected veteran (i.e., potentially using the same form as in the pre-offer stage). Contractors may choose to go a step further and request that individuals identifying as a protected veteran only because of their recently separated status, provide a discharge date. On the other hand, contractors may also choose to request that individuals identify the specific protected veteran category(ies) to which they belong.

9. Is there a required form to solicit veteran status?

No, but the OFCCP provided a "Sample Invitation to Self-Identify" in Appendix B of the revised regulations. Language from this sample invitation should be used to ensure that required topics are covered when developing your form. See the response to FAQ 7, above, for additional information about solicitation of specific categories.

10. When the contractor initially (and every 5 years thereafter) solicits disability status from their workforce, can the contractor also solicit veteran status?

Yes. The regulations do not require that you solicit veteran status from your workforce (except at time of hire); however it is a best practice to update the veteran status of employees if you are already surveying your workforce for other demographic information. In addition, it is recommended that the collection of demographic information not be conducted during merit-related or compensation reviews.

11. If an applicant or employee does not self-identify as disabled, is the contractor allowed to visually identify?

Yes, you are allowed to identify an individual as having a disability, but it is not recommended. Consider potential risks that are associated with visual inspection (e.g., potentially being held responsible for personnel actions taken on disability information that the individual did not self-disclose).

12. What if an applicant or employee requests an accommodation, but they did not self-identify as being disabled? Should the contractor change the disability self-identification form?

The regulations allow the employer to override the disability self-id information in cases such as these. However, contractors are cautioned to consider the implications of changing an employee's response to a voluntary self-identification. The contractor must also consider the individual's request for an accommodation in accordance with the ADA/ADAAA.

13. In some instances, the definitions outlined for protected veteran status may seem confusing to an applicant or employee. How should HR representatives in our organization provide clear direction to confused employees or applicants when completing the protected veteran self-identification process?

In a case where an applicant or employee is confused about the protected veteran categories, the contractor should rely on the definitions provided in the regulations. The applicant or employee may reference the definitions and choose the option they believe best matches their situation without any additional guidance or coercion from company representatives.

DATA ANALYSIS QUESTIONS

14. If audited, do I have to submit Subpart C data and analyses as part of the initial desk audit submission?

Yes, some analytic data must be submitted with desk audit materials. OFCCP amended the itemized listing that accompanies a scheduling letter for a compliance evaluation in October, 2014 to require additional information aligned to the revised 503 and VEVRAA regulations. Specifically, contractors are required to submit an analysis of the outreach and recruitment efforts, audit and reporting system documentation, data collection analysis computations, utilization analysis under 503, and documentation of the hiring benchmark adopted under VEVRAA. In addition, reasonable accommodation policies and the most recent review of personnel processes as well as physical and mental job qualifications is requested.

15. What if I am audited six months or more into my first AAP cycle after March 24, 2014 (e.g., AAP date of January 1, 2015 and audited on August 1, 2015)? Do I have to submit Subpart C data and analyses based on the six months that have passed as part of the initial desk audit submission?

The revised scheduling letter does require that contractors who are six or more months into their plan when they receive the scheduling letter submit additional information. There are two options provided. Contractors may either submit the underlying data, such that OFCCP can complete the computations (i.e., data collection analysis 44(k) analytics and utilization analysis), or contractors must complete these analytics and submit them with the other desk audit materials. Contractors should consider computing and submitting the analytics, as opposed to sending the raw data to OFCCP with the initial desk audit submission.

16. For purposes of conducting a disability utilization analysis, how do I account for employees who do not reply to the survey or do not wish to answer?

OFCCP has stated that individuals responding "yes" should be compared against all other individuals in the job group, ignoring whether they responded to the invitation. However, because low response rates are a known issue, it is a best practice to remove individuals who did not complete the survey or who indicated they did not wish to answer to more appropriately analyze the known disabled/not disabled individuals. Contractors should also conduct the analysis as required by OFCCP.

17. What should I do, if anything, with the VEVRAA hiring benchmark?

The regulation requires contractors to adopt a hiring benchmark, but does not specify a comparison to incumbency or analysis of hiring activity. However, for contractors looking to assess their data in comparison to the benchmark, it is recommended to compare the percent of hires that are protected veterans at the establishment to the hiring benchmark percentage.

18. Will the number of hires be different from the number of openings and fills for the disability and protected veteran data collection analysis referenced at 60-741.44 (k) and 60-300.44 (k)?

It is possible that the number of hires would be different than the number of openings or jobs filled during the affirmative action plan year. The difference could be due to the timing of the start/end of the AAP year being in the middle of a requisition or recruitment. The difference in numbers may also reflect cancelled or pending requisitions.

JOB POSTING QUESTIONS

19. How broad is the requirement to include the EEO tagline in job postings (i.e., is it just printed postings, or does it include radio/TV/other media)?

Contractors should include the EEO tagline in all job posting regardless of the advertising method. Contractors can use different versions of the tagline to better suit the different advertising methods (i.e., the required minimum tagline for print is "vet/disability", but whole words must be used in radio advertisements). The tagline, at least in its minimum form (vet/disability), must be included in the advertisement.

20. Does the requirement to include the EEO tagline extend to company and branding materials distributed at a fair or posted in a magazine, even when job openings are not being advertised?

If the contractor is creating general marketing brochures that are not related to any job openings or potential recruitment for openings, then the EEO tagline need not be included. However, because there is a chance these general marketing brochures may be used in recruitment efforts, it is a best practice to include the EEO tagline in the general marketing materials.

21. The EO clause requires that contractors notify applicants of their rights with an electronic posting, if they use an electronic application process. What does it mean when it says the posting must be "conspicuously stored" with, or as part of, the application?

This requirement refers to ensuring that the electronic posting of applicants' rights is "conspicuous." In other words, applicants should not have to search to find the posting. It should be with, or a part of, the application, such that applicants applying for positions will see the posting if they fill out an application.

22. Who should be listed as the contractor official when information is sent to the state employment services pursuant to the obligation under 41 CFR 60-300.5(4)?

The "contractor official" may be a chief hiring official, a Human Resources contact, a senior management contact, or any other manager for the contractor that can verify the information set forth in the job listing sent to the state. You may use the same contact for every state as long as they are knowledgeable about the job posting and able to verify information requested.

23. I use a 3rd party vendor to list with the state. Am I allowed to have my vendor pass along the required information to the state employment agencies for me?

Yes, but it is the responsibility of the contractor to ensure that the information is provided to the state. If a vendor does not fulfill this obligation, the contractor will still be responsible for noncompliance. If your vendor is the one to provide this information to the state, it is recommended that you request documentation of these communications for your records. If a third party vendor is used, you must provide their contact information in addition to letting the state know that you are a Federal Contractor that requests priority referrals for veterans and the contact information for the contractor hiring official. This information must be sent for the first post with the state after the effective date of the regulations and anytime time after if the information is changed.

24. Is there mandated language that I must use in order to satisfy the EEO tagline requirement?

The Final Rules add the obligation to the EEO tagline that protected veterans and individuals with disabilities must be incorporated into the statement. Although there is no mandated language, OFCCP has clearly stated in their FAQs that abbreviating "disability" and "protected veteran status" as "D" and "V", does not satisfy the EEO tagline requirement. As long as the words "disability" and "vet" are included in your tagline you have met the minimum requirements. Contractors are able to expand upon the minimum requirements to make the tagline more robust if desired. Additionally, you may use different versions for your tagline, if helpful, for various postings (e.g., magazine ad, electronic job ad, billboard, etc.), as long as you are following minimum compliance standards.

EEO POLICY STATEMENT QUESTIONS

25. Regarding the changes to the EEO/AA policy statement, what does "top official" mean?

The contractor must identify the top U.S. official within the entire contractor organization (i.e., not the highest ranking official at each establishment, rather the single highest ranking U.S. official within the contractor's organization). If the contractor is based in the U.S., this will likely be the President/CEO of the organization. This person must be named as fully supporting the EEO/AA policy.

26. How often do we have to send our policy statement to subcontractors, vendors and suppliers?

Although the regulations do not provide specific guidelines regarding frequency, we recommend that the policy statement is disseminated on an annual basis.

27. Can the contractor shorten their policy statement in some cases, or must it be verbatim from the AAP?

Yes, the contractor may shorten the policy statement if necessary. If a shortened version is utilized, make sure to include all pertinent information, as required by the regulations

RECORDKEEPING

28. Who is allowed to have access to the disability information for applicants and/or employees? Is it okay if decision makers (e.g. hiring managers) have access to disability information?

Disability information collected from applicants should be stored as other EEO information is in the ATS (e.g., race and sex). This information should be considered confidential and not shared with decision makers. Access should be restricted to only those human resources professionals who have affirmative action or EEO reporting obligations.

29. How many years am I required to keep records under the revised regulations?

Yes. Changes to 503 and VEVRAA now include a 3 year recordkeeping requirement for the following records:

- Evaluations of outreach and recruitment efforts (41 CFR 60-300.44(f) and 41 CFR 60-741.44(f));
- Records pertaining to the data collection of comparisons regarding applicants and employees (41 CFR 60-300.44(k) and 41 CFR 60-741.44(k)); and
- Records related to the hiring benchmark requirement (41 CFR 60-300.45) (VEVRAA only).

Although you are not required to keep all records for 3 years, DCI recommends that you increase your overall recordkeeping to 3 years for ease of implementation and greater likelihood that required records will not be incorrectly purged after 2 years. The recordkeeping requirement is not dependent on the number of employees.

30. I noticed that there appears to be a disparity between the VEVRAA regulatory text and the 503 regulatory texts regarding the storage of self-identification information. Specifically, at 60-300.23(d) which requires and 60-300.42 (d), the contractors shall maintain a separate medical file on persons who identify as disabled veterans.

The OFCCP is aware of the differences outlined in the 503 and VEVRAA regulations. We believe there was an error when finalizing the regulations. During this time, the regulation related to disabled veterans information being stored separately also conflicts with the VETS-100A filings, which are no longer relevant since they have been replaced with VETS-4212. Because the former VETS-100A filings required contractors to have all protected veteran categories, including the disabled veteran status, the specific regulation found at 300.42(d) stating that the separate file should be maintained in accordance with 60-300.23(d) can be treated as erroneous and ignored. However, this information must be retained and treated as confidential. Hiring managers should not have access to information about disabled veteran status.

GENERAL QUESTIONS

31. What should we do about existing purchase orders and contracts, in light of the new contract language requirements for flowdown language?

All purchase orders and contracts after of March 24, 2014 necessary to the performance of the Federal contract(s) will need to have the revised language.

32. Do the new regulations require Federal contractors to give preference to protected veterans and/or individuals with disabilities?

No, the regulations do not require contractors to give a preference to veterans or individuals with disabilities. They do, however, require that contractors provide equal opportunity to apply and be considered for positions, and they require that contractors not discriminate against these individuals.

33. When are contractors obligated to begin collecting disability information from applicants? Is the obligation the same for employees?

Contractors are required to solicit disability information for applicant pre- and post-offer on the first AAP cycle that begins after March 24, 2014 (i.e., effective date of the regulations). Per the regulations, contractors may maintain their current AAP for the duration of their AAP year, but must collect the information at the start of the next AAP. The obligation for collecting disability information from incumbents is the same, in that employees must be surveyed during the transitional AAP year after the effective date of the regulations.

34. Does the Final Rule change my obligation to review the physical and mental qualification standards of my company´s jobs?

No. The Final Rule retains the existing regulatory requirement for "periodic" review so no new or different obligations are created for contractors. If the physical or mental qualifications standards of a job change, a contractor should update job descriptions and postings for those positions. Otherwise, the contractor should determine a schedule for reviewing the physical or mental qualifications standards of jobs that works best for the contractor. It should be noted that the revised scheduling letter specifically requests information on the last review completed and the schedule for future reviews.

35. There are some circumstances in which I notice a conflict or disparity between what is written in the preamble to the regulations, the OFCCP FAQs, and the regulatory text itself. What should I do when there is a conflict between these sources?

The OFCCP FAQs and the Preamble are considered sub-regulatory tools. The actual regulations should be used as the ultimate source of guidance if there is truly a conflict between information. This has been upheld in related case law (e.g., OFCCP v. United Space Alliance, LLC). However, if the regulatory text is vague, other tools, such as the Preamble, may be used to determine how a contractor should comply. For instance, the regulatory text does not give contractors guidance on the use of the Internet Applicant Rule for applicants who self-identify as disabled or a protected veteran; however, the Preamble clarifies that the Internet Applicant Rule may be applied. The information in the Preamble and the regulatory text is not conflicting in this example, it is simply a clarification.