

Duff on Hospitality Law

What is the OFCCP and Do Hoteliers and Restaurateurs Need to Care?

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The Office of Federal Contract Compliance Programs (OFCCP) enforces regulations aimed at federal government contractors, with a specific eye towards preventing both intentional and unintentional employment discrimination based on any protected class (e.g. race, sex, or disability). Many employers think that the OFCCP has no interest in them because they do no business with the federal government. If only it were that easy. Many clients have called after receiving notice that they now are considered a federal contractor because of a service that was purchased by a previously unknown federal government group.

It is important to be aware of your status as a federal contractor because you may need to comply with complex affirmative action practices, including for hiring, and you may need to keep detailed records of your efforts to comply. In addition, OFCCP rules have been changing lately. The new rules expand the affirmative action, non-discrimination, and related record keeping obligations for contractors regarding covered veterans and individuals with disabilities. So, even if you thought you were doing it right – you may need to make changes.

Do the OFCCP rules apply to hoteliers and restaurateurs?

As a general rule, if your business does any work pursuant to a federal or federally-assisted contract, you could be subject to regulatory requirements under one or more of the laws enforced by OFCCP. The work that triggers OFCCP compliance obligations could include providing guest rooms, hosting a meeting or event, or providing catering for a federal government group.

Hotels have been subject to OFCCP compliance actions in the past. Although we are aware of no compliance action directed at a restaurant, that likely stems from the relatively large dollar amounts required to trigger enforcement. Contracts of less than \$10,000 do not generally trigger OFCCP enforcement. Contracts of \$50,000 or more generally require that each contractor/subcontractor with 50 or more employees develop a written Affirmative Action Program or Plan (AAP). Specific requirements will vary depending on the industry and services involved under the contract (for instance, construction contractors are subject to separate requirements from other service providers).

If you suspect that you may be a federal contractor, you should become familiar with OFCCP requirements. The most recently issued rules regard two laws enforced by OFCCP: Section 503 of the Rehabilitation Act (Section 503), which prohibits discrimination against qualified individuals with disabilities, and the Vietnam Era Veterans' Readjustment Act (VEVRA), which prohibits discrimination against protected veterans. Both laws are administered and enforced by the OFCCP as they apply to federal contractors and subcontractors, and the new rules clarify and expand contractors' obligations.

What do the new rules require?

Noteworthy provisions found in the new rules include the following:

Opportunity for Self-Identification. Contractors must invite all employee applicants to self-identify protected status at the pre-offer and post-offer stages of the hiring process, on a form to be published by the OFCCP. For disabilities, contractors can identify disabilities (visually or based on applicant disclosures) if the applicant does not self-identify as disabled, and the contractor must offer employees the opportunity to self-identify every five years.

Records Collection and Retention. Contractors must evaluate the effectiveness of their outreach and recruitment efforts to reach affirmative action goals. The new rules require specific steps including measuring effectiveness of affirmative action efforts (e.g., comparing number of individuals with disabilities who apply to number hired) and determining necessary remedial actions. Contractors must retain certain documents for three years, including outreach and recruiting information, data collection analysis, and records regarding utilization and hiring benchmarks. OFCCP must be permitted to review documents either on-site or off-site, at OFCCP's option. (Also known as an audit.)

Specific Equal Opportunity (EO) Clause Reference. The new rules provide specific language to be used when the EO clause is incorporated into a subcontract so that subcontractors will be on-notice about their responsibilities as federal contractors.

Utilization Goals under Section 503 set at Seven Percent. Contractors must analyze the percentage of disabled individuals employed in each job group and compare their figure to the 7% goal. For contractors with 100 or fewer total workers, the analysis can be workforce-wide rather than by job group. If a contractor does not reach the 7% goal, the contractor must assess impediments to equal employment, and execute an appropriate program to reduce those impediments.

Hiring Benchmarks under VEVRA. Contractors can either use the national percentage of veterans in the civilian work force (currently 8%), or develop their own custom benchmark by considering factors including average percentages in the civilian work force over the previous three years, veteran participation in the state's employment service delivery system over the previous four quarters, and the contractor's assessment of its external outreach and recruiting efforts.

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The final rules were published in the Federal Register on September 24, 2013, and become effective on March 24, 2014. The rules are available at the following links:

[Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Special Disabled Veterans, Veterans of the Vietnam Era, Disabled Veterans, Recently Separated Veterans, Active Duty Wartime or Campaign Badge Veterans, and Armed Forces Service Medal Veterans](#)

[Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals With Disabilities](#)

If you have any questions about this development or how OFCCP-enforced laws impact your business, please contact [Greg Duff](#).

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