

Law Review 1137

Federal Contractor Affirmative Action for Hiring Veterans

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1.8—Relationship Between USERRA and other Laws/Policies

8.0—Veterans' Preference

On April 26, 2011, the Office of Federal Contract Compliance Programs (OFCCP), in the United States Department of Labor (DOL), published in the *Federal Register* a proposed new rule intended to strengthen the affirmative action requirements for federal contractors and subcontractors for employing veterans. The deadline for comments on the proposed rule is June 25, 2011. To submit comments, visit the federal e-rulemaking portal at <http://www.regulations.gov>. After the comment period, OFCCP will consider the submitted comments, perhaps make some adjustments in the proposed rule, and then publish the final rule in the *Federal Register* and the *Code of Federal Regulations*.

Under section 4212 of title 38, United States Code (38 U.S.C. 4212), federal contractors and subcontractors are required to take affirmative action to employ and advance in employment special disabled veterans (generally 30% or more disabled), Vietnam era veterans, and other veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. OFCCP is responsible for enforcing section 4212.^[1]

The proposed rule clarifies mandatory job listing requirements, under which a contractor must provide job vacancy and contact information for each of its locations to an appropriate employment service delivery system. The rule proposes requiring contractors to engage in at least three specified types of outreach and recruitment efforts each year. In addition, the proposed rule would require that all applicants be invited to self-identify as “protected veteran” before they are offered a job. Increasing data collection on job referrals, applicants and hires, and requiring contractors to establish hiring benchmarks to assist in measuring the effectiveness of their affirmative action efforts also are proposed.

Many of the young men and women returning from military service in Iraq and Afghanistan are having difficulty in finding suitable employment, and this is particularly a problem for those returning with serious disabilities incurred in service. Improved enforcement of 38 U.S.C. 4212 will likely be most helpful in addressing this problem.

Please do not conflate 38 U.S.C. 4212 with the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4301-4335. USERRA applies to private employers regardless of size, and without regard to whether those employers do business with the Federal Government.^[2] USERRA forbids employer discrimination against those who serve or have served in our nation’s uniformed services, including the Reserve and National Guard, but USERRA does not require employers to take affirmative action for veterans. Under USERRA, a person who leaves a civilian job for voluntary or involuntary service in the uniformed services is entitled to reemployment with the pre-service employer, after release from the period of service, provided the individual meets the USERRA eligibility criteria.

DOL’s Veterans’ Employment and Training Service (VETS) is responsible for enforcing USERRA, while OFCCP is responsible for enforcing section 4212. The two DOL agencies work closely together to protect the rights of veterans. It is entirely possible that a single veteran could simultaneously have rights under section 4212 and USERRA.

[1] OFCCP also has authority under Executive Order 11246 and section 503 of the Rehabilitation Act of 1973. Those who do business with the Federal Government, as contractors or subcontractors, are held to the fair and reasonable standard that they not discriminate in employment on the basis of gender, race, color, religion, national origin, disability, or status as a protected veteran. For general information, call OFCCP's toll-free helpline at 800-397-6251 or visit <http://www.dol.gov/ofccp>.

[2] USERRA also applies to federal, state and local governments, as employers.