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In this issue:

OFCCP Regulations Implementing Jobs for Veterans Act of 2003 Finalized

by Nancy J. Purvis and Lloyd W. Aubry, Jr.

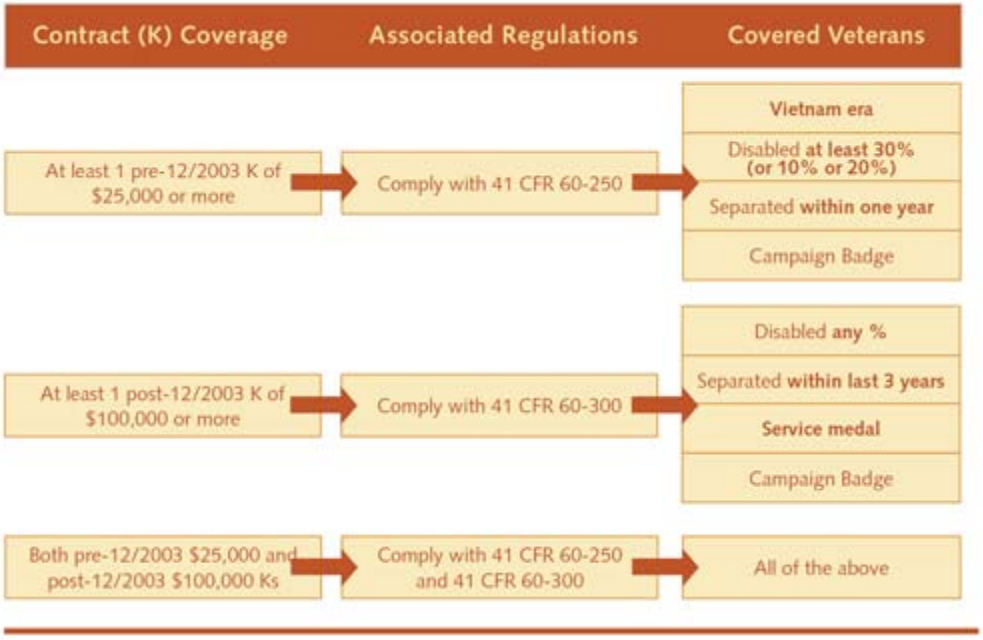
The EEO-related obligations associated with federal government contracting, including the requirement to prepare and implement an Affirmative Action Plan (AAP), can be fairly characterized as byzantine. The most recent complication facing government contractors is the Office of Federal Contract Compliance Programs' (OFCCP) recent publication of final regulations implementing the Jobs for Veterans Act of 2003 (JVA) at 41 CFR 60-300. Unfortunately, in publishing new regulations for veterans, OFCCP did not rescind the old regulations at 41 CFR 60-250 under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA). Federal contractors now must determine which law applies and then must comply with the corresponding regulations. The purpose of this article is to provide a roadmap for that process.

Employers that are federal government contractors or subcontractors need to evaluate their federal contracts to determine whether they are (1) still covered by the Vietnam Era Veterans Readjustment Assistance Act of 1974, or (2) now covered by the Jobs for Veterans Act, or (3) covered by both acts. This determination dictates which veterans in their work force and applicant pools are protected by the laws enforced by the OFCCP, as well as which set(s) of regulations control their affirmative action obligations to veterans.

Only contracts entered into before December 1, 2003, are covered by VEVRAA. Contracts entered into or modified on or after this date require compliance with JVA. Although the new regulations that implement JVA (41 CFR 60-300) are similar to the old regulations under VEVRAA (41 CFR 60-250), the two sets of regulations differ in a number of details. The major distinction between them is how they define covered veterans. The following briefly outlines the changes in the definition of "covered veteran" for employers who used to be covered by VEVRAA, but are now covered by JVA and not covered by VEVRAA:

- Vietnam-era veterans are no longer protected.
- All veterans with service-connected disabilities qualify as disabled veterans.
- Recently separated veterans are covered for three years following their discharge from the military.
- JVA covers veterans who participated in a military operation for which a service medal was awarded.

The following graphic provides a simplified version of the differences between VEVRAA and JVA with respect to applicable regulations and the definition of "covered veteran".



On its website OFCCP has indicated that it expects employers that are covered by JVA to begin using the new categories of protected veterans as soon as possible. For many employers this means changes to check-off lists that are used for collecting information for VETS-100 reporting, as well as altering the language of the Invitation to Self-Identify that is used for identifying individuals who want to benefit under the Affirmative Action Program for veterans.

This article has attempted to briefly outline the major changes to the affirmative action requirements for veterans. Further detailed information is available from OFCCP's website, http://www.dol.gov/esa/ofccp/index.htm

Nancy Purvis is a paralegal in our Palo Alto office, specializing in affirmative action plans and OFCCP issues. She can be reached at **650.813.4280** or npurvis@mofo.com.

***Guard Publishing Company* — Employees Do Not Have a Statutory Right to Use Employer's Email System Under NLRA**

Update– In late December, 2007, the National Labor Relations Board issued its long-awaited decision in the above case and, by a 3-2 vote, adopted a narrower rule regarding the permissible parameters of lawful workplace non-solicitation policies. In doing so, the Board conformed its rule to two federal circuit court opinions that had refused to enforce two previous Board decisions. We reported on this case at our annual Update Seminars in early January 2008, and recently the NLRB's General Counsel issued a report detailing implementation of this decision in subsequent NLRB enforcement actions.

In *Guard Publishing Company*, 307 NLRB No. 70 (2007), the company adopted an email "Communications System Policy" which prohibited the use of the company's email system for soliciting or proselytizing "for commercial ventures, religious or political causes, outside organizations, or other non-job-related solicitations." The company was aware of and tolerated employees sending personal, non-work-related emails such as jokes, baby announcements, party invitations, etc. There was, however, no evidence that emails were used to solicit support for participation in any outside cause or organization other than the United Way, for which the employer conducted periodic charitable campaigns. Pursuant to its policy, the employer disciplined an employee for sending three union-related emails from her work computer to unit members at their company email address. The union filed charges related to the policy and discipline, arguing that the prohibition violated the employees' Section 7 rights (the right to participate in union activity free from employer discrimination) under the National Labor Relations Act and that discipline was discriminatory because employees were not disciplined for other non-business- related use of the email system.

First, the Board found that the Communications System Policy did not violate Section 7. Relying on prior precedent related to employer-owned equipment (such as that related to bulletin boards, telephones, and copiers), the Board concluded that employees did not have a statutory right to use the employer email system

for Section 7 matters. Accordingly, an employer may lawfully bar employees' non-work-related use of its email system, provided it does not discriminate against Section 7 activities.

Second, the Board found that the employee discipline was not *per se* discriminatory just because other personal use of the email system was tolerated. In doing so, the Board modified existing Board law with respect to discriminatory enforcement and rejected the existing precedent that an employer violated Section 7 if it treated union communications differently from any other communication. Rather, the Board adopted a narrower view of discrimination by focusing on whether the different treatment is directed at Section 7 activities and communications because of their union or protected status. For example, an employer violates Section 7 if it permits email solicitations for one union but not another, or permits anti-union communications but not pro-union communications. However, an employer would not violate Section 7 if it permitted charitable solicitations but barred all non-charitable solicitations (including union solicitations). Applying this new standard, the Board found one instance of discipline to be discriminatory because it disciplined the employee for a "union-related message" which did not constitute prohibited solicitation under the policy. As to the other two messages that solicited employee support for union activities, the Board found the employer's discipline was permissible.

NLRB General Counsel Ronald Meisburg issued a report on May 15, 2008, reviewing a number of NLRB enforcement actions involving implementation of the new rule, though he did not identify the particular cases by name, referring to them only as Cases 1-5. In Case 2 the employer had a broad no-solicitation rule prohibiting solicitation for any purpose during working time. However, on investigation the Board found that while the employer disciplined employees engaged in union-solicitation activity, it did not discipline employees involved in non-union-related solicitations, including Avon, Mary Kaye cosmetics, and Tupperware; individual commercial solicitations for jewelry and foods; and school-fundraising solicitations such as for candy and wrapping paper. In *Guard Publishing*, the company, while allowing personal emails, did not permit emails soliciting support for groups or organizations, thus distinguishing the two cases. The Board contended the policy was unlawful and issued a complaint.

A similar result was reached in Case 5 where the employer had always maintained two bulletin boards: one for official employer announcements and the other for all types of non-work-related personal or general matters such as anti-war protest marches and party announcements. After union activity commenced at the facility, a union leaflet and a list of demands were posted on the employee bulletin board. When the union postings were removed from the bulletin board, they were reposted, at which point the employer took down all of the employee materials on the employee bulletin board and replaced them with employer-posted materials. Concluding that anti-union animus was the cause of eliminating the employee bulletin board, the General Counsel determined that the already-issued complaint was consistent with *Guard Publishing*.

The lesson of these cases is that whatever policy is chosen by the employer, it must be carefully considered and crafted, as well as consistently enforced, if the policy is to achieve its intended objectives.