

[Federal Register: August 8, 2007 (Volume 72, Number 152)]  
[Rules and Regulations]  
[Page 44393-44416]  
From the Federal Register Online via GPO Access [wais.access.gpo.gov]  
[DOCID:fr08au07-11]

=====

DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60-300

RIN 1215-AB46

Affirmative Action and Nondiscrimination Obligations of  
Contractors and Subcontractors Regarding Disabled Veterans, Recently  
Separated Veterans, Other Protected Veterans, and Armed Forces Service  
Medal Veterans

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

-----

SUMMARY: The Office of Federal Contract Compliance Programs (OFCCP) is publishing a new set of regulations to implement the amendments to the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ('`VEVRAA'') that were made by the Jobs for Veterans Act ('`JVA'') enacted in 2002. The JVA amendments raised the threshold dollar amount of the Government contracts that are subject to the affirmative action provisions of VEVRAA, changed the categories of veterans protected by the law, and changed the manner in which the mandatory job listing requirement is to be implemented. The final regulations published today apply only to covered Government contracts entered into or modified on or after December 1, 2003. The existing VEVRAA implementing regulations found in 41 CFR part 60-250 will continue to apply to Government contracts entered into before December 1, 2003.

DATES: Effective Date: These regulations are effective September 7, 2007.

FOR FURTHER INFORMATION CONTACT: Lynn A. Clements, Acting Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs, 200 Constitution Avenue, NW., Room N3422, Washington, DC. 20210. Telephone: (202) 693-0102 (voice) or (202) 693-1337 (TTY).

SUPPLEMENTARY INFORMATION:

Current Regulations and Rulemaking History

The Jobs for Veterans Act ('`JVA''), (Pub. L. 107-288, 116 Stat. 2033), was signed by the President on November 2, 2002. Section 2(b)(1) of the JVA amended the affirmative action provisions of the Vietnam Era

Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, ('`VEVRAA''). Section 2(b)(3) of the JVA made the amendments applicable to Government contracts entered into on or after December 1, 2003.

Prior to amendment by the JVA, the affirmative action provisions of VEVRAA required parties holding Government contracts or subcontracts of \$25,000 or more to ``take affirmative action to employ and advance in employment qualified special disabled veterans, veterans of the Vietnam era, recently separated veterans, and any 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 has adopted the term ``other protected veteran'' to refer to ``veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.''

In addition, prior to amendment, VEVRAA required that the Secretary promulgate regulations requiring contractors ``to list immediately with the appropriate local employment service office all of its employment openings, except that the contractor may exclude openings for executive and top management positions, positions which are to be filled from within the contractor's organization, and positions lasting three days or less.''

The JVA amendments made three significant changes to the affirmative action provisions of VEVRAA. First, section 2(b)(1) of the JVA increased the coverage threshold from a contract of \$25,000 or more to a contract of \$100,000 or more.

Second, the JVA amendments changed the categories of covered veterans under VEVRAA. The JVA eliminated the category of Vietnam era veterans from coverage under VEVRAA. However, many Vietnam era veterans may remain covered in other categories. The JVA added as a new category of covered veterans--those ``veterans who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985.''. The JVA expanded the coverage of veterans with disabilities. Prior to amendment by the JVA, VEVRAA

[[Page 44394]]

covered veterans rated as having 10% to 20% serious employment handicap or a disability rated 30% or more by the Department of Veterans Affairs. The JVA amendments expanded coverage to include all veterans with service-connected disabilities. The JVA also expanded the coverage of ``recently separated veterans'' from one to three years after discharge or release from active duty.

Third, the JVA modified the mandatory job listing requirement for covered contractors. Currently, the regulation at 41 CFR 60-250.5 allows contractors to satisfy their job listing obligations by listing employment openings either with the appropriate local employment service office or with America's Job Bank (AJB). Section 2(b)(1) of the JVA requires the Secretary to promulgate regulations that obligate each covered contractor to list all of its employment openings with ``the appropriate employment service delivery system (as defined in section 4101(7) of this title).'' Section 5(c)(1) of the JVA defines the term ``employment service delivery system'' as ``a service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act.''. See 38 U.S.C. 4101(7). (The Wagner-Peyser Act established the Employment Service, which is a nationwide system of public employment offices.) The JVA provides that a contractor also may list employment openings with ``one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery

points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the Department of Labor).'' Thus, as a result of the JVA amendments, listing job openings solely with AJB will no longer comply with the requirements of VEVRAA.

On January 20, 2006, OFCCP published for a 60-day comment period a Notice of Proposed Rulemaking (NPRM), 71 FR 3352, to implement the JVA amendments to VEVRAA. OFCCP published a notice on March 21, 2006, 71 FR 14135, which corrected the e-mail address for submitting comments on the January 20 NPRM, and extended the comment period for seven days, or until March 28, 2006. OFCCP received five comments: two from State workforce development agencies, and three from employer associations whose members include Federal contractors. OFCCP reviewed and carefully considered the comments in the development of this final rule.

## Overview of the Final Rule

The final rule adopts regulations implementing the JVA amendments to VEVRAA that will be codified in a new 41 CFR part 60-300. OFCCP explained in the preamble of the NPRM that most provisions in part 60-300 are identical to the parallel provisions in the existing VEVRAA implementing regulations in 41 CFR part 60-250, except where differences are required to implement the JVA amendments. Consequently, the same section numbers are used in both parts 60-250 and 60-300. Generally, the differences between the two sets of regulations are found in the provisions that reference the contract coverage threshold and the categories of covered veterans. In the Section-by-Section Analysis of the NPRM, OFCCP highlighted only the provisions in the proposed rule that differ from provisions in the part 60-250 regulations. Likewise, the provisions in the part 60-250 regulations that have been incorporated in today's final rule without substantive change are omitted from the discussion in the Section-by-Section Analysis of Comments and Revisions below.

This final rule, for the most part, adopts the provisions that were proposed in the January 20 NPRM. However, a few of the proposed provisions have been modified in response to the public comments. The discussion which follows identifies the significant issues raised in comments received in response to the NPRM, provides OFCCP's responses to those comments, and explains any resulting changes to the proposed rule.

## Section-by-Section Analysis of Comments and Revisions

### Subpart A--Preliminary Matters, Equal Opportunity Clause

#### Section 60-300.1 Purpose, Applicability and Construction

This section discusses the purpose, applicability, and construction of the part 60-300 regulations. Paragraphs (a) and (c)(2) refer to the four categories of veterans covered under the JVA: (1) Disabled veterans, (2) recently separated veterans, (3) other protected veterans, and (4) Armed Forces service medal veterans.

Paragraph (b) states that this part applies to any Government contract or subcontract of \$100,000 or more entered into on or after December 1, 2003. The singular form of the term ``contract'' is used in paragraph (b) in order to make clear that a single contract in the amount of \$100,000 or more is required to establish coverage under VEVRAA; contracts are not aggregated to reach the coverage threshold. Additionally, paragraph (b) states that a contractor whose only covered Government contract was entered into before December 1, 2003, must comply with the requirements in the existing VEVRAA implementing

regulations in part 60-250, and a contractor that has covered contracts entered into both before and on or after December 1, 2003, must comply with the regulations in part 60-300 and existing part 60-250.

Two commenters asked whether contractors subject to the existing VEVRAA regulations in part 60-250 and the regulations in part 60-300 implementing the JVA amendments must develop two separate VEVRAA affirmative action programs (AAPs). OFCCP wishes to clarify that a contractor that must comply with both sets of VEVRAA regulations need not develop two AAPs. The JVA amendments increased the dollar amount of the contract that triggers the written AAP requirement, but the JVA amendments did not affect the required contents of the written AAP under VEVRAA. OFCCP explained in the NPRM that, with the exception of the changes necessitated by the JVA amendments, Sec. 60-300.44, which addresses the requirements of AAPs under VEVRAA, is identical to Sec. 60-250.44. Since the contents of the written AAP required under Sec. 60-300.44 and Sec. 60-250.44 are the same, contractors may develop a single AAP that satisfies the requirements of both regulations.

One commenter, an employer association, asserted that it would be unduly burdensome and confusing for contractors to have to comply with two sets of VEVRAA regulations, as they would be required to track different categories of protected veterans. The commenter stated that OFCCP has some flexibility, and, as a matter of enforcement policy, the agency could adopt a final rule that requires contractors to comply with only one set of VEVRAA regulations. The commenter argued that OFCCP could state in the final rule that contractors need only comply with the new JVA regulations, even if they also have contracts that are covered under the existing regulations in part 60-250. Further, the commenter stated that the final rule could provide that contractors entering into contracts that are covered under the regulations in new part 60-300 after the start of the AAP year have the option of continuing to comply only with the recordkeeping and reporting requirements under the part 60-250 rules until the end of the AAP year.

[[Page 44395]]

OFCCP disagrees with the commenter's claim that compliance with the requirements of two sets of VEVRAA regulations would be unduly burdensome. First, complying with the requirements of part 60-300 will not increase the paperwork burden of contractors already covered under the VEVRAA regulations. The regulations in part 60-300 implementing the JVA amendments, like the existing VEVRAA implementing regulations in part 60-250, require that contractors extend to all applicants an invitation to self-identify as a veteran who may be covered under the Act and wishes to benefit under the affirmative action program. The only difference between the invitations to self-identify required under part 60-300 and part 60-250 is the categories of veterans that are invited to self-identify. Because OFCCP has included a sample invitation to self-identify in Appendix B of the part 60-300 regulations, compliance with the part 60-300 requirement to invite applicants to self-identify as covered veterans will not add to the burden hours associated with the information collection requirements of the affirmative action provisions of VEVRAA. If a contractor is covered by part 60-250 and part 60-300, the contractor may continue using the part 60-250 sample invitation to self-identify form and add the part 60-300 sample invitation to self-identify form once the final rule becomes effective. Contractors also may choose to combine the two sample invitation to self-identify forms provided in part 60-250 and part 60-300 such that the contractor extends to applicants one invitation to self-identify which lists all of the categories of veterans protected under parts 60-250 and 60-300.

Further, the JVA did not alter the written AAP requirement under VEVRAA. Contractors that also are subject to the regulations in part 60-300 may continue to implement the AAPs developed under the part 60-250 regulations, but their affirmative action efforts must include the three additional categories of covered veterans. These contractors may develop one AAP, rather than two, as long as the components of that AAP, including the outreach and positive recruitment activities, include all categories of veterans protected under parts 60-250 and 60-300.

Moreover, OFCCP believes that only a small percentage of contractors will be required to comply with both sets of VEVRAA regulations. The term ``Government contract'' is defined in existing Sec. 60-250.2(i) and Sec. 60-300.2(i) of the final rule as ``any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or nonpersonal services (including construction).'' Existing Sec. 60-250.2(i)(1) and 60-300.2(i)(1) of the final rule provide that a ``modification'' is ``any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions.'' The JVA applies to Government contracts entered on or after December 1, 2003. Because a contract modification is a ``Government contract'', the JVA applies to modifications of otherwise covered contracts made on or after December 1, 2003. Consequently, modification of a contract that would otherwise be covered by part 60-300 on or after December 1, 2003, but for the date the contract was entered into, would have the effect of modifying the VEVRAA equal opportunity clause; the new requirements of part 60-300 would be applicable to the modified contract, rather than the old requirements of part 60-250.

To clarify the effect of modifying a contract on the VEVRAA requirements applicable after modification, language has been added to Sec. 60-300.1(b) addressing the issue. In the final rule, Sec. 60-300.1(b) has been revised to state ``[t]his part applies to any Government contract or subcontract of \$100,000 or more, entered into or modified on or after December 1, 2003 \* \* \*. In addition, Sec. 60-300.1(b) of the final rule states ``[a]ny contractor or subcontractor whose only contract \* \* \* was entered into before December 1, 2003 (and not modified as described above) must follow part 60-250.''

The regulations published today and the existing VEVRAA implementing regulations in part 60-250 do not require contractors to count the number of veterans in their employ. The Veterans' Employment and Training Service (VETS), rather than OFCCP, administers and enforces the requirement that contractors track and report on the number of employees in their workforces who are covered veterans, and has established a form for reporting the required information. See 41 CFR Chapter 61.

Finally, OFCCP also disagrees with the assertion that the final rule could provide that contractors need comply with only one set of VEVRAA regulations. Many of the veterans currently protected under the regulations in part 60-250 remain covered in the categories of veterans protected under the JVA. However, because the JVA eliminated the Vietnam era veterans from coverage under VEVRAA, some Vietnam era veterans might lose the VEVRAA protections prematurely if OFCCP were to adopt a rule requiring contractors with contracts entered both before and on and after December 1, 2003, to comply only with the regulations implementing the JVA amendments. Conversely, some veterans covered under the JVA were not covered previously. OFCCP does not have the authority to permit contractors subject to both pre- and post-JVA requirements to comply only with post-JVA requirements because OFCCP rulemaking authority can only be exercised in a manner that carries out

the provisions of the statute. Here, Congress expressly made the JVA amendments applicable to contracts entered into on or after December 1, 2003, and thereby provided that veterans covered under contracts entered into prior to the effective date of the JVA amendments remain covered under VEVRAA.

#### Section 60-300.2 Definitions

In the NPRM, OFCCP proposed to incorporate in this section many of the definitions contained in existing Sec. 60-250.2 without any substantive changes. The proposal called for some definitions in existing Sec. 60-250.2 to be incorporated in Sec. 60-300.2 with modifications necessitated by the JVA amendments. Further, OFCCP proposed to adopt a few definitions that have no parallel definitions in the existing Sec. 60-250.2. Likewise, some definitions in Sec. 60-250.2 were not included in the proposed rule because of the changes the JVA made to VEVRAA.

OFCCP received several comments on the proposed definitions, and all were from one commenter. The commenter, an employer association, requested that the final rule clearly indicate that only veterans of the United States armed forces, as opposed to veterans of the armed forces of other nations, are covered under the affirmative action provisions of VEVRAA. The commenter stated that one option for clarifying coverage under VEVRAA would be to add a separate definition for the term "veteran." Alternatively, the commenter recommended that OFCCP add clarifying language to the definitions for the terms "disabled veteran" and "recently separated veteran." The commenter noted that the definitions for the terms "other protected veteran" and "Armed Forces service medal veteran" already indicate that the regulations apply to veterans of the United States armed forces.

In response to this comment, the definitions for the terms "disabled veteran" and "recently separated

[[Page 44396]]

veteran" in paragraphs (n) and (q), respectively, have been revised in the final rule to make clear that only veterans "who served on active duty in the U.S. military, ground, naval, or air service" are covered under the affirmative action provisions of VEVRAA. For the sake of clarity and consistency, this language also has been added to the definitions for the term "other protected veteran" in paragraph (p) and the term "Armed Forces service medal veteran" in paragraph (r) in the final rule. Paragraph (p) also replaces "person" with "veteran" for clarity.

The commenter also expressed the view that veterans who are discharged from service for certain serious offenses should not be entitled to the protections of the affirmative action provisions of VEVRAA. Accordingly, the commenter suggested that OFCCP adopt in the final rule coverage standards similar to those established under the regulations implementing the Uniformed Services Employment and Reemployment Rights Act (USERRA). The regulation at 20 CFR 1002.135 excludes from the protections of USERRA employees whose military service falls within one of four categories, including separation from service with a dishonorable or bad conduct discharge.

For purposes of the laws relating to veterans' benefits, which include the affirmative action provisions of VEVRAA, the definition of veteran means "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." See 38 U.S.C. 101(2). Thus, dishonorably discharged veterans are excluded from the protections of

VEVRAA by statute. Since persons who are separated from service with dishonorable discharges do not meet the statutory definition of ``veteran,'' these persons are not entitled to the protections of the affirmative action provisions of VEVRAA. For clarity, the final rule defines veteran in paragraph (z) as ``a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable.''

One comment addressed the definition for the term ``other protected veteran.'' The commenter stated that employers need guidance on the wars, campaigns, and expeditions for which a campaign badge has been authorized. The commenter asserted that the information available on the Office of Personnel Management's Web site is out-of-date and only somewhat relevant to private employers. The commenter suggested that OFCCP develop an up-to-date list of the covered conflicts for which a campaign badge has been authorized, or work with other affected agencies to develop and maintain a link to a Web site that contains a current list of the wars, campaigns, and expeditions that would qualify a veteran as an ``other protected veteran.''

OFCCP agrees that contractors should have access to information about the veterans included in the category ``other protected veterans.'' Therefore, OFCCP will provide a link on its Web site to a list compiled by the Department of Defense, as well as a link to the information maintained by the Office of Personnel Management. These links will allow contractors to find lists of wars, campaigns, and expeditions for which a campaign badge has been authorized. OFCCP is providing these links as a courtesy to the contractor community. Contractors remain responsible for complying with their nondiscrimination and affirmative obligations regarding all protected veterans. Paragraph (p) is adopted in the final rule as stated earlier in this section.

The employer association providing comments on the definitions also stated that guidance was needed on the operations that would qualify a veteran as an ``Armed Forces service medal veteran,'' which is defined in paragraph (r). As was explained in the NPRM, Armed Forces service medals are awarded to military personnel who participate in a United States military operation deemed to be significant activity, and who encounter no foreign armed opposition or imminent hostile action. The commenter requested that OFCCP provide contractors access to an up-to-date list of the operations for which Armed Forces service medals have been awarded. OFCCP does not believe that providing such a list is necessary because the form used to document a veteran's separation from active duty military service, called the DD Form 214, Certificate of Release or Discharge from Active Duty, indicates whether a veteran is a recipient of the Armed Forces service medal. Veterans who self-identify as an ``Armed Forces service medal veteran'' may be asked to provide a copy of this form. Paragraph (r) is adopted in the final rule as stated earlier in this section.

OFCCP proposed in the NPRM to incorporate in paragraph (y) the definition of the ``employment service delivery system'' that was added to the definitional section of VEVRAA, 38 U.S.C. 4101(7), by Section 5(c)(1) of the JVA. Under the JVA, ``employment service delivery system'' means a ``service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act.'' (The Wagner-Peyser Act established the Employment Service, which is a nationwide system of public employment offices.) The commenter recommended that OFCCP revise the definition of ``employment service delivery system'' in the final rule to state in plain language the name or type of agency with which the employer is to list its job openings.

OFCCP agrees that contractors should have clear guidance regarding the types of agencies with which the employer is to list job openings. However, OFCCP also recognizes contractors may wish to satisfy the mandatory job listing requirement in a variety of ways, depending on the number, timing, and location of the positions to be filled. For this reason, OFCCP believes that further defining the appropriate ``employment delivery system'' would unnecessarily constrain contractors' flexibility to list with an appropriate delivery system. Instead, in Sec. 60-300.5 of the final rule, OFCCP has added language providing contractors with examples of the types of delivery systems with which contractors may list job openings. The revised language specifically provides that listing employment openings with the state workforce agency job bank or the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment delivery system. In light of these changes to Sec. 60-300.5, paragraph (y) of the final rule will remain as written in the NPRM.

#### Section 60-300.4 Coverage and Waivers

This section is identical to Sec. 60-250.4 in the existing VEVRAA regulations, except that proposed paragraphs (a)(1) and (a)(2) implement the JVA amendments and state that contracts of \$100,000 or more are covered under VEVRAA. We received no comments for this section. Accordingly, Sec. 60-300.4 is adopted in the final rule as proposed.

#### Section 60-300.5 Equal Opportunity Clause

Paragraph (a) of the final rule contains the equal opportunity (EO) clause that must be included in all covered Government contracts and subcontracts. The language in paragraph (a)(1) of the EO clause is identical to the language in the parallel provision in existing Sec. 60-250.5, except that paragraph (a)(1) refers to the categories of veterans protected under the JVA. Thus, ``disabled veterans'' and ``Armed Forces service medal veterans'' are mentioned in

[[Page 44397]]

paragraph (a)(1) of the final rule, while ``special disabled veterans'' and ``veterans of the Vietnam era'' are referenced in existing Sec. 60-250.5(a)(1).

Paragraphs (a)(2) and (a)(3) set out the contractor's obligation to list employment openings with the appropriate employment service delivery system. The JVA amendments eliminated listing employment openings solely with America's Job Bank as an option for complying with the mandatory job listing requirement. The JVA requires that contractors and subcontractors list their employment openings with the appropriate ``employment service delivery system.'' See 38 U.S.C. 4212(a)(2)(A). In addition to listing their employment openings with the appropriate employment service delivery system, the JVA provides that contractors and subcontractors also may list their employment openings with one-stop career centers under the Workforce Investment Act of 1998, other appropriate service delivery points, or America's Job Bank (or any additional or subsequent national electronic job bank established by the U.S. Department of Labor). Accordingly, paragraph (a)(2) of the final rule generally tracks the JVA provision, and provides that contractors must list employment openings with the appropriate employment service delivery system.

The three employer associations all expressed concern about the

elimination of AJB as a means for contractors to fulfill the mandatory job listing requirements. One employer association asserted that contractors that regularly advertise multiple job openings in locations throughout the country will face huge administrative burdens if they are required to list each job opening with individual employment service offices. The employer association stated that listing with the AJB allowed contractors to publicize job opportunities on a nationwide basis through a single Web site on the Internet, rather than listing them with each local employment service office of each location where an open position is being filled. The association claimed that a small army of dedicated staff would be required to comply with the requirement to list each job with individual employment service offices.

Similarly, another employer association claimed that the money, time, and resources required to comply with the requirement to separately list job openings with each individual local employment services agency would be substantial. The commenter maintained that compliance with the separate listing requirement is made more challenging by the different protocols for listing jobs that exist in the various local employment services offices. According to the commenter, some employment service offices require contractors to post openings only by regular mail, some accept listings via fax, and some accept postings only by email.

One commenter urged OFCCP to consider alternatives to the proposed job listing provision that would reduce the burden on contractors. Two commenters raised questions about the status of a Department-sponsored solution that would allow contractors to meet both the current and the revised mandatory job listing requirement. One commenter recommended that the Department continue the effort to develop a Department-sponsored solution, and that OFCCP delay publishing the final rule until after a solution has been implemented.

Delaying publication of the final rule until development of a Department-sponsored solution has been completed is not a feasible option. In December 2005, the Government Accountability Office (GAO) issued a report entitled ``Veterans' Employment and Training Service Labor Actions Needed to Improve Accountability and Help States Implement Reforms to Veterans' Employment Services'' (GAO-06-176). The GAO Report sets forth results of a review of progress made in implementing the reforms to employment and training services for veterans required by the JVA. GAO noted that the Department has not yet issued regulations to implement the JVA amendments to the affirmative action provisions of VEVRAA and recommended that the Department issue such regulations as soon as possible. In response to the GAO Report, OFCCP agreed to expedite issuing the federal contractor regulations.

However, OFCCP appreciates the difficulties contractors may face if they must list job openings with multiple employment service delivery systems, particularly if those systems maintain different methods for posting job openings or if the contractor must act to fulfill multiple job openings in different geographical locations in a short period of time. Therefore, OFCCP has added language to this section providing that contractors may fulfill their job posting requirement by listing job openings with the appropriate state workforce agency job bank. The appropriate state workforce agency job bank shall be the job bank in which the job opening occurs. Contractors also may satisfy the posting requirement by listing job openings with the local employment service delivery system where the opening occurs.

A contractor may satisfy the mandatory job listing requirement by submitting job listings to the appropriate employment delivery system in a variety of ways, including via mail, facsimile (FAX), electronic mail, or other electronic postings. The vast majority of the state

workforce agency job banks accept job postings via the Internet. Contractors may use third parties, such as private or non-profit sector job banks, Internet gateway and portal sites, and recruiting services and directories, to assist them with the transmission of job postings to the appropriate employment delivery system.

OFCCP believes that this approach allows contractors the necessary flexibility to determine the most effective way to comply with the mandatory job listing requirement, depending on the number, timing, and location of the positions to be filled. OFCCP will provide a link on its Web site to all state workforce agency job banks. This link will allow contractors to identify those state workforce agency job banks that accept electronically-transmitted job postings. OFCCP is providing this link as a courtesy to the contractor community. Contractors remain responsible for complying with the requirement to list with the appropriate employment delivery system.

In order to make clear that contractors may satisfy the mandatory job listing requirement in a variety of ways, paragraph (a)(2) of the final rule reads as follows: ``The contractor agrees to immediately list all employment openings which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one where the contract is being performed, but excluding those of independently operated corporate affiliates, with the appropriate employment service delivery system where the opening occurs. Listing employment openings with the state workforce agency job bank or the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment service delivery system. In paragraph (a)(4), OFCCP is changing the phrase ``state employment security agency'' to ``state workforce agency'' so that paragraph (a)(4) is consistent with paragraph (a)(2) of this section.

[[Page 44398]]

OFCCP also received two comments on the definition of ``executive and senior management'' in proposed paragraph (a)6.ii. In order to conform to a technical amendment made by the JVA, OFCCP proposed to use the term ``senior management'' in proposed paragraph (a)6.ii., instead of ``top management,'' which is the term used in existing Sec. 250.5(a)6.ii. However, in all other respects, the proposed definition for the term ``executive and senior management'' is identical to the definition of ``executive and top management'' found in the existing Sec. 250.5(a)6.ii.

One commenter observed that, in defining the term ``executive and senior management'' in proposed Sec. 60-300.5(a)6.ii. and current Sec. 250.5(a)6.ii., OFCCP followed the regulations implementing the exemption for executives from the minimum wage and overtime pay requirements of the Fair Labor Standards Act (FLSA), published at 29 CFR part 541 (``part 541 regulations''). The commenter also noted that the Department of Labor revised the part 541 regulations, effective August 23, 2004, and that the revisions include streamlined tests for determining whether a person qualifies as an ``executive'' exempt from the overtime provisions. See 69 FR 22122. For the sake of consistency and in order to avoid confusion, the commenter maintained that the definition of ``executive and senior management'' in paragraph (a)6.ii. should conform to the updated tests for determining who qualifies as an ``executive employee'' set forth in the part 541 regulations.

In response to the comment, OFCCP has revised the definition of ``executive and senior management'' to reflect the standards for

determining when a person qualifies as an ``executive employee'' found in 29 CFR 541.100 and 541.101. Thus, paragraph (a)6.ii. in the final rule defines the term ``executive and senior management'' as: (1) any employee ``(a) Compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities; (b) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (c) Who customarily and regularly directs the work of two or more other employees; and (d) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight;'' or (2) any employee ``who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.''

Another commenter expressed the view that the proposed definition of ``executive and senior management'' could be interpreted to exclude from the mandatory job listing requirement ``most low level managers and supervisors.''. The commenter argued that ``executive and senior management'' should be defined as ``positions which direct company policy and direction and not be hinged to supervision of employees.''. OFCCP believes that its revised definition adequately addresses this commenter's concerns, as supervisory responsibility is not the sole determinant of whether a job is considered ``executive and senior management.''. In order to be considered an ``executive and top management'' position exempt from the mandatory job listing requirement, a job must satisfy all of the factors listed in paragraph (a)6.ii.

## Subpart B--Discrimination Prohibited

### Section 60-300.21 Prohibitions

The final rule adopts Sec. 60-300.21 as proposed. This section is identical to existing Sec. 60-250.21, except that the categories of veterans covered under the JVA are referenced in the final rule.

Paragraph (c) provides that it is unlawful for contractors to participate in contractual arrangements that have the effect of subjecting the applicants and employees who are covered veterans to discrimination. A comment from a workforce development agency expressed concerns about the contractual arrangements federal contractors have with temporary employment agencies. The commenter asserted that many federal contractors use temporary employment agencies to recruit candidates for job vacancies and that when the temporary agencies receive job orders from a client they tend to refer candidates they have ``on-file.''. According to the commenter, temporary agencies are not obligated to comply with the mandatory job listing requirements because they ``are not by definition subcontractors to the federal contractor.''. The commenter argued that, to better serve veterans, either temporary agencies should be considered as subcontractors, or contractors listing job orders with temporary agencies also should be required to list their job orders with the employment service.

A contractor's use of an employment agency does not relieve the contractor of its obligation to comply with the mandatory job listing requirement. Section 60-250.5(a) expressly provides that ``listing of employment openings with the appropriate employment service delivery system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort \* \* \*'' (Emphasis

supplied.) Thus, the regulations generally require contractors to list with the appropriate employment service delivery system the jobs that also are provided to an employment agency. The only jobs listed with an employment agency that need not be listed with the employment service are those exempt from the mandatory job listing requirement. Section 60-250.5(a)6.i exempts from the mandatory job listing requirement positions that are executive and senior management, positions filled from within the contractor's organizations, and positions lasting three days or less.

In addition, paragraph (c) of this section forbids contractors from using an employment agency that discriminates against covered veterans. Accordingly, a contractor would violate VEVRAA if it uses an employment agency that discriminates against veterans to recruit for vacancies.

Further, OFCCP disagrees with the commenter's assertion that all temporary employment agencies are excluded from coverage under VEVRAA. Section 60-300.2(1), as does the parallel provision in the part 60-250 regulations, defines the term ``subcontract'' as ``any agreement or arrangement between a contractor and any person \* \* \* which, in whole or in part, is necessary to the performance of any one or more contracts; or \* \* \* under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.'' Whether a particular subcontract is covered under the VEVRAA regulations depends on a variety of factors such as the requirements of the Government contract in issue and the role of the subcontractor in fulfilling the obligations of the Government contract. Thus, some, but certainly not all, temporary employment agencies may have agreements with Government contractors that would render them a covered subcontractor under VEVRAA.

[[Page 44399]]

#### Section 60-300.22 Direct Threat Defense

This section is identical to existing Sec. 60-250.22, except that the cross-reference is to Sec. 60-300.2(w) of this final rule. OFCCP received no comments on this section. It is adopted in the final rule as proposed.

#### Section 60-300.23 Medical Examinations and Inquiries

This section is identical to existing Sec. 60-250.23, except that the proposal references the category of ``disabled veteran(s)'' rather than ``special disabled veterans.'' No comments were submitted on this section. The final rule adopts Sec. 60-300.23 as proposed.

#### Section 60-300.24 Drugs and Alcohol

This section is identical to existing Sec. 60-250.24, except that this section includes a citation to Sec. 60-300.23(d). OFCCP received no comments on this section. Accordingly, the final rule adopts this section as proposed.

#### Section 60-300.25 Health Insurance, Life Insurance and Other Benefit Plans

This section is identical to Sec. 60-250.25 in the current VEVRAA implementing regulations, except that ``disabled veteran'' rather than ``special disabled veteran'' is referenced in paragraph (d). We received no comments on this section. The final rule adopts Sec. 60-300.25 as proposed.

## Subpart C--Affirmative Action Program

### Section 60-300.40 Applicability of the Affirmative Action Program Requirement

OFCCP proposed paragraph (a) raised the coverage threshold to a contract of \$100,000 or more. As discussed in the preamble discussion of the Sec. 60-300.1, some comments expressed concern about the increased burden that would result if contractors are required to develop and maintain two AAPs--one under the part 60-250 and a second AAP under part 60-300. OFCCP explained that contractors subject to the final rule and the regulations in part 60-250 may develop a single AAP that addresses the requirements under parts 60-250 and 60-300.

One commenter asked about the deadline for developing the AAP required under 60-300.40. Paragraph (b) provides that a contractor must develop an AAP within 120 days of the commencement of a contract. Under the existing VEVRAA regulations, a contractor with a contract of \$50,000 or more must develop a written AAP. Any contractor with a contract of \$100,000 or more that was entered into on or after December 1, 2003, should already have an AAP in place that would meet the requirements of this section. The final rule adopts Sec. 60-300.40 without change.

### Section 60-300.42 Invitation to Self-Identify

This section is identical to Sec. 60-250.42, except that the categories of veterans protected under the JVA are referenced in this section. In addition, the regulatory citations in this section are to provisions in the final rule. We received one comment to this section asking for clarification on the self-identification process. The process is explained in this section. Section 60-300.42 is adopted in the final rule as proposed.

### Section 60-300.43 Affirmative Action Policy

This section is identical to Sec. 60-250.43, except that this section specifies the categories of veterans covered under the JVA, and contains citations to provisions in the proposed rule. No comments were received on this section. Accordingly, Sec. 60-300.43 is adopted in the final rule as proposed.

### Section 60-300.44 Required Contents of Affirmative Action Programs

With the exception of changes necessitated by the JVA amendments, this section is identical to Sec. 60-250.44 in the existing VEVRAA implementing regulations. The categories of veterans protected under the JVA are referenced throughout this section. In addition, consistent with the technical amendments to VEVRAA, the term ``senior management'' is used in paragraph (h)(2)(i), which sets out the requirement that the contractor assign responsibility for implementation of the AAP. Further, this section contains citations to provisions in the final rule. We received no comments on Sec. 60-300.44 and it is adopted in the final rule without change.

## Subpart D--General Enforcement and Complaint Procedures

### Section 60-300.60 Compliance Evaluations

This section is identical to Sec. 60-250.60, except for the

differences necessitated by the JVA. One difference is that the categories of veterans protected under the JVA are referenced in this section. The other difference is found in paragraph (c), which addresses OFCCP verification of contractor compliance with reporting requirements. Paragraph (c) of existing Sec. 60-250.60 provides that OFCCP may verify whether a contractor is complying with its obligation to file its Annual VETS-100 Report pursuant to the regulations in 41 CFR part 61-250. The regulations in part 61-250, which were issued by VETS, apply only to contracts entered into before December 1, 2003.

Paragraph (c) of this section provides that OFCCP may verify whether a contractor has complied with applicable reporting requirements required under regulations promulgated by VETS. OFCCP changed ``any reporting requirement'' from the NPRM to ``applicable reporting requirements'' in the final rule for clarity. This change gives OFCCP authority to investigate compliance with all applicable reporting requirements required under regulations promulgated by VETS, including any new reporting requirements that VETS may implement as a result of the JVA.

We received two comments concerning the reporting requirements under VEVRAA that are administered by VETS. One commenter stated that contractor burden will increase because of the requirements to submit the VETS-100 under both parts 60-250 and 60-300. This same commenter suggested that OFCCP coordinate its final rule to any changes to the VETS-100 Report under VETS. As explained in the discussion of Sec. 60-300.1, the VEVRAA implementing regulations administered by OFCCP contain no reporting requirements. Accordingly, contractors subject to the existing regulations in part 60-250 and the regulations in part 60-300 will not face an increase in their reporting burden under OFCCP's rule.

We also received one comment concerning the relationship between OFCCP and VETS compliance evaluations. Under the current regulations in part 60-250.5, during the onsite portion of a compliance evaluation, a compliance officer confirms with the contractor that it has listed its employment openings with the local employment service office and may contact the local employment service office directly to verify that the contractor has complied with the mandatory job listing requirements. Under this final rule, OFCCP will confirm that contractors holding Government contracts subject to the JVA have listed employment openings with the appropriate employment delivery system and may contact the employment delivery system directly to verify this information.

Under the current regulations in part 60-250.5, OFCCP also confirms with the contractor that it has completed a VETS-100 report during the onsite portion of a compliance evaluation. If

[[Page 44400]]

the contractor has not completed the VETS-100 report, OFCCP will notify VETS. Under this section of the final rule, OFCCP will confirm that a contractor holding a Government contract covered by the JVA has completed any applicable VETS reporting requirements, including any new reporting requirements that VETS may implement as a result of the JVA. If the contractor has not completed any applicable reporting requirements, OFCCP will notify VETS.

#### Section 60-300.61 Complaint Procedures

This section is identical to Sec. 60-250.61, except for the changes necessary to conform to the amendments made by the JVA. Further, the regulatory citations in this section are to sections in the final rule. In paragraph (a) of the final rule, OFCCP is changing

``state employment security agency'' to ``state workforce agency'' to be consistent with Sec. 300.5.

#### Section 60-300.64 Show Cause Notices

Except for the citations to provisions in the final rule, this section is identical to Sec. 60-250.64. Section 60-300.64 is adopted in the final rule as proposed.

#### Section 60-300.65 Enforcement Proceedings

Except for the citations to provisions in the final rule, this section is identical to Sec. 60-250.65. We received no comments to this section; it is adopted in the final rule without change.

#### Section 60-300.66 Sanctions and Penalties

Except for the citations to provisions in the final rule, this section is identical to Sec. 60-250.66. The final rule adopts Sec. 60-300.66 as proposed.

#### Section 60-300.69 Intimidation and Interference

This section is identical to Sec. 60-250.69, except that this section refers to the categories of veterans protected under the JVA. Section 60-300.69 is adopted in the final rule without change.

#### Subpart E--Ancillary Matters

#### Section 60-300.84 Responsibilities of Appropriate Employment Service Delivery System

According to VEVRAA, 38 U.S.C. Section 4212 (a)(2)(B), appropriate employment service delivery systems are required to give priority in referral to disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans to employment openings listed by contractors with such appropriate employment delivery systems pursuant to the mandatory job listing requirements of the equal opportunity clause. According to Section 4212(a)(2)(c), the appropriate employment service delivery system also shall provide a list of such employment openings to States, political subdivisions of States, or any private entities or organizations under contract to carry out employment, training, and placement services under chapter 41 of title 38.

OFCCP proposed Sec. 60-300.84 was identical to current Sec. 60-250.84. In the final rule, OFCCP has revised this section to clarify the scope of its authority over, and its interactions with, these employment delivery systems. OFCCP may contact the employment delivery systems to request information pertinent to whether the contractor is in compliance with the mandatory job listing requirements. OFCCP does not, however, have responsibility for ensuring that the appropriate employment delivery systems provide priority referral to covered veterans. Accordingly, OFCCP added the words ``By statute'' to the first sentence of this section to clarify that the obligation of employment delivery systems to provide veterans with priority of service arises by statute, and not because of a requirement imposed by OFCCP.

#### Appendix A to Part 60-300--Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

Except for the references to the categories of veterans covered under the JVA and citations to provisions in the final rule, Appendix A to part 60-300 is substantially similar to Appendix A to part 60-250 in the existing VEVRAA regulations. We received no comments on Appendix A. Accordingly, Appendix A is adopted in the final rule without change.

#### Appendix B to Part 60-300--Sample Invitation to Self-Identify

Except for the references to the categories of veterans covered under the JVA and citations to provisions in the final rule, Appendix B to part 60-300 is substantially similar to Appendix B to part 60-250 in the existing VEVRAA regulations. We received no comments on this aspect of the proposal. The final rule adopts Appendix B as proposed in the NPRM.

#### Appendix C to Part 60-300--Review of Personnel Processes

Proposed Appendix C to part 60-300 is substantially similar to Appendix C to part 60-250 in the existing VEVRAA regulations, except for the references to the categories of veterans covered under the JVA and citations to provisions in the proposed rule. We received no comments on Appendix C. The final rule adopts Appendix C without change.

#### Regulatory Procedures

##### Executive Order 12866

The Department is issuing this final rule in conformance with Executive Order 12866, section 1(b), Principles of Regulation. The Department has determined that this rule is a ``significant regulatory action'' under Executive Order 12866, section 3(f), Regulatory Planning and Review, but is not economically significant as defined in section 3(f)(1). Therefore, the information enumerated in section 6(a)(3)(C) of the order is not required. Pursuant to Executive Order 12866, this rule has been reviewed by the Office of Management and Budget (OMB).

##### Executive Order 13132

OFCCP has reviewed this rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ``federalism implications.'' This rule does not ``have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

#### Regulatory Flexibility Act

This rule clarifies existing requirements for Federal contractors. In view of this fact and because the rule does not substantively change existing obligations for Federal contractors, the Department concludes that this rule will not have a significant economic impact on a substantial number of small entities. The Secretary has certified to the Chief Counsel for Advocacy of the Small Business Administration to this effect. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

#### Unfunded Mandates Reform

Executive Order 12875--This rule does not create an unfunded Federal mandate upon any State, local, or tribal government.

Unfunded Mandates Reform Act of 1995--This rule does not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more, or increased expenditures by the private sector of \$100 million or more.

[[Page 44401]]

#### Paperwork Reduction Act

The information collection requirements contained in the existing VEVRAA regulations, with the exception of those related to complaint procedures, are currently approved under OMB Control No. 1215-0072 (Recordkeeping and Reporting Requirements-Supply and Service) and OMB Control No. 1215-0163 (Construction Recordkeeping and Reporting). The information collection requirements contained in the existing complaint procedures regulation are currently approved under OMB Control No. 1215-0131. This rule adopts a new set of VEVRAA implementing regulations that incorporate the changes made by the JVA amendments, and apply to Government contracts entered on or after December 1, 2003. The JVA amended VEVRAA by increasing the contract coverage threshold, changing the categories of veterans protected under the law, and changing the manner in which the mandatory job listing requirement is to be implemented. The increase in the contract coverage threshold from \$25,000 to \$100,000 may result in a decrease in the number of respondents and burden hours. However, this rule does not make any changes to the currently approved information collections. Consequently, this rule need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 et seq.

#### List of Subjects in 41 CFR Part 60-300

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, Reporting and recordkeeping requirements, and Veterans.

Signed at Washington, DC, this 2nd day of August, 2007.  
Victoria A. Lipnic,  
Assistant Secretary for Employment Standards.  
Charles E. James, Sr.,  
Deputy Assistant Secretary for Federal Contract Compliance.

0

Accordingly, for the reasons set forth in the preamble, Chapter 60 of Title 41 of the Code of Federal Regulations is amended to read as follows:

PART 60-300--AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS REGARDING DISABLED VETERANS, RECENTLY SEPARATED VETERANS, OTHER PROTECTED VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS

Subpart A--Preliminary Matters, Equal Opportunity Clause  
Sec.

60-300.1 Purpose, applicability and construction.  
60-300.2 Definitions.

60-300.3 [Reserved]  
60-300.4 Coverage and waivers.  
60-300.5 Equal opportunity clause.  
Subpart B--Discrimination Prohibited  
60-300.20 Covered employment activities.  
60-300.21 Prohibitions.  
60-300.22 Direct threat defense.  
60-300.23 Medical examinations and inquiries.  
60-300.24 Drugs and alcohol.  
60-300.25 Health insurance, life insurance and other benefit plans.  
Subpart C--Affirmative Action Program  
60-300.40 Applicability of the affirmative action program requirement.  
60-300.41 Availability of affirmative action program.  
60-300.42 Invitation to self-identify.  
60-300.43 Affirmative action policy.  
60-300.44 Required contents of affirmative action programs.  
Subpart D--General Enforcement and Complaint Procedures  
60-300.60 Compliance evaluations.  
60-300.61 Complaint procedures.  
60-300.62 Conciliation agreements.  
60-300.63 Violation of conciliation agreements.  
60-300.64 Show cause notices.  
60-300.65 Enforcement proceedings.  
60-300.66 Sanctions and penalties.  
60-300.67 Notification of agencies.  
60-300.68 Reinstatement of ineligible contractors.  
60-300.69 Intimidation and interference.  
60-300.70 Disputed matters related to compliance with the Act.  
Subpart E--Ancillary Matters  
60-300.80 Recordkeeping.  
60-300.81 Access to records.  
60-300.82 Labor organizations and recruiting and training agencies.  
60-300.83 Rulings and interpretations.  
60-300.84 Responsibilities of appropriate employment service delivery system.  
Appendix A to Part 60-300--Guidelines on a Contractor's Duty To Provide Reasonable Accommodation  
Appendix B to Part 60-300--Sample Invitation To Self-Identify  
Appendix C to Part 60-300--Review of Personnel Processes

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 and 4212; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

Subpart A--Preliminary Matters, Equal Opportunity Clause

Sec. 60-300.1 Purpose, applicability and construction.

(a) Purpose. The purpose of the regulations in this part is to set forth the standards for compliance with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (38 U.S.C. 4212, or VEVRAA), which requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified covered veterans. Disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans are covered veterans under VEVRAA.

(b) Applicability. This part applies to any Government contract or subcontract of \$100,000 or more, entered into or modified on or after December 1, 2003, for the purchase, sale or use of personal property or

nonpersonal services (including construction): Provided, that subpart C of this part applies only as described in Sec. 60-300.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part. Any contractor or subcontractor whose only contract(s) for the purchase, sale or use of personal property and nonpersonal services (including construction) was entered into before December 1, 2003 (and not modified as described above) must follow part 60-250. Any contractor or subcontractor who has contracts for the purchase, sale or use of personal property and nonpersonal services (including construction) that were entered into before December 1, 2003 (and not modified as described above), and contracts that were entered into on or after December 1, 2003, must follow both parts 60-250 and 60-300.

(c) Construction--(1) In general. The Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) (42 U.S.C. 12101, et seq.) set out as an appendix to 29 CFR part 1630 issued pursuant to Title I may be relied upon for guidance in interpreting the parallel provisions of this part.

(2) Relationship to other laws. This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any state or political subdivision that provides greater or equal protection for the rights of disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans as compared to the protection afforded by this part. It may be a defense to a charge

[[Page 44402]]

of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

#### Sec. 60-300.2 Definitions.

For the purpose of this part:

(a) Act means the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212.

(b) Equal opportunity clause means the contract provisions set forth in Sec. 60-300.5, ``Equal opportunity clause.''

(c) Secretary means the Secretary of Labor, United States Department of Labor, or his or her designee.

(d) Deputy Assistant Secretary means the Deputy Assistant Secretary for Federal Contract Compliance of the United States Department of Labor, or his or her designee.

(e) Government means the Government of the United States of America.

(f) United States, as used in this part, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

(g) Recruiting and training agency means any person who refers workers to any contractor, or who provides or supervises apprenticeship or training for employment by any contractor.

(h) Contract means any Government contract or subcontract.

(i) Government contract means any agreement or modification thereof

between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term Government contract does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

(1) Modification means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments and extensions.

(2) Contracting agency means any department, agency, establishment or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

(3) Person, as used in this paragraph (i) and paragraph (1) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, state or local government, and any agency, instrumentality, or subdivision of such a government.

(4) Nonpersonal services, as used in this paragraph (i) and paragraph (1) of this section, includes, but is not limited to, the following: Utility, construction, transportation, research, insurance, and fund depository.

(5) Construction, as used in this paragraph (i) and paragraph (1) of this section, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(6) Personal property, as used in this paragraph (i) and paragraph (1) of this section, includes supplies and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements).

(j) Contractor means, unless otherwise indicated, a prime contractor or subcontractor holding a contract of \$100,000 or more.

(k) Prime contractor means any person holding a contract of \$100,000 or more, and, for the purposes of subpart D of this part, ``General Enforcement and Complaint Procedures,'' includes any person who has held a contract subject to the Act.

(l) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services (including construction) which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

(m) Subcontractor means any person holding a subcontract of \$100,000 or more and, for the purposes of subpart D of this part, ``General Enforcement and Complaint Procedures,'' any person who has held a subcontract subject to the Act.

(n) Disabled veteran means:

(1) A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or

(2) A person who was discharged or released from active duty because of a service-connected disability.

(o) Qualified disabled veteran means a disabled veteran who has the ability to perform the essential functions of the employment position with or without reasonable accommodation.

(p) Other protected veteran means a veteran who served on active

duty in the U.S. military, ground, naval or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense.

(q) Recently separated veteran means any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service.

(r) Armed Forces service medal veteran means any veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 FR 1209).

(s) Essential functions--(1) In general. The term essential functions means fundamental job duties of the employment position the disabled veteran holds or desires. The term essential functions does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including, but not limited to, the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The contractor's judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

[[Page 44403]]

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(t) Reasonable accommodation--(1) The term reasonable accommodation means:

(i) Modifications or adjustments to a job application process that enable a qualified applicant who is a disabled veteran to be considered for the position such applicant desires;\1\ or

-----

\1\ A contractor's duty to provide a reasonable accommodation with respect to applicants who are disabled veterans is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Disabled veteran applicants must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

-----

(ii) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified disabled veteran to

perform the essential functions of that position; or

(iii) Modifications or adjustments that enable the contractor's employee who is a disabled veteran to enjoy equal benefits and privileges of employment as are enjoyed by the contractor's other similarly situated employees who are not disabled veterans.

(2) Reasonable accommodation may include but is not limited to:

(i) Making existing facilities used by employees readily accessible to and usable by disabled veterans; and

(ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for disabled veterans.

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified disabled veteran in need of the accommodation. \2\ This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

-----

\2\ Contractors must engage in such an interactive process with a disabled veteran, whether or not a reasonable accommodation ultimately is identified that will make the person a qualified individual. Contractors must engage in the interactive process because, until they have done so, they may be unable to determine whether a reasonable accommodation exists that will result in the person being qualified.

-----

(u) Undue hardship--(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (u)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(v) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety and other requirements established by the contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(w) Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that a disabled veteran poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

(x) Compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of the Vietnam Era Veterans' Readjustment Assistance Act.

(y) Employment service delivery system means a service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act.

(z) Veteran means a person who served in the active military, naval, or air service of the United States, and who was discharged or released therefrom under conditions other than dishonorable.

Sec. 60-300.3 [Reserved]

Sec. 60-300.4 Coverage and waivers.

(a) General--(1) Contracts and subcontracts of \$100,000 or more. Contracts and subcontracts of \$100,000 or more are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) Contracts for indefinite quantities. With respect to indefinite delivery-type contracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, ``call-type'' contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be ordered in any year under such contract will be less than \$100,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year, and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order is \$100,000 or more. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) Employment activities within the United States. This part applies only to

[[Page 44404]]

employment activities within the United States and not to employment activities abroad. The term ``employment activities within the United States'' includes actual employment within the United States, and decisions of the contractor made within the United States pertaining to the contractor's applicants and employees who are within the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or transfer of persons employed in the United States to contractor establishments abroad).

(4) Contracts with state or local governments. The requirements of the equal opportunity clause in any contract or subcontract with a state or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(b) Waivers--(1) Specific contracts and classes of contracts. The Deputy Assistant Secretary may waive the application to any contract of the equal opportunity clause in whole or part when he or she deems that special circumstances in the national interest so require. The Deputy Assistant Secretary may also grant such waivers to groups or categories of contracts: where it is in the national interest; where it is found impracticable to act upon each request individually; and where such waiver will substantially contribute to convenience in administration of the Act. When a waiver has been granted for any class of contracts, the Deputy Assistant Secretary may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the Act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

(2) National security. Any requirement set forth in the regulations of this part shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the contracting agency will notify the Deputy Assistant Secretary in writing within 30 days.

(3) Facilities not connected with contracts. The Deputy Assistant Secretary may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities which he or she finds to be in all respects separate and distinct from activities of the contractor related to the performance of the contract, provided that he or she also finds that such a waiver will not interfere with or impede the effectuation of the Act. Such waivers shall be considered only upon the request of the contractor.

#### Sec. 60-300.5 Equal opportunity clause.

(a) Government contracts. Each contracting agency and each contractor shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

EQUAL OPPORTUNITY FOR DISABLED VETERANS, RECENTLY SEPARATED VETERANS,  
OTHER PROTECTED VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS

1. The contractor will not discriminate against any employee or applicant for employment because he or she is a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran in all employment practices, including the following:

- i. Recruitment, advertising, and job application procedures;
- ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;
- iii. Rates of pay or any other form of compensation and changes in compensation;
- iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- v. Leaves of absence, sick leave, or any other leave;
- vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor;
- vii. Selection and financial support for training, including apprenticeship, and on-the-job training under 38 U.S.C. 3687, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- viii. Activities sponsored by the contractor including social or recreational programs; and
- ix. Any other term, condition, or privilege of employment.

2. The contractor agrees to immediately list all employment openings which exist at the time of the execution of this contract and those which occur during the performance of this contract, including those not generated by this contract and including those occurring at an establishment of the contractor other than the one where the contract is being performed, but excluding those of independently operated corporate affiliates, with the appropriate employment service delivery system where the opening occurs. Listing employment openings with the state workforce agency job bank or with the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment service delivery system.

3. Listing of employment openings with the appropriate employment service delivery system pursuant to this clause shall be made at least concurrently with the use of any other recruitment source or effort and shall involve the normal obligations which attach to the placing of a bona fide job order, including the acceptance of referrals of veterans and nonveterans. The listing of employment openings does not require the hiring of any particular job applicants or from any particular group of job applicants, and nothing herein is intended to relieve the contractor from any requirements in Executive orders or regulations regarding nondiscrimination in employment.

4. Whenever a contractor, other than a state or local governmental contractor, becomes contractually bound to the listing provisions in paragraphs 2 and 3 of this clause, it shall advise the state workforce agency in each state where it has establishments of the name and location of each hiring location in the state. As long

as the contractor is contractually bound to these provisions and has so advised the state agency, there is no need to advise the state agency of subsequent contracts. The contractor may advise the state agency when it is no longer bound by this contract clause.

5. The provisions of paragraphs 2 and 3 of this clause do not apply to the listing of employment openings which occur and are filled outside of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, Wake Island, and the Trust Territories of the Pacific Islands.

6. As used in this clause: i. All employment openings includes all positions except executive and senior management, those positions that will be filled from within the contractor's organization, and positions lasting three days or less. This term includes full-time employment, temporary employment of more than three days' duration, and part-time employment.

ii. Executive and senior management means: (1) Any employee (a) compensated on a salary basis at a rate of not less than \$455 per week (or \$380 per week, if employed in American Samoa by employers other than the

[[Page 44405]]

Federal Government), exclusive of board, lodging or other facilities; (b) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof; (c) who customarily and regularly directs the work of two or more other employees; and (d) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight; or (2) any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management.

iii. Positions that will be filled from within the contractor's organization means employment openings for which no consideration will be given to persons outside the contractor's organization (including any affiliates, subsidiaries, and parent companies) and includes any openings which the contractor proposes to fill from regularly established ``recall'' lists. The exception does not apply to a particular opening once an employer decides to consider applicants outside of his or her own organization.

7. The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

8. In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the Act.

9. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Deputy Assistant Secretary for Federal Contract Compliance, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants who are disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans. The contractor must ensure that applicants

or employees who are disabled veterans are informed of the contents of the notice (e.g., the contractor may have the notice read to a visually disabled individual, or may lower the posted notice so that it might be read by a person in a wheelchair).

10. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and is committed to take affirmative action to employ and advance in employment qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans.

11. The contractor will include the provisions of this clause in every subcontract or purchase order of \$100,000 or more, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Deputy Assistant Secretary for Federal Contract Compliance may direct to enforce such provisions, including action for noncompliance.

[End of Clause]

(b) Subcontracts. Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

(c) Adaption of language. Such necessary changes in language may be made to the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

(d) Inclusion of the equal opportunity clause in the contract. It is not necessary that the equal opportunity clause be quoted verbatim in the contract. The clause may be made a part of the contract by citation to 41 CFR 60-300.5(a).

(e) Incorporation by operation of the Act. By operation of the Act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the Act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

(f) Duties of contracting agencies. Each contracting agency shall cooperate with the Deputy Assistant Secretary and the Secretary in the performance of their responsibilities under the Act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of their obligations under the Act and this part, providing the Deputy Assistant Secretary with any information which comes to the agency's attention that a contractor is not in compliance with the Act or this part, responding to requests for information from the Deputy Assistant Secretary, and taking such actions for noncompliance as are set forth in Sec. 60-300.66 as may be ordered by the Secretary or the Deputy Assistant Secretary.

#### Subpart B--Discrimination Prohibited

#### Sec. 60-300.20 Covered employment activities.

The prohibition against discrimination in this part applies to the following employment activities:

- (a) Recruitment, advertising, and job application procedures;
- (b) Hiring, upgrading, promotion, award of tenure, demotion,

transfer, layoff, termination, right of return from layoff, and rehiring;

(c) Rates of pay or any other form of compensation and changes in compensation;

(d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(e) Leaves of absence, sick leave, or any other leave;

(f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;

(g) Selection and financial support for training, including, apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(h) Activities sponsored by the contractor including social and recreational programs; and

(i) Any other term, condition, or privilege of employment.

#### Sec. 60-300.21 Prohibitions.

The term discrimination includes, but is not limited to, the acts described in this section and Sec. 60-300.23.

(a) Disparate treatment. It is unlawful for the contractor to deny an employment opportunity or benefit or otherwise to discriminate against a qualified individual because of that individual's status as a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran.

(b) Limiting, segregating and classifying. Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of that individual's status as a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran. For example, the contractor may not segregate qualified disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans into separate work areas or into separate lines of advancement.

(c) Contractual or other arrangements--(1) In general. It is unlawful for the contractor to participate in a contractual or other arrangement or relationship that has the effect of subjecting the contractor's own qualified applicant or employee who is a disabled veteran, recently separated veteran, other protected veteran, or

[[Page 44406]]

Armed Forces service medal veteran to the discrimination prohibited by this part.

(2) Contractual or other arrangement defined. The phrase ``contractual or other arrangement or relationship'' includes, but is not limited to, a relationship with: an employment or referral agency; a labor organization, including a collective bargaining agreement; an organization providing fringe benefits to an employee of the contractor; or an organization providing training and apprenticeship programs.

(3) Application. This paragraph (c) applies to the contractor, with respect to its own applicants or employees, whether the contractor offered the contract or initiated the relationship, or whether the contractor accepted the contract or acceded to the relationship. The contractor is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or

applicants.

(d) Standards, criteria or methods of administration. It is unlawful for the contractor to use standards, criteria, or methods of administration, that are not job-related and consistent with business necessity, and that:

(1) Have the effect of discriminating on the basis of status as a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran; or

(2) Perpetuate the discrimination of others who are subject to common administrative control.

(e) Relationship or association with a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran. It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate against, a qualified individual because of the known disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran status of an individual with whom the qualified individual is known to have a family, business, social or other relationship or association.

(f) Not making reasonable accommodation. (1) It is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee who is a disabled veteran, unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(2) It is unlawful for the contractor to deny employment opportunities to an otherwise qualified job applicant or employee who is a disabled veteran based on the need of such contractor to make reasonable accommodation to such an individual's physical or mental impairments.

(3) A qualified disabled veteran is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service, opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified disabled veteran.

(g) Qualification standards, tests and other selection criteria--

(1) In general. It is unlawful for the contractor to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out individuals on the basis of their status as disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans unless the standard, test or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude a disabled veteran if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude individuals on the basis of their status as disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant who is a disabled veteran because the applicant's disability prevents him or her from performing marginal functions. When considering a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran for an employment opportunity, the contractor may not rely on portions of such

veteran's military record, including his or her discharge papers, which are not relevant to the qualification requirements of the opportunity in issue.

(2) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3, do not apply to 38 U.S.C. 4212 and are similarly inapplicable to this part.

(h) Administration of tests. It is unlawful for the contractor to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who is a disabled veteran with a disability that impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant, except where such skills are the factors that the test purports to measure.

(i) Compensation. In offering employment or promotions to disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related and/or military-service-related pension or other disability-related and/or military-service-related benefit the applicant or employee receives from another source.

#### Sec. 60-300.22 Direct threat defense.

The contractor may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See Sec. 60-300.2(w) defining direct threat.)

#### Sec. 60-300.23 Medical examinations and inquiries.

(a) Prohibited medical examinations or inquiries. Except as stated in paragraphs (b) and (c) of this section, it is unlawful for the contractor to require a medical examination of an applicant or employee or to make inquiries as to whether an applicant or employee is a disabled veteran or as to the nature or severity of such a veteran's disability.

(b) Permitted medical examinations and inquiries--(1) Acceptable pre-employment inquiry. The contractor may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(2) Employment entrance examination. The contractor may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition

[[Page 44407]]

an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of their status as a disabled veteran.

(3) Examination of employees. The contractor may require a medical

examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. The contractor may make inquiries into the ability of an employee to perform job-related functions.

(4) Other acceptable examinations and inquiries. The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

(5) Medical examinations conducted in accordance with paragraphs (b)(2) and (b)(4) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees who are disabled veterans as a result of such examinations or inquiries, the contractor must demonstrate that the exclusionary criteria are job-related and consistent with business necessity, and that performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part.

(c) Invitation to self-identify. The contractor shall invite applicants to self-identify as being covered by the Act, as specified in Sec. 60-300.42.

(d) Confidentiality and use of medical information. (1) Information obtained under this section regarding the medical condition or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials engaged in enforcing the laws administered by OFCCP, including this part, or enforcing the Americans with Disabilities Act, shall be provided relevant information on request.

(2) Information obtained under this section regarding the medical condition or history of any applicant or employee shall not be used for any purpose inconsistent with this part.

#### Sec. 60-300.24 Drugs and alcohol.

(a) Specific activities permitted. The contractor:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the contractor holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and

Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies that apply to employment in sensitive positions subject to such regulations.

(b) Drug testing--(1) General policy. For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of Sec. 60-300.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) Transportation employees. Nothing in this part shall be construed to encourage, prohibit, or authorize the otherwise lawful exercise by contractors subject to the jurisdiction of the Department of Transportation of authority to test employees in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (b)(1) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of Sec. Sec. 60-300.23(b)(5) and 60-300.23(d)(2).

Sec. 60-300.25 Health insurance, life insurance and other benefit plans.

(a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not inconsistent with state law.

(b) The contractor may establish, sponsor, observe or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with state law.

(c) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to state laws that regulate insurance.

(d) The contractor may not deny a qualified disabled veteran equal access to insurance or subject a qualified disabled veteran to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

(e) The activities described in paragraphs (a), (b) and (c) of this section are permitted unless these activities are used as a subterfuge to evade the purposes of this part.

Subpart C--Affirmative Action Program

Sec. 60-300.40 Applicability of the affirmative action program requirement.

(a) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$100,000 or more.

(b) Contractors described in paragraph (a) of this section shall,

within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. This program may be integrated into or kept separate from other affirmative action programs.

[[Page 44408]]

(c) The affirmative action program shall be reviewed and updated annually.

(d) The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor also shall make the affirmative action program promptly available on-site upon OFCCP's request.

Sec. 60-300.41 Availability of affirmative action program.

The full affirmative action program shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

Sec. 60-300.42 Invitation to self-identify.

(a) Disabled veterans. The contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a disabled veteran who may be covered by the Act and wishes to benefit under the affirmative action program. Such invitation shall be extended after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, except that the contractor may invite disabled veterans to self-identify prior to making a job offer when:

(1) The invitation is made when the contractor actually is undertaking affirmative action for disabled veterans at the pre-offer stage; or

(2) The invitation is made pursuant to a Federal, state or local law requiring affirmative action for disabled veterans.

(b) Recently separated veterans, other protected veterans, and Armed Forces service medal veterans. The contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is a recently separated veteran, other protected veteran, or Armed Forces service medal veteran who may be covered by the Act and wishes to benefit under the affirmative action program. Such invitation may be made at any time before the applicant begins his or her employment duties.

(c) The invitations referenced in paragraphs (a) and (b) of this section shall state that a request to benefit under the affirmative action program may be made immediately and/or at any time in the future. The invitations also shall summarize the relevant portions of the Act and the contractor's affirmative action program. Furthermore, the invitations shall state that the information is being requested on a voluntary basis, that it will be kept confidential, that refusal to provide it will not subject the applicant to any adverse treatment, and that it will not be used in a manner inconsistent with the Act. (An acceptable form for such an invitation is set forth in Appendix B of this part. Because a contractor usually may not seek advice from a disabled veteran regarding placement and accommodation until after a job offer has been extended, the invitation set forth in Appendix B of

this part contains instructions regarding modifications to be made if it is used at the pre-offer stage.)

(d) If an applicant so identifies himself or herself as a disabled veteran, the contractor should also seek the advice of the applicant regarding proper placement and appropriate accommodation, after a job offer has been extended. The contractor also may make such inquiries to the extent they are consistent with the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12101, (e.g., in the context of asking applicants to describe or demonstrate how they would perform the job). The contractor shall maintain a separate file in accordance with Sec. 60-300.23(d) on persons who have self-identified as disabled veterans.

(e) The contractor shall keep all information on self identification confidential. The contractor shall provide the information to OFCCP upon request. This information may be used only in accordance with this part.

(f) Nothing in this section shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees who are known to the contractor to be disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans.

(g) Nothing in this section shall relieve the contractor from liability for discrimination under the Act.

#### Sec. 60-300.43 Affirmative action policy.

Under the affirmative action obligations imposed by the Act contractors shall not discriminate because of status as a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran and shall take affirmative action to employ and advance in employment qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in Sec. 60-300.20.

#### Sec. 60-300.44 Required contents of affirmative action programs.

Acceptable affirmative action programs shall contain, but not necessarily be limited to, the following ingredients:

(a) Policy statement. The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees who are disabled veterans are informed of the contents of the policy statement (for example, the contractor may have the statement read to a visually disabled individual, or may lower the posted notice so that it may be read by a person in a wheelchair). The policy statement should indicate the chief executive officer's attitude on the subject matter, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy should state, among other things, that the contractor will: recruit, hire, train and promote persons in all job titles, and ensure that all other personnel actions are administered, without regard to disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran status; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and

applicants shall not be subjected to harassment, intimidation, threats, coercion or discrimination because they have engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA) or any other Federal, state or local law requiring equal opportunity for disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans;

(3) Opposing any act or practice made unlawful by VEVRAA or its implementing regulations in this part or any other Federal, state or local law requiring equal opportunity for disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans; or

(4) Exercising any other right protected by VEVRAA or its implementing regulations in this part.

[[Page 44409]]

(b) Review of personnel processes. The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees who are known disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that when a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran is considered for employment opportunities, the contractor relies only on that portion of the individual's military record, including his or her discharge papers, that is relevant to the requirements of the opportunity in issue. The contractor shall ensure that its personnel processes do not stereotype disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans in a manner which limits their access to all jobs for which they are qualified. The contractor shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government. (Appendix C of this part is an example of an appropriate set of procedures. The procedures in Appendix C of this part are not required and contractors may develop other procedures appropriate to their circumstances.)

(c) Physical and mental qualifications. (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the periodic review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified disabled veterans, they are job-related for the position in question and are consistent with business necessity.

(2) Whenever the contractor applies physical or mental qualification standards in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification standards tend to screen out qualified disabled veterans, the standards shall be

related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph (c)(2).

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See Sec. 60-300.2(w) defining direct threat.)

(d) Reasonable accommodation to physical and mental limitations. As is provided in Sec. 60-300.21(f), as a matter of nondiscrimination the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled veteran unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, if an employee who is known to be a disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee's disability; if the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

(e) Harassment. The contractor must develop and implement procedures to ensure that its employees are not harassed because of their status as a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran.

(f) External dissemination of policy, outreach and positive recruitment. The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraphs (f)(1) through (f)(8) of this section that are reasonably designed to effectively recruit qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraphs (f)(1) through (f)(8) of this section or that its activities will be limited to those listed. The scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(1) The contractor should enlist the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for, qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans, to fulfill its commitment to provide meaningful employment opportunities to such veterans:

- (i) The Local Veterans' Employment Representative in the local employment service office nearest the contractor's establishment;
- (ii) The Department of Veterans Affairs Regional Office nearest the contractor's establishment;
- (iii) The veterans' counselors and coordinators ('`Vet-Reps'') on college campuses;
- (iv) The service officers of the national veterans' groups active in the area of the contractor's establishment; and
- (v) Local veterans' groups and veterans' service centers near the contractor's establishment.

(2) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Plant tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature should be an integral part of the briefing. Formal arrangements should be made for

referral of applicants, follow up with sources, and feedback on disposition of applicants.

(3) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans. An effort should be made to participate in work-study programs with Department of Veterans Affairs rehabilitation facilities which specialize in training or educating disabled veterans.

(4) The contractor should establish meaningful contacts with appropriate veterans' service organizations which serve disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans for such purposes as advice, technical assistance, and referral of potential employees. Technical assistance from the resources described in this paragraph may consist of advice on proper placement, recruitment, training and accommodations contractors may undertake, but no such resource providing technical assistance

[[Page 44410]]

shall have authority to approve or disapprove the acceptability of affirmative action programs.

(5) Disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(6) The contractor should send written notification of company policy to all subcontractors, vendors and suppliers, requesting appropriate action on their part.

(7) The contractor should take positive steps to attract qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These persons may be located through the local chapters of organizations of and for disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans.

(8) The contractor, in making hiring decisions, should consider applicants who are known disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(g) Internal dissemination of policy. (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop internal procedures such as those listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (g)(2) of this section or that its activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation. The scope of the contractor's efforts shall depend upon all the circumstances,

including the contractor's size and resources and the extent to which existing practices are adequate.

(2) The contractor should implement and disseminate this policy internally as follows:

(i) Include it in the contractor's policy manual;

(ii) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans. The contractor should periodically schedule special meetings with all employees to discuss policy and explain individual employee responsibilities;

(iii) Publicize it in the company newspaper, magazine, annual report and other media;

(iv) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation, making clear the chief executive officer's attitude;

(v) Discuss the policy thoroughly in both employee orientation and management training programs;

(vi) Meet with union officials and/or employee representatives to inform them of the contractor's policy, and request their cooperation;

(vii) Include articles on accomplishments of disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans in company publications; and

(viii) When employees are featured in employee handbooks or similar publications for employees, include disabled veterans.

(h) Audit and reporting system. (1) The contractor shall design and implement an audit and reporting system that will:

(i) Measure the effectiveness of the contractor's affirmative action program;

(ii) Indicate any need for remedial action;

(iii) Determine the degree to which the contractor's objectives have been attained;

(iv) Determine whether known disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans have had the opportunity to participate in all company sponsored educational, training, recreational and social activities; and

(v) Measure the contractor's compliance with the affirmative action program's specific obligations.

(2) Where the affirmative action program is found to be deficient, the contractor shall undertake necessary action to bring the program into compliance.

(i) Responsibility for implementation. An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity should appear on all internal and external communications regarding the company's affirmative action program. This official shall be given necessary senior management support and staff to manage the implementation of this program.

(j) Training. All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented.

Subpart D--General Enforcement and Complaint Procedures

Sec. 60-300.60 Compliance evaluations.

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment and otherwise treat qualified individuals without discrimination based on their status as a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) Compliance review. A comprehensive analysis and evaluation of the hiring and employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. The desk audit is conducted at OFCCP offices;

(ii) An on-site review, conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation

[[Page 44411]]

during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) Off-site review of records. An analysis and evaluation of the affirmative action program (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of the Executive Order and regulations;

(3) Compliance check. A determination of whether the contractor has maintained records consistent with Sec. 60-300.80; at the contractor's option the documents may be provided either on-site or off-site; or

(4) Focused review. An on-site review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to Sec. 60-300.62.

(c) Reporting Requirements. During a compliance evaluation, OFCCP may verify whether the contractor has complied with applicable reporting requirements required under regulations promulgated by the Veterans' Employment and Training Service (VETS). If the contractor has not complied with any such reporting requirement, OFCCP will notify VETS.

Sec. 60-300.61 Complaint procedures.

(a) Place and time of filing. Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint alleging a violation of the Act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown. Complaints may be submitted to the OFCCP, 200 Constitution Avenue, NW., Washington, DC 20210, or to any OFCCP regional, district, or area office. Complaints may also be submitted to the Veterans' Employment and Training Service of the Department of Labor directly, or through the Local Veterans' Employment Representative (LVER) at the local employment service office. Such parties will assist veterans in preparing complaints, promptly refer such complaints to OFCCP, and maintain a record of all complaints which they receive and forward. OFCCP shall inform the party forwarding the complaint of the progress and results of its complaint investigation. The state workforce agency shall cooperate with the Deputy Assistant Secretary in the investigation of any complaint.

(b) Contents of complaints--(1) In general. A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

(i) Name and address (including telephone number) of the complainant;

(ii) Name and address of the contractor who committed the alleged violation;

(iii) Documentation showing that the individual is a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran. Such documentation must include a copy of the veteran's form DD-214, and, where applicable, a copy of the veteran's Benefits Award Letter, or similar Department of Veterans Affairs certification, updated within one year prior to the date the complaint is filed;

(iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and

(v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) Third party complaints. A complaint filed by an authorized representative need not identify by name the person on whose behalf it is filed. The person filing the complaint, however, shall provide OFCCP with the name, address and telephone number of the person on whose behalf it is made, and the other information specified in paragraph (b)(1) of this section. OFCCP shall verify the authorization of such a complaint by the person on whose behalf the complaint is made. Any such person may request that OFCCP keep his or her identity confidential, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(c) Incomplete information. Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(d) Investigations. The Department of Labor shall institute a prompt investigation of each complaint.

(e) Resolution of matters. (1) If the complaint investigation finds

no violation of the Act or this part, or if the Deputy Assistant Secretary decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to Sec. 60-300.65(a)(1), the complainant and contractor shall be so notified. The Deputy Assistant Secretary, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

(2) The Deputy Assistant Secretary will review all determinations of no violation that involve complaints that are not also cognizable under Title I of the Americans with Disabilities Act.

(3) In cases where the Deputy Assistant Secretary decides to reconsider the determination of a Notification of Results of Investigation, the Deputy Assistant Secretary shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration, to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

(4) If the investigation finds a violation of the Act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to Sec. 60-300.62.

#### Sec. 60-300.62 Conciliation agreements.

If a compliance evaluation, complaint investigation or other review by OFCCP finds a material violation of the Act or this part, and if the contractor is willing to correct the violations and/or deficiencies, and if OFCCP determines that settlement on that basis (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement shall be

[[Page 44412]]

required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to) such make whole remedies as back pay and retroactive seniority. The agreement shall also specify the time period for completion of the remedial action; the period shall be no longer than the minimum period necessary to complete the action.

#### Sec. 60-300.63 Violation of conciliation agreements.

(a) When OFCCP believes that a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violation alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which OFCCP asserts that such a delay would result in irreparable injury to the employment rights of affected employees or applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(b) In those cases in which OFCCP asserts that a delay would result in irreparable injury to the employment rights of affected employees or applicants, enforcement proceedings may be initiated immediately without proceeding through any other requirement contained in this

chapter.

(c) In any proceedings involving an alleged violation of a conciliation agreement OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

Sec. 60-300.64 Show cause notices.

When the Deputy Assistant Secretary has reasonable cause to believe that the contractor has violated the Act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings or other appropriate action to ensure compliance should not be instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (see Sec. 60-300.65).

Sec. 60-300.65 Enforcement proceedings.

(a) General. (1) If a compliance evaluation, complaint investigation or other review by OFCCP finds a violation of the Act or this part, and the violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate, OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any of the above in this sentence. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance evaluation. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Deputy Assistant Secretary may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in Sec. 60-300.5, including appropriate injunctive relief.

(b) Hearing practice and procedure. (1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the Act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60-30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: Provided, That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions and decision of the Administrative Law Judge, or the submission of exceptions and responses to exceptions to such decision (if any), whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights and Labor-Management, Regional Solicitors, and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60-30 to ``Executive Order 11246'' shall mean the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended;

to ``equal opportunity clause'' shall mean the equal opportunity clause published at Sec. 60-300.5; and to ``regulations'' shall mean the regulations contained in this part.

Sec. 60-300.66 Sanctions and penalties.

(a) Withholding progress payments. With the prior approval of the Deputy Assistant Secretary, so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the Act or this part.

(b) Termination. A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the Act or this part.

(c) Debarment. A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the Act or this part subject to reinstatement pursuant to Sec. 60-300.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months but no more than three years.

(d) Hearing opportunity. An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

Sec. 60-300.67 Notification of agencies.

The Deputy Assistant Secretary shall ensure that the heads of all agencies are notified of any debarments taken against any contractor.

Sec. 60-300.68 Reinstatement of ineligible contractors.

(a) Application for reinstatement. A contractor debarred from further contracts for an indefinite period under the Act may request reinstatement in a letter filed with the Deputy Assistant Secretary at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the Act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Deputy Assistant Secretary also shall consider, among other factors, the severity of the violation which resulted in the debarment, the contractor's attitude towards compliance, the contractor's past compliance history, and whether the contractor's reinstatement would impede the effective enforcement of the Act or this part. Before reaching a decision, the Deputy Assistant Secretary may conduct a compliance evaluation of the contractor and may require the contractor to supply additional

[[Page 44413]]

information regarding the request for reinstatement. The Deputy Assistant Secretary shall issue a written decision on the request.

(b) Petition for review. Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor's objections to the

Deputy Assistant Secretary's decision. The petition shall be served on the Deputy Assistant Secretary and the Associate Solicitor for Civil Rights and Labor-Management and shall include the decision as an appendix. The Deputy Assistant Secretary may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

Sec. 60-300.69 Intimidation and interference.

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

(1) Filing a complaint;

(2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the Act or any other Federal, state or local law requiring equal opportunity for disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans;

(3) Opposing any act or practice made unlawful by the Act or this part or any other Federal, state or local law requiring equal opportunity for disabled veterans, recently separated veterans, other protected veterans, or Armed Forces service medal veterans, or

(4) Exercising any other right protected by the Act or this part.

(b) The contractor shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion or discrimination. The sanctions and penalties contained in this part may be exercised by the Deputy Assistant Secretary against any contractor who violates this obligation.

Sec. 60-300.70 Disputed matters related to compliance with the Act.

The procedures set forth in the regulations in this part govern all disputes relative to the contractor's compliance with the Act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

Subpart E--Ancillary Matters

Sec. 60-300.80 Recordkeeping.

(a) General requirements. Any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later. Such records include, but are not necessarily limited to, records relating to

requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor shall preserve all personnel records relevant to the complaint, compliance evaluation or action until final disposition of the complaint, compliance evaluation or action. The term personnel records relevant to the complaint, compliance evaluation or action would include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person, and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

(b) Failure to preserve records. Failure to preserve complete and accurate records as required by paragraph (a) of this section constitutes noncompliance with the contractor's obligations under the Act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, That this presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

(c) The requirements of this section shall apply only to records made or kept on or after the date that the Office of Management and Budget has cleared the requirements.

#### Sec. 60-300.81 Access to records.

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation and pertinent to compliance with the Act or this part. Information obtained in this manner shall be used only in connection with the administration of the Act and in furtherance of the purposes of the Act.

#### Sec. 60-300.82 Labor organizations and recruiting and training agencies.

(a) Whenever performance in accordance with the equal opportunity clause or any matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, the Department of Veterans Affairs, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency or other representative of workers who are employed by a contractor to cooperate

[[Page 44414]]

with, and to assist in, the implementation of the purposes of the Act.

Sec. 60-300.83 Rulings and interpretations.

Rulings under or interpretations of the Act and this part shall be made by the Deputy Assistant Secretary.

Sec. 60-300.84 Responsibilities of appropriate employment service delivery system.

By statute, appropriate employment service delivery systems are required to refer qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans to fill employment openings listed by contractors with such appropriate employment delivery systems pursuant to the mandatory job listing requirements of the equal opportunity clause and are required to give priority to disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans in making such referrals. The employment service delivery systems shall provide OFCCP, upon request, information pertinent to whether the contractor is in compliance with the mandatory job listing requirements of the equal opportunity clause.

Appendix A to Part 60-300--Guidelines on a Contractor's Duty To Provide Reasonable Accommodation

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on Title I of the Americans with Disabilities Act (ADA) set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630). Although the following discussion is intended to provide an independent ``free-standing'' source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as well. See Sec. 60-300.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under VEVRAA, like reasonable accommodation required under Section 503 and the ADA, is a part of the nondiscrimination obligation. See EEOC appendix cited in this paragraph. Affirmative action is unique to VEVRAA and Section 503, and includes actions above and beyond those required as a matter of nondiscrimination. An example of this is the requirement discussed in paragraph 2 of this appendix that a contractor shall make an inquiry of a disabled veteran who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to

the known physical or mental limitations of an ``otherwise qualified'' disabled veteran, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in Sec. 60-300.2(o), a disabled veteran is qualified if he or she has the ability to perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the disabled veteran is qualified with respect to that process. One is ``otherwise qualified'' if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees who are known to be disabled veterans. As stated in Sec. 60-300.42(a) (see also Appendix B of this part), the contractor is required to invite applicants who have been provided an offer of employment, before they are placed on the contractor's payroll, to indicate whether they are a disabled veteran who may be covered by the Act and wish to benefit under the contractor's affirmative action program. Section 60-300.42(d) further provides that the contractor should seek the advice of disabled veterans who ``self-identify'' in this way as to proper placement and appropriate accommodation. Moreover, Sec. 60-300.44(d) provides that if an employee who is a known disabled veteran is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables a disabled veteran to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment, as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee who is a disabled veteran in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the ``best'' accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) Accommodations in the application process; (2) accommodations that enable employees who are disabled veterans to perform the essential functions of the position held or desired; and (3) accommodations that enable employees who are disabled veterans to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term ``undue hardship'' refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor's business. The contractor's claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered-- those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between

the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source, e.g., the Department of Veterans Affairs or a state vocational rehabilitation agency, or if Federal, state or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the disabled veteran should be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. Section 60-300.2(t) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are any number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor generally should consult with the disabled veteran in deciding on the appropriate accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate state vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1-800-669-4000 (voice), 1-800-669-6820 (TTY)), the Job Accommodation Network (JAN) operated by the Office of Disability Employment Policy in the U.S. Department of Labor (1-800-526-7234 or 1-800-232-9675), private disability organizations (including those that serve veterans), and other employers.

6. With respect to accommodations that can permit an employee who is a disabled veteran to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance,

[[Page 44415]]

modify or acquire equipment. For the visually-impaired such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, braille devices, talking calculators, magnifiers, audio recordings and braille or large-print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids and telecommunications devices for the deaf (TDDs). For persons with limited physical dexterity, the obligation may require the provision of goose neck telephone headsets, mechanical page turners and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter or travel attendant, permitting the use of accrued paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by disabled veterans--including areas used by employees for purposes other than the performance of essential job functions such as restrooms, break rooms, cafeterias, lounges,

auditoriums, libraries, parking lots and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in Sec. 60-300.2(t) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified disabled veteran cannot perform to another position. Accordingly, if a clerical employee who is a disabled veteran is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, i.e., those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor which has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind disabled veteran with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the disabled veteran. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit disabled veterans who cannot work a standard schedule because of the need to obtain medical treatment, or disabled veterans with mobility impairments who depend on a public transportation system that is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the disabled veteran's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider applicants who are known disabled veterans for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees who are disabled veterans by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A "reasonable amount of time" should be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. The contractor may maintain the reassigned disabled veteran at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not disabled veterans. It should also be noted that the contractor is not required to promote a disabled veteran as an accommodation.

11. With respect to the application process, appropriate accommodations may include the following: (1) Providing information regarding job vacancies in a form accessible to disabled veterans who are vision or hearing impaired, e.g., by making an announcement available in braille, in large print, or on audio tape, or by responding to job inquiries via TDDs; (2) providing readers, interpreters and other similar assistance during the application,

testing and interview process; (3) appropriately adjusting or modifying employment-related examinations, e.g., extending regular time deadlines, allowing a disabled veteran who is blind or has a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her ability, to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices; and (4) ensuring a disabled veteran with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

#### Appendix B to Part 60-300--Sample Invitation to Self-identify

Note: When the invitation to self-identify is being extended to disabled veterans prior to an offer of employment, as is permitted in limited circumstances under Sec. Sec. 60-300.42(a)(1) and (2), paragraph 7(ii) of this appendix, relating to identification of reasonable accommodations, should be omitted. This will avoid a conflict with the EEOC's ADA Guidance, which in most cases precludes asking a job applicant (prior to a job offer being made) about potential reasonable accommodations.

#### [Sample Invitation to Self-Identify]

1. This employer is a Government contractor subject to the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, which requires Government contractors to take affirmative action to employ and advance in employment qualified disabled veterans, recently separated veterans, other protected veterans, and Armed Forces service medal veterans.

2. [THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING AN INVITATION TO RECENTLY SEPARATED VETERANS, OTHER PROTECTED VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS ONLY.] If you are a recently separated veteran, other protected veteran, or Armed Forces service medal veteran, we would like to include you under our affirmative action program. If you would like to be included under the affirmative action program, please tell us. The term ``recently separated veteran'' refers to any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty. The term ``other protected veteran'' refers to a person who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, under laws administered by the Department of Defense. The term ``Armed Forces service medal veteran'' refers to a person who, while serving on active duty in the Armed Forces, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (62 FR 1209).

[THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING AN INVITATION TO DISABLED VETERANS ONLY.] If you are a disabled veteran, we would like to include you in our affirmative action program. If you would like to be included under the affirmative action program, please tell us. This information will assist us in placing you in an appropriate position and in making accommodations for your disability. The term ``disabled veteran'' refers to a veteran who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary, or was discharged or released from active duty because of a service-connected disability.

[THE FOLLOWING TEXT SHOULD BE USED WHEN EXTENDING AN INVITATION

TO DISABLED VETERANS AS WELL AS RECENTLY SEPARATED VETERANS, OTHER PROTECTED VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS.] If you are a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran, we would like to include you under our affirmative action program. If you would like to be included under the affirmative action program, please tell us. [The contractor should include here the definitions of ``disabled veteran,' ' ``recently separated veteran,' ' ``other protected veteran,' ' and ``Armed Forces service medal veteran' ' found in the two preceding paragraphs.]

3. You may inform us of your desire to benefit under the program at this time and/or at any time in the future.

[[Page 44416]]

4. Submission of this information is voluntary and refusal to provide it will not subject you to any adverse treatment. The information provided will be used only in ways that are not inconsistent with the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended.

5. The information you submit will be kept confidential, except that (i) supervisors and managers may be informed regarding restrictions on the work or duties of disabled veterans, and regarding necessary accommodations; (ii) first aid and safety personnel may be informed, when and to the extent appropriate, if you have a condition that might require emergency treatment; and (iii) Government officials engaged in enforcing laws administered by OFCCP, or enforcing the Americans with Disabilities Act, may be informed.

6. [The contractor should here insert a brief provision summarizing the relevant portion of its affirmative action program.]

7. [THE FOLLOWING TEXT SHOULD BE USED ONLY WHEN EXTENDING AN INVITATION TO DISABLED VETERANS, EITHER BY THEMSELVES OR IN COMBINATION WITH RECENTLY SEPARATED VETERANS, OTHER PROTECTED VETERANS, AND ARMED FORCES SERVICE MEDAL VETERANS. PARAGRAPH 7(II) SHOULD BE OMITTED WHEN THE INVITATION TO SELF-IDENTIFY IS BEING EXTENDED PRIOR TO AN OFFER OF EMPLOYMENT.] If you are a disabled veteran it would assist us if you tell us about (i) any special methods, skills, and procedures which qualify you for positions that you might not otherwise be able to do because of your disability so that you will be considered for any positions of that kind, and (ii) the accommodations which we could make which would enable you to perform the job properly and safely, including special equipment, changes in the physical layout of the job, elimination of certain duties relating to the job, provision of personal assistance services or other accommodations. This information will assist us in placing you in an appropriate position and in making accommodations for your disability.

#### Appendix C to Part 60-300--Review of Personnel Processes

The following is a set of procedures which contractors may use to meet the requirements of Sec. 60-300.44(b):

1. The application or personnel form of each known applicant who is a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran should be annotated to identify each vacancy for which the applicant was considered, and the form should be quickly retrievable for review by the Department of Labor and the contractor's personnel officials for use in investigations and internal compliance activities.

2. The personnel or application records of each known disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran should include (i) the identification of each promotion for which the covered veteran was considered, and (ii) the identification of each training program for which the covered veteran was considered.

3. In each case where an employee or applicant who is a disabled veteran, recently separated veteran, other protected veteran, or Armed Forces service medal veteran is rejected for employment, promotion, or training, the contractor should prepare a statement of the reason as well as a description of the accommodations considered (for a rejected disabled veteran). The statement of the reason for rejection (if the reason is medically related), and the description of the accommodations considered, should be treated as confidential medical records in accordance with Sec. 60-300.23(d). These materials should be available to the applicant or employee concerned upon request.

4. Where applicants or employees are selected for hire, promotion, or training and the contractor undertakes any accommodation which makes it possible for him or her to place a disabled veteran on the job, the contractor should make a record containing a description of the accommodation. The record should be treated as a confidential medical record in accordance with Sec. 60-300.23(d).

[FR Doc. E7-15385 Filed 8-7-07; 8:45 am]

BILLING CODE 4510-CM-P