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DEPARTMENT OF LABOR

Office of Federal Contract Compliance Programs

41 CFR Part 60-250

RIN 1215-AB65

Nondiscrimination and Affirmative Action Obligations of  
Contractors and Subcontractors Regarding Protected Veterans

AGENCY: Office of Federal Contract Compliance Programs, Labor.

ACTION: Final rule.

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SUMMARY: This final rule revises the regulations in 41 CFR part 60-250 implementing the nondiscrimination and affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended ('`Section 4212'' or ``VEVRAA''). The regulations in part 60-250 implement the nondiscrimination and affirmative action provisions of VEVRAA prior to their amendment in 2002 by the Jobs for Veterans Act ('`JVA''), and apply to contracts entered into before December 1, 2003. Today's final rule revises the mandatory job listing provision in the part 60-250 regulations to provide that 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 mandatory job listing requirements under the part 60-250 regulations. The effect of this final rule is to conform the mandatory job listing provision in the part 60-250 regulations to the parallel provision in the

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regulations of the Office of Federal Contract Compliance Programs ('`OFCCP'') implementing the JVA amendments to VEVRAA in 41 CFR part 60-300. Today's final rule also clarifies that the regulations in part 60-250 apply to any contract or subcontract of at least \$25,000 entered into before December 1, 2003, and that the regulations in part 60-300, not the part 60-250 regulations, apply to such a contract or subcontract if it is modified on or after December 1, 2003 and the contract or subcontract as modified is for \$100,000 or more.

DATES: Effective Date: These regulations are effective April 7, 2008.

FOR FURTHER INFORMATION CONTACT: Sandra Dillon, 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: The nondiscrimination and affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act, 38 U.S.C. 4212, ('`VEVRAA' or '`Section 4212'') require Federal contractors and subcontractors to provide equal employment opportunity to and take affirmative action to employ and advance in employment the categories of veterans protected under the law. Prior to the amendments made in 2002 by the Jobs for Veterans Act (Pub. L. 107-288, 116 Stat. 2033)(`JVA'), VEVRAA required, in part, that the President implement the nondiscrimination and affirmative action provisions by promulgating 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.

OFCCP's regulations implementing the pre-JVA nondiscrimination and affirmative action provisions of VEVRAA are published in 41 CFR part 60-250. The pre-JVA nondiscrimination and affirmative provisions of VEVRAA and the regulations in part 60-250 continue to apply to contractors with contracts entered into before December 1, 2003. The mandatory job listing requirement is addressed in the regulation containing the equal opportunity clause at 41 CFR 60-250.5. OFCCP clarified in Sec. 60-250.5(a)2 that ``the appropriate local employment service office'' is ``an appropriate local employment service office of the state employment security agency wherein the opening occurs.'' In addition, OFCCP interpreted the language in the pre-JVA affirmative action provisions of VEVRAA to authorize the use of alternative methods for complying with the mandatory job listing requirement. Thus, Sec. 60-250.5(a)2 currently provides that ``[l]isting employment openings with the U.S. Department of Labor's America's Job Bank shall satisfy the requirement to list jobs with the local employment service office.''

Today's final rule revising the mandatory job listing provision in Sec. 60-250.5(a)2 was made necessary by two events. First, the JVA amended the nondiscrimination and affirmative action provisions of VEVRAA and made those amendments applicable only to contracts entered into on or after December 1, 2003. Among the changes made by the JVA amendments was a change to the manner in which the mandatory job listing provision is to be implemented. 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.'' 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). In addition to listing with an appropriate employment service delivery system, the JVA permits contractors to 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 Department of Labor).'' Under the JVA amendments, listing jobs solely with America's Job Bank (``AJB'') no longer complies with the requirements of VEVRAA. In addition, AJB ceased operations on July 1, 2007.

OFCCP recently published final regulations to implement the JVA amendments to the nondiscrimination and affirmative action provisions of VEVRAA (72 FR 44393, August 8, 2007). The regulation at 41 CFR 60-

300.5(a)2 implementing the mandatory job listing requirement provides that ``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.'' Contractors that are covered by both the regulations in part 60-250 and part 60-300 have asked whether they may use the same methods to satisfy their mandatory job listing obligations under both sets of regulations. In addition, with the elimination of one of the permissible methods under Sec. 60-250.5(a)2 for satisfying their job listing obligations, contractors have inquired about other methods that might be used to comply with the mandatory job listing requirements in the part 60-250 regulations.

OFCCP has interpreted the language of the pre-JVA nondiscrimination and affirmative action provisions of VEVRAA and the current Sec. 60-250.5(a)2 to authorize alternative methods for listing job openings with the local employment service office. Thus, OFCCP has interpreted the current Sec. 60-250.5(a)2 to permit contractors to list job openings in the same manner that is permitted under the regulation at 41 CFR 60-300.5(a)2. In a Frequently Asked Question (``FAQ'') published on the OFCCP Web site, OFCCP advised contractors that ``listing with the state workforce agency job bank in the state where the job opening occurs also will satisfy the listing requirement under the part 60-250 regulations.'' In another FAQ published on the Web site, OFCCP further explained that ``contractors subject to both sets of regulations also may satisfy the listing requirement by listing openings with an appropriate local employment service delivery system.'' See <http://www.dol.gov/esa/regs/compliance/ofccp/faqs/jvafaqs.htm>.

Today's final rule makes two changes to the mandatory job listing provision in Sec. 60-250.5(a)2. First, the final rule removes the reference to AJB since it no longer exists. Second, today's final rule conforms the mandatory job listing provision in the part 60-250 regulations to the interpretation of current Sec. 60-250.5(a)2 that is set forth in the FAQs. Thus, the final rule revises Sec. 60-250.5(a)2 to state that ``listing employment openings with the state workforce agency job bank where the opening occurs or with the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment service office.'' As a result of the changes made by this final rule, the VEVRAA regulations at part 60-250 and part 60-300 will identify the same methods for satisfying the mandatory listing requirement.

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In addition, this final rule revises Sec. 60-250.1(b) to clarify that the regulations in part 60-250 apply to any contract or subcontract of at least \$25,000 entered into before December 1, 2003, and that the regulations in part 60-300, not the part 60-250 regulations, apply to such a contract or subcontract if it is modified on or after December 1, 2003, and the contract or subcontract as modified is for \$100,000 or more. This change will assist contractors in determining whether the regulations in part 60-250 and/or the regulations in part 60-300 apply to their contracts.

Regulatory Procedures

Publication in Final

OFCCP has determined that this rulemaking need not be published as a proposed rule, as generally required by the Administrative Procedure Act, 5 U.S.C. 553 (``APA''). Notice-and-comment requirements do not

apply to ``interpretive rules.'' 5 U.S.C. 553(b)(A). The amendment to 41 CFR 60-250.5(a)2 is not being published as a proposed rule because it is an interpretive rule and therefore exempt from APA notice and comment procedures. Consistent with OFCCP's interpretation that under the pre-JVA affirmative action provisions of VEVRAA and existing 41 CFR 60-250.5(a)2 more than one method may be used to list openings with the appropriate local employment service office, the final rule amends 41 CFR 60-250.5(a)2 to include additional means of listing jobs. The current rule allowed contractors to post jobs on AJB, while this final rule permits contractors to satisfy the mandatory job listing requirement by posting employment openings with the state workforce agency job bank or with the local employment service delivery system where the employment opening occurs. For these reasons, the exemption for interpretive rules permits OFCCP to publish this final rule to codify OFCCP's interpretation that listing job openings with the state workforce agency job banks or with the local employment service delivery system where the job opening occurs are permissible methods for complying with the mandatory listing requirement at 41 CFR 60-250.5(a)2.

In addition, notice-and-comment rulemaking is not required for the amendment to 41 CFR 60-250.1(b), which clarifies the scope and applicability of the regulations in 41 CFR part 60-250 and the regulations in 41 CFR part 60-300. The JVA made the amendments to the nondiscrimination and affirmative action provisions of VEVRAA applicable only to Government contracts entered into on or after December 1, 2003. The term ``Government contract'' is defined in existing 41 CFR 60-250.2(i) and 41 CFR 60-300.2(i) 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).'' Because a contract modification is a ``Government contract,'' the JVA amendments apply to modifications of otherwise covered contracts made on or after December 1, 2003. Consequently, the regulation at 41 CFR 60-300.1(b) provides that part 60-300 applies to any contract of \$100,000 or more, entered into or modified on or after December 1, 2003. The amendment to 41 CFR 60-250.1(b) essentially incorporates the effective date of the JVA amendments, which was determined by statute, and tracks the regulation in 41 CFR 60-300.1(b). The Department of Labor may not, in response to public comment, change or decline to implement the effective dates of the JVA amendments. Consequently, there is good cause for finding that applying the notice-and-comment procedure to the amendment to 41 CFR 60-250.1 is unnecessary and contrary to the public interest, pursuant to Section 553(b)(B) of the APA.

#### Executive Order 12866

This final rule has been drafted and reviewed in accordance with Executive Order 12866, section 1(b), Principles of Regulation. OFCCP has determined that this rule is not ``a significant regulatory action'' under Executive Order 12866, section 3(f). Accordingly, it does not require an assessment of potential costs and benefits under section 6(a)(3) of that order.

#### Executive Order 13132

OFCCP has reviewed the rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have ``federalism implications.'' The rule will 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

The 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, we certify that the rule will not have a significant economic impact on a substantial number of small business entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required.

#### Small Business Regulatory Enforcement Fairness Act

OFCCP has concluded that the rule is not a ``major'' rule under the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.). In reaching this conclusion, the OFCCP has determined that the rule will not likely result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

#### 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.

#### Congressional Review Act

This regulation is not a major rule for purposes of the Congressional Review Act.

#### 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 final rule amends the regulations implementing VEVRAA to allow contractors to list with the state workforce agency job bank where the opening occurs or the local employment service delivery system where the opening occurs to comply with the obligation to list jobs with an appropriate local employment service

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office. However, this final rule does not make any changes to the currently approved information collections. Consequently, this final 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 60-250

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 1st day of April, 2008.  
Victoria A. Lipnic,  
Assistant Secretary for Employment Standards.  
Charles E. James, Sr.,  
Deputy Assistant Secretary for Federal Contract Compliance.

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Accordingly, under authority of 38 U.S.C. 4212, Title 41 of the Code of Federal Regulations, Chapter 60, Part 60-250, is amended as follows:

PART 60-250--AFFIRMATIVE ACTION AND NONDISCRIMINATION OBLIGATIONS OF CONTRACTORS AND SUBCONTRACTORS REGARDING SPECIAL DISABLED VETERANS, VETERANS OF THE VIETNAM ERA, RECENTLY SEPARATED VETERANS, AND OTHER PROTECTED VETERANS

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1. The authority citation for part 60-250 continues to read as follows:

Authority: 29 U.S.C. 793; 38 U.S.C. 4211 (2001) (amended 2002); 38 U.S.C. 4212 (2001) (amended 2002) and 4212; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

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2. Section 60-250.1 is amended by revising paragraph (b) to read as follows.

Sec. 60-250.1 Purpose, applicability and construction.

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(b) Applicability. This part applies to any Government contract or subcontract of \$25,000 or more entered into before December 1, 2003, for the purchase, sale or use of personal property or nonpersonal services (including construction), except that the regulations in 41 CFR part 60-300, and not this part, apply to such a contract or subcontract that is modified on or after December 1, 2003 and the contract or subcontract as modified is in the amount of \$100,000 or more: Provided, That subpart C of this part applies only as described in Sec. 60-250.40(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.

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3. Section 60-250.5 is amended by revising paragraph (a)2 to read as follows.

Sec. 60-250.5 Equal opportunity clause.

(a) \* \* \*

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 wherein the contract is being performed, but excluding those of independently operated corporate affiliates, at an appropriate local employment service office of the state employment security agency wherein the opening occurs. Further, listing employment openings with the state workforce agency job bank where the opening occurs or with the local employment service delivery system where the opening occurs will satisfy the requirement to list jobs with the appropriate employment service office.

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