

NWX-DOL ESA OFCCP

Moderator: Brenda Stewart

August 29, 2013

1:00 pm CT

Coordinator: Welcome everyone and thank you for standing by. Today's conference is being recorded. If you have any objections, you may disconnect at this time.

I'd like to turn your conference over to Ms. Brenda Stewart. You may begin, ma'am.

Brenda Stewart: Thank you, operator, and good afternoon everyone. Again I am Brenda Stewart and I will be acting as your moderator for today's webinar. This is actually an exciting and an historical time for OFCCP and we are looking forward to sharing with you these updated requirements for the Vietnam Era Veterans' Readjustment Assistance Act of 1974, better known as VEVRAA.

A lot of people throughout OFCCP nationwide and the U.S. Department of Labor have worked diligently to bring about the reality of this final rule. And we appreciate you taking the time to join us and have a lot of information that will be presented.

Joining us is our presenter, (Naomi Levin). (Naomi) is the branch chief for the policy branch in the national office. We also have two solicitors that will be participating and providing comments and answering some questions.

But during the presentation (Naomi) will give you an overview of the VEVRAA final rule, how like the changes and any effective dates. And towards the end of the presentation, if time allows, we will take questions through the WebEx chat box. So we encourage you to submit your questions throughout the presentation, so that we can get to as many as possible at the end.

And then at the end we will introduce Director Shiu and she'll be on the phone with us for a few minutes to make a few remarks. So right now I will turn the presentation over to (Naomi).

(Naomi Levin): Okay. Thank you, Brenda, and I wanted to let everybody know I am (unintelligible) with colleagues who have been involved in this project pretty much since the beginning. With me (Susan Chastain) and (Kerier Bickerstaff) and you will undoubtedly will be hearing from them from time to time as well with me as we go forward.

Next slide.

Okay this is our overview and agenda for our program today. We'll talk to you a little background for those who are less familiar with VEVRAA and we'll discuss things like the effective date. We'll then take what I call a tour of the key changes to the regulations. And as Brenda indicated to you, time allowing, we'll take some of your questions.

Before we begin a kind of note, a couple of notes for you, there is lots of additional information on our Web site. If you haven't been there, I encourage you to go. We have a landing page for the VEVRAA final rule -- which is very easy to find, if you go to our main page.

And on there you'll find lots of material. You may read the regulation -- which is posted in three parts. So if you want to just read the regulatory text, you can go to the regulatory text and just read that. If you do that, you will find the regulation has been posted in its entirety. It doesn't mean we changed everything, but it's much, much easier to read the rule than read the change (unintelligible) context if you have the whole regulation posted.

If you want to know which things are new and which things are not, then go to the summary and preamble and that will explain all the different changes and why we did what we did and why we maybe didn't do other things that we originally proposed.

And finally if you want to know about the burden associated with the rule, if you're interested in that, you'll find a separate section posted that will be it says regulatory procedures. That's also commonly just referred to as the burden analysis. That's on our Web site.

We have some FAQs on our Web site already, fact sheets on our Web site, so there's a lot of information.

Also let me assure you this is not a one-shot deal. This is just today an induction to the new changes in the regulation. There will be more things to come as we go along. So again this is not a one-shot deal today. It's just kind of a quick run through of, you know, meet the new rule.

Next slide, please.

Okay just to remind everybody the Vietnam Era Veterans' Readjustment Assistance Act of 1974 or VEVRAA prohibits employment discrimination against certain protected veterans -- including recently separated veterans, those who have been separated from service within the past three years, and disabled veterans -- and requires contractors and subcontractors to take affirmative action to employ and advance in employment those protected veterans.

Contractors and subcontractors who have a contract with the federal government of \$100,000 or more are covered by VEVRAA. They may not discriminate against those who are protected -- protected veterans under VEVRAA.

Those who in addition to a contract of \$100,000 or more have 50 or more employees are required to have a written affirmative action program and to report annually on their affirmative action efforts to recruit and employ protected veterans.

Next, please.

Okay. Well why did we go through this process? Well there's a number of reasons for making changes to the VEVRAA implementing regulation. First among them was the regulatory framework articulating the responsibilities with respect to affirmative action and recruitment efforts has been in place virtually unchanged since the 1970s.

Meanwhile of course a lot of has changed, a lot of the way we do business has changed, a lot has changed technologically speaking and so that's a good reason to take another look at the rule and see what kind of updating it needs.

Also there are a large of number of veterans returning from tours of duty in Iraq, Afghanistan and all kinds of other locations around the world. Many of these people have serious disabilities that they're coming back with and these are all protected veterans under VEVRAA.

Many of these returning vets face substantial obstacles in finding employment in civilian workforce and making that transition over to civilian workforce. For example according to the Bureau of Labor Statistics data, that's BLS data, for 2012 the unemployment rate for a post-September 2001 or what BLS refers to as Gulf War-era II veterans was 9.9% compared to 7.9% for non-vets. The unemployment for male Gulf War-era II veterans aged 18 to 24 was 20% compared to 16.4% for non-vets in the same age group.

Addressing difficulties our returning veterans have been facing and are experiencing right now is the focus of a number of federal efforts -- including the 2011 Vow to Hire Heroes Act and the 2012 Joining Forces Initiative. Updating and strengthening or VEVRAA regulations is another important means by which the government can address the issues of veterans' employment.

Next slide, please.

The final rules come after OFCCP's April 2011 publication of a proposed rule where we proposed a number of changes to the VEVRAA rule. That was followed by a period of public comment and thorough review and analysis of all of the public comments we received.

As a result of that review the final rule takes a more tailored and streamlined approach than we did in the proposed rule and it focuses more on enhancing contractor accountability and fostering compliance with the requirements of the law.

Particularly with respect to affirmative action obligations, the revised VEVRAA rule provides contractors and it will also provide OFCCP with management tools really that are needed to better assess whether and where there are still barriers to equal employment. And you need to know where they are so that they can be removed or reduced.

And it will also provide tools to assess the effectiveness of outreach and recruitment efforts, so they can be adjusted if they're not being effective. And we can help and work with contractors to help them do that if we know that they're not effective.

Next slide.

Speaking of effective, the effective date of the VEVRAA final rule is 180 days after publication in the Federal Register. The final rule has not yet been published in the Federal Register. It is right now posted on our Web site following its announcement the other day by Vice President Biden. So the 180 days does not run yet.

Once the rule is in fact published in the Federal Register, we would post a link to that official version of the rule in the Register and of course post the effective date -- which would be in the Register version of the rule.

This 180-day period provides time for contractors and for that matter for all of OFCCP staff to become familiar with new and revised provisions in the law. And this also provides us time for additional education efforts, additional technical assistance efforts, for contractors, for interested groups, the general public, for anybody. So we have some time here to make sure everybody knows what is in the new rule, what it means to them, what's required and we'll taking advantage of having that time period.

Next slide, please.

Although the effective date of the rule is 180 days after publication, it's also important to note that the final rule also provides for phased in compliance of the affirmative action requirements in Subpart C. Subpart C of the rule is the portion of the rule that addresses the contents of an affirmative action program. It addresses the invitation to self-identify and those sorts of things. Outreach and recruitment that is in Subpart C.

Specifically the preamble and (unintelligible) compliance provision is in the preamble. The preamble states that contractors who have an AAP developed under the existing rule in place on the effective date of the new rule are permitted to choose to maintain that AAP until the end of their current AAP cycle and to come into compliance with Subpart C of the final rule with their next AAP cycle.

Having a provision like this will make things simpler for everyone, for contractors and OFCCP, because it will ensure that only one set of requirements will apply to each AAP during a compliance evaluation and that's exactly what we want to happen.

So if a contractor has an AAP that was developed under the existing rules and you're being reviewed say a month after the effective date, OFCCP will review that AAP under the existing rules. So if your plan was in place on that day and then you're subject to a review before your next cycle, that's what we will do.

Once you update that AAP, with the new AAP cycle and you're subject to compliance review, OFCCP would be reviewing that new AAP using the new revised regulation.

Please be aware that this phased in compliance only applies to the affirmative action requirements in Subpart C. It does not apply to changes in other parts of the regulations, for example in any non-discrimination provision. So anything that is in Subpart A or B or D or E that includes recordkeeping will not be subject to phased in compliance. (Kerier)?

(Kerier Bickerstaff): Yes and I just wanted to jump in and say I mean I think for those of you who have reviewed the final rule the majority of the new requirements do fall under Subpart C. So the majority of the requirements we're going to be talking about here today are those that would be phased in after the beginning of your next AAP cycle.

And just to kind of give an example as to how that will work, right now we're expecting the effective date of the rule some time in the spring of next year. That would be 180 days or so from now. So if those of you who have an AAP cycle that begins January 1, you all will be able to keep that AAP and you will be reviewed under that AAP for Subpart C purposes under the existing rule until the next AAP cycle you have, so an AAP cycle beginning then on January 1, 2015 would be (unintelligible) compliance with the new rule would take effect.

(Naomi Levin): That's correct. Please, next slide. Okay so this is not happening tomorrow (unintelligible) the message we want you all to have.

Okay before we begin a discussion of the changes to the rule, we want to note first that the final rule includes a number of non-substantive changes that we're not going to really talking about today. But you can take a look at them on your own. For example we have alphabetized the definitions. Currently they're mostly in order by topic -- which is a little cumbersome -- so that of course will make it easier to find things and easier to use.

We've also since we're updating the rules updated the title of the head of OFCCP, so we have now changed that out from Deputy Assistant Secretary to Director -- which again reflects the current title of the head of OFCCP.

Today though we're only going to be talking about the key substantive changes. Our time is very limited.

Next, please.

Okay so let's kick this off with talking about first the fate of Part 60-250. These are the original VEVRAA regulations. And under the current rule Part 60-250 government contracts for \$25,000 or more entered into before December 1, 2003 that have not been terminated or modified.

Our experience told us that there were no such contracts left anymore. That basically anything had either ended on its own or had since been modified and meant that was covered under the Part 60-300 regulation. We put that out for notice and comment and so please tell us if we're wrong. And the comments did not tell us we were wrong. So that made us pretty certain that Part 250 has

basically become obsolete. And so in the final rules you see we have rescinded the Part 250 regulations in there (unintelligible) as obsolete.

However sure though we may be we still wanted to error on the side of caution in case we were mistaken in some way or there was still a few contracts out there covered only under Part 250 but haven't been modified so they're not under Part 300.

So to address that situation you will see in the rules a new definition for a term pre-JVA veterans, that's the Jobs for Veterans Act, and you will find provisions protecting pre-JVA veterans. Now these are defined as veterans who would be protected under Part 250 were Part 250 still in existence but are not protected under Part 300. So anybody protected under Part 300 is not a pre-JVA veteran.

Those who are, if there still are pre-JVA veterans, what we've done is provide provisions in there that protect pre-JVA veterans from discrimination and retaliation so that they may file discrimination complaints if need be under the Part 300 regulation. So it's a limited protection if there are any pre-JVA veterans out there.

Next slide, please.

In addition to adding the definition for pre-JVA veteran, the VEVRAA final rule also makes changes to a couple of other key definitions. The final rule adds a definition of protected veteran -- which has been a term that a lot people have used for a very long time as sort of a slang but was actually not in the regulations itself.

So in the final rule you see protected veteran defined as the catchall for any veteran in any category that is protected under the VEVRAA law. So that will be a helpful change.

Also the final rule replaces the term other protected veteran. Now other protected veteran is currently defined to mean active duty wartime or campaign badge veteran. The problem the term other protected veteran is it's not very descriptive and for that reason was frequently misunderstood to mean veterans other than those in categories protected by veterans and as a reference to all veterans -- which was not correct -- and so that term was actually more confusing.

What we've done is we have replaced that term with the very descriptive term active duty wartime or campaign badge veteran. A term like that should put to rest any confusion and really clarify terms in VEVRAA.

Next slide, please.

Now we move into the some of the substantive changes. The VEVRAA final rule clarifies that contractors must provide job listing information in a format and manner that is permitted by the appropriate state employment service delivery system. Basically there's a number of changes in the rule that update the rules and sort of bring them into the modern time and the way folks do business.

This particular provision was inspired by a number of problems we've heard where some contractors were not always providing job listings in a way that their particular agency could use them. So all this provision does is basically say you must provide job listing information in a manner and format that can

be useable by the state agency to whom you're providing that piece of information.

(Kerier Bickerstaff): And just to jump in to clarify one point that had come up frequently in the comments, the mandatory job listing requirement itself is not new. This is something that was established in the VEVRAA statute. It's not even a regulatory creation. This is in the statute itself.

So really what we were merely trying to do here is to clarify that existing rule and have it take effect in a way that would give it some meaning so that the (ESDS) that are receiving these job listings can actually make them work.

(Naomi Levin): Yes. Because many contractors are providing their listings in a format that can be used, but because we heard enough instances of trouble, we thought it was necessary to provide the clarification to ensure consistency.

So if your state agency says you may provide listings electronically, you can give them to us in hardcopy. But if we got rid of our fax machine, then you may not fax them job listings but may provide them electronically, so just any way that's useable by them.

In addition to that, we have also again to clarify an existing requirement, as (Kerier) points out, added a requirement that contractors have to in their job listing provide some basic additional information -- their status as a federal contractor, their contact information, their request for priority referral -- and they have to keep that information updated on an annual basis. Again this is all designed to make the job listing requirement work the way it has been designed to work.

Next slide. We have a problem? Next slide. Okay.

Next we have the contractor and we wanted to take on the issue of electronic posting. We have been asked numerous times if (unintelligible) electronic posting of the notice to employees of rights and the notice of obligation that is posted regularly and asked about can we do that particularly because we have teleworkers, we have people who don't work on the job site, we have people who work only in the field, we have people who work at sort of centralized, shared workstations, how about posting electronically.

So the final rule addresses this by saying that yes you can satisfy your posting obligations for employees who have telework arrangements, for those who don't work at the contractor's physically location by posting electronically.

The caveat to this is if you do that, you either must provide computers to these employees so that they can access the notices or you must have actual knowledge that the postings are accessible by computers so that the employees can actually see the information that you're posting.

In addition the final rule also requires that contractors using electronic or Internet-based application systems must keep a copy of their posting with that electronic application. The rule says that postings must be conspicuously stored with or as part of the electronic application. So again this is all designed to sort of bring us into the modern era of telecommuting and Internet-based application processes.

Next slide. Are we good? Okay.

The final rule adds also a new paragraph to the (unintelligible) clause to sort of bring parity between the executive order and VEVRAA that requires the

contractor to state in solicitations and advertisements that it is equal employment opportunity employer of veterans protected by VEVRAA.

Now we do know that some contractors have already been doing this and that's great. So we have required this. This is analogous to the existing requirement under the executive order to state that you're an equal opportunity employer without regard to race, color, religion, sex or national origin.

This sends a message to veterans that you are welcoming and that you are equal opportunity employer. It also in some instances will serve as a reminder to contractors of the obligations towards veterans. And again this should not be something that is difficult to do. It means adding a word, maybe two words, to your existing notice and your advertisements and solicitations, so that should not be very difficult.

Next slide.

Something else that we had discussed was the incorporation by reference. Now under the current rules incorporating the EO clause by reference is done simply by putting a citation to the particular regulation as is required by the (far). The problem with that is that it does very little to notify contractors and subcontractors that they have VEVRAA obligations, they have obligations, special obligations as contractors or what those obligations are.

And as a result there have certainly been circumstances where subcontractors were in for a very rude awakening when OFCCP sends them a scheduling letter and they didn't know their obligations, were not aware they had obligations.

And so what we have done is still permitting incorporation by reference with the citation. But in addition incorporation by reference now must include specific mandatory language that you see on the screen. It's very brief. It must be in bold text.

It's simply two sentences and it says, "This contractor and subcontractor shall abide by the requirements of 41 CFR 60-300.5(a)," which is the EO clause, "This regulation prohibits discrimination against qualified protected veterans and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified protected veterans."

It's two sentences but it will serve the purpose of putting subcontractors on notice that they have obligations and they will now know how they can get additional information about those obligations.

Next slide.

Another where changes are made is in the requirement to invite voluntary self-identification of protected veteran status. At the pre-offer stage the final rule eliminates the separate inquiry regarding whether an individual is a disabled veteran and instead the final rule requires that at the pre-offer stage a contractor must invite applicants to self-identify that's your protected veteran (unintelligible) any category, just are you a protected veteran or not.

This invitation may be included with the job application, but the rule requires only that the invitation be made pre-offer and we'll talk more about timing of the pre-offer invitation in a moment.

At the post-offer stage, the contractor must invite applicants to voluntarily self-identify the specific categories of protected veteran status to which they belong. The final rule makes clear that the purpose of this post-offer requirement is to enable contractors to get the information they need to report on the VETS-100 that they must report to the Department of Labor every year on this form.

The rule is actually phrased in terms of categories that VETS, that's the Veterans' Employment and Training Service, requires contractors to report. So basically what we've done is made the rule kind of living document in this area. So this way if the categories of what VETS requires change, if the VETS-100 form changes, the post-offer requirement will automatically change with it without an additional need for rulemaking.

(Kerier Bickerstaff): And this is (Kerier) again. One thing I wanted to jump in and talk about here we received a lot of comments and I think that there's generally there was some misconception about the pre-offer inquiry and that it may run afoul of other federal laws -- particularly the ADA.

And I think there's a couple responses to that. First of all, the pre-offer invitation in VEVRAA doesn't identify disability at all, so it's not even an issue. Even if it did however it's very clear in the ADA and 503 laws that any pre-offer inquires into disability status if they're made pursuant to a federal law requiring affirmative action for individuals like VEVRAA does then that's perfectly permissible.

And so we've addressed that issue in pretty good detail in the preamble and also to assuage any remaining doubts there is a letter from the Office of Legal Counsel from the EEOC agreeing with that position and that is available on the OFCCP Web site.

(Naomi Levin): Yes on the landing page for the 503 final rule -- which is the subject of tomorrow's webinar.

Yes and it also the current rules have model invitations in Appendix B. Currently we still have that in Appendix B. Basically what we have done is we have updated those model invitations to (unintelligible) the change (unintelligible) to the rule and any other sort of updates that we're needed to that. So you'll still find model language that you can use in the new final regulation.

Next slide, please.

Okay I promised we would talk about the timing of the pre-offer inquires and here we are. One concern that we saw over and over again among the contractor commenters was a concern about timing of pre-offer invitations to self-identify.

Contractors were concerned that the requirement to collect pre-offer self-identification data at a very early stage might not comport with the Internet applicant rule that you will find in the regulations to Executive Order 11246.

And they were concerned that if there were a conflict that this would interfere and they'd have to request and give invitations to self-identify under VEVRAA to all kinds of people who provide unsolicited electronic applications that they wouldn't otherwise have to do under the internet applicant rule. And that every single person who ever submitted any kind of application would have to be given an invitation to self-identify and this might skew the statistics and demographic data.

Let me be clear. The final rule does not adopt the Internet applicant rule. However in an effort to simplify and harmonize the regulatory requirements under VEVRAA with those of the Internet applicant regulations under Executive Order 11246 the preamble states as a matter of policy OFCCP would permit contractors to invite applicants to self-identify as a protected veteran at the same time as contractors collect demographic data from applicants under Executive Order 11246. So that would apply non-Internet applicants, non-Internet applicant rules applicants and to Internet rule applicants as well.

Keep in mind though that under executive order's Internet applicant rule, contractors are allowed in essence to do a first cut and screen out individuals who they believe do not meet basic qualifications of the position before they collect and retain demographic data regarding race, gender and ethnicity.

Because of this there is a concern that these basic qualifications may be used either intentionally or inadvertently, it really doesn't matter, they can be used to screen out qualified disabled veterans because these qualifications may not have been designed to take into account the possibility that someone with a disability might be able to meet the qualification standard with a reasonable accommodation or might be able to do the essential functions of the job with a reasonable accommodation.

So in light of this the preamble to the final rule points out that under VEVRAA it is unlawful for contractors to use qualification standards that screen out or that tend to screen out a disabled veteran or a class of disabled veterans on basis of disability unless the standard is job related and consistent with business necessity. This is not a new rule. This is in the existing rule.

This would also apply to contractors design and use of basic qualification screens under the Internet applicant rule because after all these basic qualification screens are qualification standards. Again this is not new.

In addition selection that relate to the performance of an essential function or are consistent with business necessity may not be used to exclude an individual with a disability if that individual could satisfy the criteria with a reasonable accommodation, so just a couple of caveats there.

Next slide.

Now we turn to outreach and recruitment. Some of the most significant changes in the revised regulations relate to recordkeeping in this area and to documentation of specific metrics -- both of which are key to accountability for compliance.

First, in the area of outreach and recruitment the final rule retains contractors' flexibility to choose their own outreach and recruitment methods, choose what works best for you, what meets your needs given the particular job or the particular location.

You'll find updated examples of outreach and recruitment activities in the new regulatory text. What you'll find also is a new requirement that contractors must document each of their outreach and recruitment efforts and must do an annual written assessment of the effectiveness of each of these efforts.

The contractors conclusions in this regard as to whether things are effective must be reasonable as determined by OFCCP. If the contractor determines that the totality of its efforts were not effective, it must identify and implement

alternative efforts. Now this does not mean that every effort must be wonderfully, marvelously successful. It means the totality of your efforts need to be successful. If the totality of your efforts are not effective, it's time to change your efforts and do something different.

Contractors are also required to maintain all of your records regarding outreach and recruitment efforts -- including your annual assessment -- for three years. Now this allows contractors, it allows OFCCP to see how things are doing over time. So something may be off one year or the year is a fluke. This allows you to see if things are working for you over time, to see if there are any trends and will give you a much better idea of whether or not particularly methods are or not effective.

Next slide.

Another significant recordkeeping requirement is the new Section 44K. This section is a data analysis section. It requires contractors to document and update annually (unintelligible) quantitative comparisons for the number protected veterans who apply for jobs and for the number of protected veterans that are hired.

Specifically contractors would be required to track the number of applicants who are veterans, the total number of applicants for all jobs, the total number of job openings and jobs filled, the number of protected veterans who are hired and the total number of applicants hired.

This data is needed to fill a huge data gap that currently exists in VEVRAA as we have it now. There is no structured data collection requirement currently in VEVRAA regarding the number of veterans who apply for jobs with contractors, how they fair in the process, how well they do, what happens to

them, how many people hired. This lack of data makes it next to impossible for contractors and for that matter for OFCCP to perform even rudimentary evaluations of the availability of protected vets in the workforce or to make any kind of an objective assessment about the effectiveness of outreach and recruitment efforts.

This data also must be maintained for three years. Again it allows you to see what is happening over time. It allows you to see trends. It allows you to see that something seems wrong, nothing is happening, something's not working. There may be a barrier somewhere. My efforts are not effective. I need new ones and having this information over time will make it easier to get a more accurate picture of what's going on in the workplace.

Next slide.

Another significant change in the VEVRAA regulations is the requirement that contractors set an annual hiring benchmark for protected veterans. First question, and I know many of you are asking it because we've been asked it many times already, is this benchmark a goal? The benchmark is not a goal.

The second question, why not? Or put another way, what's the difference between this benchmark and a goal? Okay goals like those under the executive order generally serve two purposes. First, they provide a yardstick and a management tool by which you can measure the success of affirmative action efforts. And then secondly, they are based on availability and because they're based on availability provide an indication of what should be attainable in their workforce, what they should expect to see absent workplace barriers.

In the case of protected veterans however the data doesn't line up exactly for protected veterans because, as nobody collects data on the categories of

veterans protected by VEVRAA. The only (unintelligible) data we have is for veterans in general and that's somewhat broader than just the subject of protected veterans are a more limited group.

So the benchmark is not a goal as it simply provides a yardstick and a management tool against which contractors can measure the success of their affirmative action to efforts to recruit and hire protected veterans and the measure the effectiveness of outreach efforts. But we really can't say that it represents a target based on the availability of protected veterans in the workforce, so that's why this is a benchmark.

Failing to meet the benchmark is not a violation of VEVRAA. It will not carry any penalties. It will not lose you your contract. It will not cause you to be debarred. It will not - I don't know how to say it any more clearly than that. If you've been seeing articles or things that suggest otherwise, they're simply incorrect. There is no penalty.

However failing to establish a benchmark or failing to conduct the required assessments that (Kerier) and I have been talking about so far now that could be a violation okay. But simply not meeting the benchmark is not a violation.

The rule provides contractors with the option of two different methods for setting the benchmark. You can do either one. So the first is very simple. You simply take and use as your benchmark the national percentage of veterans in the civilian labor force. We will make that very easy by posting it on our Web site and updating it annually.

If you go to our Web site in fact you'll see something that says on the landing page benchmark database. This will be where we keep information and data that you will need to set your benchmark. You'll see it says coming soon, so

it's not ready just yet. But we will be posting this information where it's very obvious to see it.

Alternatively if you don't want to use the national percentage of veterans as your benchmark, you may establish your own individualized benchmark. And to do that you must take into account five factors.

(Kerier Bickerstaff): And just this is (Kerier), just to jump in, this is the five-factor test is what was proposed in the (unintelligible).

(Naomi Levin): The five factor are the average percentage of veterans in the civilian force (unintelligible) where the contractor is located for the past three years, the number of veterans over the previous four quarters who participated in the employment service delivery state in the system in the contractors state. And these two pieces of information will also be in that benchmark database and regularly updated.

The third factor is the applicant ratio and the hiring ratio for the previous year based on the data analysis that you've done in 44K. Now the applicant ratio would be the number of veteran applicants compared to the total number of applicants. And the hiring ratio would be of course the number of veterans hired as compared as a percentage of the total number of applicants hired.

Fourth, would be the contractors recent assessments of the effectiveness of its outreach and recruitment efforts. And lastly would be any other factor that's not mentioned unique to the contractor, such as the nature of the contractor job or its location, that might affect the availability of protected veterans. So for example if your job were to involve piloting helicopters and you're located a couple of miles from an Air Force base, you might have reason to believe

they'll be a lot of access to qualified veterans. And of course in other circumstances might be a different situation.

If you use this individualized approach, you are required to document not only the benchmark that you establish but each of the factors you used and relative significance that you gave to each factor. In essence we want you to tell us what your methodology is, what was your methodology and what was your reasoning behind that methodology.

Contractors are required to maintain records related to the benchmark for three years, that's regardless of the method you use to establish a benchmark. Again this is another area where having information and being able to see things over time is very helpful and gives you a far more accurate picture of what's going in your workforce and how your employment processes work and impact veterans than simply having one year's worth of information.

Next slide.

There are also in the VEVRAA final rule that impact the conduct of compliance evaluations. These changes provide clarity regarding the scope of compliance evaluations. They also enhance OFCCP's flexibility as to the way in which we conduct compliance evaluations in light of changes that have occurred over the years -- technological changes and changes in the way business is done.

And as a result of these kinds of changes, OFCCP will be able to operate more efficiently, which means we can be done more quickly, which is probably a good thing for all of us. And we can also be more effective in our ability to enforce VEVRAA and in helping you as contractors to comply to VEVRAA because of course that's what we aim to do in the first instance.

One change that we make in compliance evaluations is pre-award compliance reviews. We have added a pre-award compliance review requirement to VEVRAA. The procedures here mirror the pre-award procedures in the Executive Order 11246 regulations. This only makes sense to have this is all of the laws that we enforce so that we can educate across the board and make sure everybody is aware of all of their obligations, if they're having a pre-award situation.

Also the final rule includes a provision that incorporates the administrative review board's 2012 Frito-Lay decision. Now as you recall in that executive order case, the ARB, as we call it, upheld OFCCP's long-standing position that when conducted a compliance evaluation we have the authority to obtain information pertinent to the evaluation period after the scheduling letter and is not necessarily limited exclusively to information that predates the scheduling letter. This may be necessary for example in order to determine if violations that we found are continuing or if violations have been remedied.

Now the Frito-Lay case taught us that clarification was needed regarding this policy. It's a long-standing policy but clearly it was not understood by all. Since OFCCP has always followed the same policy with respect to VEVRAA as we have with respect to the executive order, the final rule adds a provision using the ARB's ruling to clarify our policy and states simply that OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations.

This language does not represent a change in our policy. It does not represent or require new contractor obligations. It simply clarifies an existing policy that plainly needed clarifying.

In addition the final rule provides that OFCCP may review documents during a compliance check, either onsite or offsite. Again this reflects current practices and technology improvements.

And the rules also remove the requirement that focused reviews be conducted only onsite, again only onsite, meaning that we can conduct them onsite or offsite. Again this is the same updating the rules to reflect the way business is done currently and how technology allows us to work.

Next slide.

We turn now to some recordkeeping updates. As we mentioned, we have a new three-year retention period for certain kind of documentation. It was clear to us from reading the comments that it would be very helpful to have all of these requirements located in one place. So in the final rule you will find those that have three-year requirements when you read the provision, it will say that you have to keep the records for three years.

But if you get confused or want to know all of the requirements that have three-year recordkeeping requirements, you will be able to find it in one provision and that's what it does. It lists all of them.

In VEVRAA there are three. You have the requirement regarding outreach and recruitment efforts to document and assess those efforts, the data collection analysis in 44K that we just talked about and the benchmark records that we also just talked about. Those are the three that have a three-year recordkeeping requirement.

Next.

The final rules contain another provision that will help OFCCP conduct compliance evaluations and complaint investigations more efficiently and of course more effectively. This provision can be found in the access to records section.

And this provision requires upon request that contractors inform OFCCP of all formats -- including specific electronic formats -- in which its records are maintained. Now it does not require you to maintain records in any specific format. It simply says they must tell us what formats your records are available in and then provide those records to us in whichever of those formats we request.

Now having those electronic records will clearly make us able to operate more efficiently in doing our work. And again that should be good for everybody.

This same section reiterates the contractors have to provide OFCCP with offsite access to records if requested during compliance evaluation or during a complaint investigation.

However to address contractor concerns that we heard during the comment period about confidentiality of materials given to OFCCP, we put in a statement. Again it reflects current policy. Just to be clear, we put in a statement confirming our commitment to treat records provided by contractors as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act or FOIA. And that's just affirming our commitment to protect confidential information to the full extent of the law.

Next slide.

In Appendix A this is the guidelines on a contractor's duty to provide reasonable accommodation. You won't find very much that has changed. In essence what we've done is we've put in some updating tweaks that you'll see to conform the guidelines to other changes we have made in the rule, some of which we've talked about.

So for example you'll see some changes made to update the references to the invitation to self-identify to reflect the changes in the final rule. You'll also see a provision requiring that in the event that reasonable accommodation that is needed constitutes an undue hardship a disabled veteran must be given the option of providing the accommodation themselves or of paying the difference between what would be an undue hardship and what would not so that the accommodation can be provided.

And also states that generally the contractor should seek the advice of a disabled veteran when providing a reasonable accommodation -- which hopefully most of you who are contractors have been doing all along.

Next slide.

In Appendix B this is simply we mentioned this before Appendix B is where you'll find the sample invitations to self-identify. And again we've simply updated these to make them consistent with the changes in the final rule.

And that takes us to the end of the tour and brings us to I'm sure what you've been waiting for very much is our question period. Do we have question?

Brenda Stewart: I'm sure we do, (Naomi). And we have (Margaret Cross) and (Susan Chastain) that will be addressing questions. Quite a few were submitted online and we will get to as many as time allows. (Margaret) and (Susan)?

(Margaret Cross): Hi this is (Margaret). Good afternoon. (Naomi), (Kerier), when will the benchmark database be available?

(Naomi Levin): As soon as possible. But I mean we would expect to have that up and running before everybody has to be using it and complying with the rules.

(Margaret Cross): All right thank you. And this question came in was, "Are we, the agency, jumping the gun by posting these rules without having them in the Federal Register already?"

(Susan Chastain): Sure this is (Susan). The status of the rules is that they have been approved by the Office of Management and Budget. They are at the Federal Register. It typically takes so the Federal (unintelligible) in the process of printing them and making them public. So they will that usually takes between a week, two weeks. We have not heard and they don't have a date firm yet back from the Federal Register. But we will make that available. The published versions will be available as soon as they're published on the OFCCP Web site.

And this relates to another question that we got a few people about when will the rules be effective. They will be that 180-day period is triggered by the publication in the Federal Register and so it'll be then 180 days. And the date the Federal Register, when the Federal Register rules, when they are published, will in fact contain that date.

(Naomi Levin): Right. In essence this is just an extra time period that we have on the beginning to be able to start getting you familiar with the new rule because the

rules are clear, they are legal for us and they've been announced, so we can put them out. But they're not published yet, so the clock does not start ticking however, as (Susan) said, until the actual publication date. So we just have a little extra lead time.

(Margaret Cross): Thank you. The self-ID form doesn't appear to include an I choose not to identify, should it?

Woman: Self-ID form?

(Margaret Cross): The sample self-identification form.

(Kerier Bickerstaff): There's in the actual self-identification form I believe it's Paragraph 2 or 3 of the form it makes clear to those filling it out that it is voluntary, that people don't need to fill it out. And so we felt that that was, you know, enough to communicate to those who receive the self-identification that if they chose not to fill it out, they certainly are not required to do that.

(Margaret Cross): Thanks, (Kerier).

(Susan Chastain): Another question that came in is it will they - a contract that's covered by OFCCP's VEVRAA requirements also need to file the reports by the Veterans' Employment and Training Services Administration, the VETS-100 or VETS-100A reports. And they were a couple of questions about whether VETS will be issuing a new report.

So VETS is another, is a sister agency of OFCCP within the Labor Department that is responsible for developing those regulations and administering the VETS reports. And VETS has announced that it will be publishing a proposed regulation that would rescind their VETS-100 report.

So that's a report that would basically cover the same universe of contractors covered by our Part 250 that we will be rescinding and that it will be publishing a new proposed VETS-100A report and that should be done shortly.

The agencies, although they're different agencies, we do try to coordinate these two programs for the benefit of contractors.

(Naomi Levin): Again our rule that post-offer inquiry will change right along and VETS their rule, eliminates (unintelligible) VETS-100. As you'll see the language allows it to simply be tied to whatever VETS does. So there's no need to be concern that suddenly you'll find yourself in a conflict. The rules will never conflict because ours is written in a way that will allow it to morph right along with whatever VETS decides to do.

(Margaret Cross): Okay. Another question came in, "Does the Vietnam Era Veterans' Readjustment Assistance Act apply to all veterans or just the Vietnam-era veterans?"

(Kerier Bickerstaff): It's either neither of those two. It's somewhere in between. There are four categories of veterans that are protected by VEVRAA and those categories are established by the statute, by the laws that Congress passes. And so those four categories are set forth in the statute and in the regulation.

So it's not all veterans but it's also not just Vietnam-era veterans. There are for instance recently separated veterans, veterans who have separated from the military in the past three years, disabled veterans who receive benefits from VA. Those are categories of veterans who are protected in addition to Vietnam-era veterans.

(Susan Chastain): I'd like to add because it relates to one more, respond to one more question, one contractor or a questioner asked whether the recently separated category, i.e., you know, recently separated in the last three years is basically frozen for that individual for that when he or she is hired or whether that five years later they would still be considered in that category.

And so the answer is that they're only a recently separated veteran for that three-year period so when they were hired. Now they may very well still be a protected veteran under other categories.

(Kerier Bickerstaff): Right. I think the active duty wartime or campaign badge veteran, I mean a lot of the people who will be coming back, you know, from wars in Afghanistan and Iraq, you know, the recent conflicts will almost certainly qualify under the that category as well.

(Naomi Levin): Yes and certainly if you're disabled.

Woman: Right.

(Naomi Levin): And you can be under more than one category but I believe the purpose of the three year, the recently separated is to assist in the transition from the service into the civilian workforce. Protection is different for other types of vets, the purpose of it I should say is different for that group. And of course you can be a protected veteran under two or three categories at one time.

(Margaret Cross): Great. Thank you. Another question came in about the affirmative action program. So currently most contractors have only one affirmative action program for both the covered veterans and the Section 503. Will the new regulations require two separate affirmative action programs or will they still be able to combine them?

(Naomi Levin): The regulations don't speak to that particularly and there is a lot of parity that has been maintained intentionally so between the two rules. And if you're on tomorrow's webinar, you will see that. There are some provisions that are different. For example there's a different type of goal provision. But there's nothing in either final rule that prohibits you from combining these into one as long as all of the elements are met. And again there will be a lot of parity between them intentionally so.

(Margaret Cross): Okay. Thank you.

(Susan Chastain): We got - there were several questions asking about benchmarks and the term that used most frequently in the OFCCP are goals. And so one of the questions was why benchmarks in the VEVRAA program as opposed to using the term goal.

So the reason that we decided to use the word benchmarks in the VEVRAA is hopefully to avoid confusion about the use of the term goals in the rest of the OFCCP program.

For those of you who are familiar with the executive order supplying service program, we say in our regulations that the purpose of those supply and service goals are really twofold. One is to serve as an aspirational goal or targets that are attainable by means of applying good faith efforts to make the affirmative action program work. So that's one of the purposes. And the other is essentially to act as a benchmark, as a measuring stick to be able to quantifiably measure the progress.

Now our concern with the veterans, when we thought about how to create the benefit of that quantifiable method for contractors to take a look at and

measure their progress for protected veterans the data available for veterans simply was not as robust and detailed as it is the race and gender area and disability area, where you get more detailed census data and broken down by job groups.

So we know that the data available for example the civilian labor force veterans data, the national data is we know that that's probably an overestimate of the percentage of protected -- VEVRAA protected -- veterans. We know that's a subset. We don't know how much of a subset that is.

So because of that concern we thought there was still utility in using this data or data developed specifically by the contractor for their own purposes, benchmark purposes, as that yardstick. That's still an important function. But it just was not going to be able at this point to provide that same purpose. So that was our reasoning.

(Kerier Bickerstaff): And I think it bears mentioning we've said this many times and we will certainly say this many times more but that we designed this specifically because just failing to meet the benchmark in and of itself is not a violation. And it seems that that's still a misunderstood aspect of the rule and we want to do everything we can to clarify so that contractors know that simply missing, not meeting that benchmark is not going to be cited as a violation.

(Naomi Levin): Yes that is it is designed to be a management tool. It is not a trick. It's not a gotcha. It's not supposed to be designed to be a gotcha. It's supposed to be designed to provide some quantitative way to be able to get a sense are you doing better, are you doing worse, might there be a problem because things aren't moving at all or do I need to do something different, that's what it's purpose is. It's purpose is not to catch people so we can assess them penalties and do all whatever. That's all it is, so we just want to be very clear about that.

(Lisa Jordan): And this is (Lisa Jordan). I'm here with (Naomi) and the two other presenters here helping out. So a question that came through on the chat, "If a contractor has a contract of less than \$100,000, are they no longer covered?"

(Kerier Bickerstaff): If the contract is less than \$100,000 then yes that's one of the primary components for coverage under VEVRAA. And so if the contract is for less than that amount, then that would not create coverage under the law.

(Lisa Jordan): Okay. Another question that came through, "When the regulation requires retention of three years of data for 2014, is that three years of previous data or does the three-year period become effective progressively over the next three years?"

(Kerier Bickerstaff): I think - go ahead.

(Susan Chastain): Yes. Well I mean the answer is that the three-year requirement is triggered when the rule becomes effective and that will be 180 days after the publication. So it's at that point that the - I guess it would be progressive at that point. We wouldn't then be expecting somebody in 180 days...

Woman: To have three years of data.

(Susan Chastain): ...to have three years of data. That was when they would really need to start making sure they're collecting the data so then it accumulates to three years.

(Naomi Levin): Right. We have to start someplace.

(Susan Chastain): Right. Exactly.

(Naomi Levin): Like that's the same when you're at a new rule starting it has to start someplace.

(Susan Chastain): Right.

(Naomi Levin): And we appreciate that.

(Susan Chastain): Right.

(Lisa Jordan): Great. Another question here, "Do we ask all individuals to self-identify the category of protected of veterans whether or not they self-identify in the pre-offer application process?"

Woman: What's that? I'm sorry. I missed the question.

(Kerier Bickerstaff): I think it seems to me the question is, is that if in the pre-offer, you do the pre-offer self-identification and you've hired someone, you're now at the post-offer for everyone do you have to do that post-offer ID and the answer is yes. The regulations require that currently and so that is still a requirement.

(Naomi Levin): Right. And remember the purchase of the post-offer self-ID here is for to get the information needed to report to VETS. That's the main purpose of the post-offer self-ID. So again that's tied separately to what you need to the reporting requirement for VETS.

(Susan Chastain): Right. Again it's the pre-offer is a more generic self-ID.

(Naomi Levin): Right.

(Susan Chastain): It's are you protected. And we felt comfortable with that. I mean that does not for example ask are you disabled vet, are you recently - it's simply are you protected vet. But then post-offer we then ask the more detailed data -- which contractors can then use for their VETS-100 report.

(Lisa Jordan): In follow-up question similar to self-identification, "Are both 503 and VEVRAA self-ID invites voluntary for applicants?"

(Naomi Levin): Yes of course. We'll talk more about the 503 invitation tomorrow. But yes like all other demographic data, self-identification voluntarily. That's the same across the board.

(Lisa Jordan): Excellent. Moving on to some other topics related to this, "Does the assessment of outreach have to be submitted to OFCCP annually?"

(Naomi Levin): No. It becomes part of your AAP. So it's like anything else. It's data that's associated with your AAP that would be for your use regularly. We would expect that information. You do this assessment that you would use your assessment to determine if you need to do something or are the things you're doing the right things, that you're getting mileage out of them and they're doing what they're supposed to. But that would be something we would be looking at when we do a compliance evaluation.

(Lisa Jordan): Okay. Another question, "Is benchmark for each (EEO1) report or EEO category or entire workforce?"

(Kerier Bickerstaff): No it's for the entire workforce and there are particular reasons we did it that way. The primary one being is that the VETS data simply there's not as many veterans as there are for some of the other demographic categories for

instance and we didn't have the data at the granular level to be able to have benchmarks for each EEO category. So it's an establishment-wide benchmark.

(Lisa Jordan): Okay. Another question here, "What determines which benchmark methodology should be used by a contractor?"

(Kerier Bickerstaff): That's really up to the contractor. I think that we on purpose we wanted to allow the contractor flexibility to set the benchmark in whichever way that it wanted to do so. And so we've provided two options for them to do that. They can look at the national benchmark that we'll publish on our Web site or if they want to, you know, look at some of the data that may be a little bit more specific to their establishment and come up with a benchmark that way, contractors are free to do that as well.

(Naomi Levin): Yes this is solely something that, you know, the contractor makes the best call is one of a number of areas where we have provided for flexibility for contractors to assess what their own needs are and what works best for them. And this is one of those areas where we want you to have as a management tool, a yardstick against which to measure. But we recognize you may want to make that determination in an individualized manner or not.

(Susan Chastain): Another question we've heard is, "Do the VEVRAA recordkeeping requirements conflict with recordkeeping requirements under other laws?"

And, you know, as (Naomi) discussed there are some differences in the VEVRAA recordkeeping, but they do not conflict with other laws. So for example as we've discussed there is a pre-offer invitation to self-identify and as (Kerier) was explaining it does not conflict with the ADA. There was some concern that it might conflict with the ADA.

In the VEVRAA context remember it is a generic invitation to self-identify for protected - it's an invitation to identify as a protected veteran, so it does not identify that someone is disabled veteran. And even if it did, there would be no problem.

Another difference is that under VEVRAA there will be a three-year recordkeeping requirement for some recruitment information, a narrow category of recruitment and outreach information. And that three-year period does not exist under the executive order. Again that's not a conflict. It's a little difference in the recordkeeping.

And then as (Naomi) discussed earlier, there have been some questions about the timing of the invitation to self-identify, whether that would conflict with the executive order Internet applicant rule and we have as a matter of policy in our preamble explained that it does not.

Let me while I'm thinking about it let me answer one other question that I did see come up. Someone noted, a couple of people noted that is lots of good information in our preamble that is not in the regulation itself. And the question was can people rely on that information in the preamble and so the answer is yes and that's very important.

We put in during the comment period there were questions, a number of questions, about does something mean, and so there are interpretations, there are statements of policy, as in when is information, when can some identification occur. So there is a lot of what we hope is helpful information that is in the preamble that would be useful.

(Naomi Levin): Yes there's quite a lengthy discussion on the timing issue, if you're interested in that, in the preamble.

The other thing I want to mention for those who don't know, in addition OFCCP does try to ensure that there is never conflict amongst our own rules, so you will never be in a position of having to violate one to comply with the other.

But in addition as part of the rulemaking process not only is there a public period but the reg gets circulated to our sister agency, the EEOC and Department of Justice and other agencies. And part of the reason for that is to make sure that there is no conflict between regulations of other sister agencies and departments. And so, you know, that's how we take care of that problem on the front end before a regulation is put out so we know it's consistent with the requirements of many of the other agencies.

(Kerier Bickerstaff): Feeding off that, this is (Kerier) again, we've received comments, both in the public comment period and also since the rules have been published on the OFCCP Web site, about, you know, will the benchmarks for protected veterans adversely impact women and minorities or somehow conflict with the contractors obligations under the executive order.

The short answer is no it will not. As in initial matter, I think that the percentage of minorities amongst the veteran population is quite similar. It's actually in recent years somewhat higher than in the general population and the general workforce population and so there shouldn't be any sort of statistical issue there.

But regardless of what census data says, as we've said many times before, the benchmark is not a quota. It does not require preferential hiring. Contractors will never or should certainly never be in the position where they're saying to themselves I need to hire a veteran to make my veteran benchmark but that's

going to prevent me from, you know, having the right of number women in my workforce. That's not the way these laws are designed to work.

The benchmark is simply a management tool, as (Naomi) said, that contractors need to take efforts to analyze what they've done to change their efforts to increase recruitment if they feel like their current efforts are not effective. But simply meeting the benchmark is not a violation of the law.

Coordinator: Excuse me. Director Patricia Shiu has joined.

Brenda Stewart: Thank you, operator. Hi, Director Shiu.

Patricia Shiu: Hello.

Brenda Stewart: Thank you for joining us and we are opening the phones lines to you.

Patricia Shiu: Thank you. Thank you everybody for taking the time today to join us in our rollout of these two new very important rules.

I want to thank first of all my entire team at the Department of Labor -- including our solicitors who've worked so very hard with us. But really everybody that's (unintelligible) effort.

And I want you to know take these rules very seriously and we want to work with you to facilitate your success in your outreach and your recruitment efforts. We will be analyzing cases on a case-by-case basis because that's what this effort is going to require.

I do hope that you will call upon us. We have over 800 people all over the country who are willing to assist and provide you guidance and support on

how to better and improve your processes, how to evaluate them. This is all about just increasing equal employment opportunity for those veterans who have sacrificed so much for our freedom and to ensure that they and their families are able to live the American dream with decent jobs.

So I know that you want to join me in this effort and it's going to be something that's going to happen over time. It's not going to happen in a moment. This is part of a larger movement and we look forward to working with all of you and thank you taking this first step by joining us here today. Good afternoon.

Brenda Stewart: Thank you, Director Shiu, and we welcome our comments and we're hoping that everyone that was listening and participating in today's event learned quite a bit. (Naomi) has got to be horse at this point. She's an excellent presenter and you have the most knowledgeable person as well as the solicitors that are here that have contributed to putting all of this together and the team that (unintelligible) has thanked. And we are grateful that they had the opportunity to present this information to you today.

We want to make sure that you're aware that the FAQs, the fact sheets are posted on our Web site. They're a valuable resource that is available to you. We'll posting the slides from today, as well as the recording from this webinar on our Web site as well some time next week.

For those of you that have not already registered for tomorrow's webinar, I did just send a link out to you through the chat box. But if you didn't get it, you can send me an e-mail williamsstewart, all one word, williams -- W-I-L-L-I-A-M-S -- stewart -- S-T-E-W-A-R-T -- dot-brenda-at-dol-dot-gov. And I will send you the links to register. Keep in mind just as today's webinar filled to capacity very quickly.

And the audio as well as on the webinar don't be disappointed if you don't get in because it will be repeated on September 18 as well as today's session will be repeated on September 11. So if you have any associates, peers that were unable to participate today, please reassure them that there will be other opportunities that they can get into these webinars or have access to the recordings as well as the presentations online.

Thank you to our knowledgeable experts for the presentation today and thank you to all of you for making the time to share and be in this information. We're hoping that it was very helpful and valuable to you and we want to make sure that we get information to you as quickly as we can.

So I encourage you to subscribe to the e-mail updates on our Web site, so that as soon as something is posted on our Web site, you will get notice about it. That includes future webinars and things like this that a very informative as well as helpful in the work that you do.

Thank you once again for joining us and thank you to our presenters. Have a great day.

END