



July 11, 2011

VIA: Internet Submission ([www.regulations.gov](http://www.regulations.gov))  
Ms. Debra A. Carr  
Director, Division of Policy, Planning and Program Development  
Office of Federal Contract Compliance Programs  
U.S. Department of Labor  
Room C-3325  
200 Constitution Avenue, NW  
Washington, DC 20210

**Identification number (RIN): 1250-AA00**

**RE:** Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans; Proposed Rule

Dear Ms. Carr:

The Center for Corporate Equality (CCE)<sup>1</sup> is submitting this comment in response to the Notice of Proposed Rulemaking — Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans (RIN 1250-AA00). The Notice, which was published on April 26, 2011, proposes a number of significant changes to the data collection, analysis, recordkeeping and knowledge dissemination requirements of federal contractors related to protected veterans.

CCE is a nonprofit equal employment opportunity research and think tank organization that was established in 2007 to help companies proactively respond to a new generation of complex and technology-based affirmative action and non-discrimination compliance issues. CCE is designed to carry out the mission of creating workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and by promoting affirmative action and equal employment regulatory compliance.

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<sup>1</sup> Portions of this comment were written by the following CCE staff: David Cohen, Eric Dunleavy, Joanna Colosimo, Eileen Curtayne, Art Gutman, and Michael Aamodt.

Protected veterans are a socially important group and CCE commends the agency's effort to strengthen regulatory requirements related to veteran affirmative action and nondiscrimination. At a time when the military is withdrawing from multiple conflicts, it is imperative that service men and women returning home are provided equal employment opportunity and that federal contractors do their due diligence to identify qualified veteran applicants.

However, it is critical that regulatory requirements on federal contractors are attainable, fair, and grounded in data that mirror reality and allow for meaningful inferences. We hope that OFCCP considers the challenges described in this submission. We anticipate that this response will stimulate positive dialogue on a variety of important topics. Until then, CCE urges that OFCCP immediately withdraw the Notice and collaborate with the federal contractor community to develop a more reasonable proposal that would strengthen non-discrimination and affirmative action for our nation's veterans, without imposing enormous burdens, relying on inadequate data and misguided analyses to assess contractor compliance, and endorsing ambiguous requirements that may have unforeseen consequences for other protected groups (i.e., women).

This submission is organized into two sections. Section 1 focuses on new federal contractor burdens related to the Notice and includes a review of job posting requirements, linkage agreements, recordkeeping, employee training, and changes to compliance evaluation time frames. Section 2 focuses on data and analytic dimensions of the Notice, with particular emphasis on the accuracy of self-identified protected veteran status, statistical hiring benchmarks, and other protected group considerations. In addition, CCE has proposed alternative strategies and solutions throughout this document that may assist the federal contractor community in achieving the veterans' affirmative action and equal employment opportunity objectives proposed by OFCCP.

Thank you for your time and consideration of these important issues.

## **Section 1: Practical and Financial Burdens**

The proposed affirmative action and nondiscrimination obligations of contractors and subcontractors regarding protected veterans include several important changes that would drastically increase the burden on federal contractors. Importantly, it is unclear whether some of the proposed changes would meaningfully improve affirmative action and nondiscrimination for protected veterans. This section addresses some of the practical limitations and financial costs faced by federal contractors that need to be evaluated before the objective of a more effective affirmative action/EEO regulation for veterans can be obtained.

### **Job Posting Requirements**

The proposed regulations would require contractors to post positions with the state and local employment office “in a manner and format required by the appropriate employment service delivery system to permit that system to provide priority referral of veterans”. CCE believes that this requirement would create an undue and potentially impossible burden on contractors.

To fully evaluate the burden this proposed change will place on federal contractors and veterans, it is important to understand the process in which most contractors post and advertise their openings. Most contractors utilize an electronic applicant tracking system (ATS) to post and advertise a position. Once a requisition is approved, the contractor will open a requisition in the ATS and then advertise the position. The ATS automatically posts that position externally to outside job boards and other job sites. This includes posting to veteran specific sites. Finally, the job is automatically pushed to a third party that specializes in posting the positions with the state and local employment office. This third party vendor has the relationships and contacts with the state and local office and sends the job posting via an electronic format.

There are hundreds (if not thousands) of local employment offices and many federal contractors have hundreds of establishments across the U.S. This would require the contractor to establish a relationship with hundreds of offices and document and tailor each of its job postings in a manner that each employment office chooses. The “manner and format” required could include such methods as hand delivery with a paper posting, faxing, regular mail, email, electronic posting, and telephone. The time, increased paperwork, and cost burden of posting jobs under the current proposed rule would make it virtually impossible for a large contractor to comply with this requirement.

The decentralized system and the variety of methods for posting jobs (particularly for those offices that do not utilize technology) will also place an unnecessary burden on veterans. Consider the following scenario: A reservist is stationed in Afghanistan and is scheduled to be sent home at the end of the month. Now that the reservist’s tour is over, he/she must now find a job. The reservist gets on the internet and tries to find job openings in their hometown of Birmingham, Alabama. However, what if the local office in Birmingham does not utilize technology and requires that all job postings are manually sent via snail mail. This office posts the position manually via a paper bound copy of all job postings. The veteran will have to take several steps to find a job and these steps will take a significant amount of his/her time and

resources. Hence, this new requirement will inadvertently make it more difficult for veterans like the one described above to find out about positions within the contractor community.

Based on the burdens outlined for federal contractor and for veterans, CCE recommends identifying a more uniform and easily accessible system for posting jobs. One solution may be to implement a system similar to Americas Job Bank (AJB). AJB was a free and centralized online resume depository and job posting site.

Funding for AJB was discontinued in 2006. However, when AJB was active, a contractor could fulfill its job posting requirement under 60-250.5 by posting all jobs directly with AJB. Contractors could easily program their applicant tracking systems to automatically post positions to AJB. In other words, as soon as a requisition was posted by a federal contractor, it was automatically posted on AJB. This process ensured that all covered positions would be posted in compliance of 60-250. This served as a “one stop shop” for posting and ensured that available jobs would be posted in one place, and that it would be easy and convenient for veterans from across the country to job search using this tool. Even a veteran who was posted overseas could search AJB from anywhere in the world and identify open positions for when they return to the United States. This was a very useful tool for contractors and veterans alike.

CCE recommends that OFCCP implement a tool similar to America’s Job Bank. Such a tool would facilitate the objective of affirmative action and equal employment opportunity for veterans as well as minimize the resource burden on federal contractors. In fact, the previous iteration of AJB would be a reasonable solution; a centralized online resume depository and job posting site would be a strong tool for improving affirmative action and non-discrimination for protected veterans. Without a centralized electronic source for contractors to post positions in, these newly proposed regulations will only make it harder for veterans to find out about job openings.

### **Linkage Agreements**

As a part of Section 60-300.3, the OFCCP is proposing that contractors engage in the use of “linkage agreements”. “Linkage agreement” is defined as “an agreement describing the connection between contractors and appropriate recruitment and/or training sources”. A linkage agreement is to be used by contractors as a source of potential applicants for the covered groups the contractor is interested in recruiting.

The proposed regulations suggest that the contractor’s existing relationships must now be codified with a formal written "agreement" containing signatures from both the employer as well as the referring agency. CCE believes this is an unnecessary administrative step for the contractor that will create additional paperwork and recordkeeping burdens. The electronic referral sourcing captured in applicant tracking systems will show which agencies and Veterans groups are effectively referring qualified candidates.

It is important to note that there has been a major shift in recruitment of qualified and diverse candidates for most contractors over the past few decades. Many contractors have a significant

number of outreach resources that are used for recruitment. Recruiting for many of the large contractor companies is often done through regional, sector, division, or business unit level shared service functions. This practice allows contractors to leverage the fluctuations in staffing needs for multiple sites and eliminates the need for a reduction in force for recruiting staff during slow periods. Further, as technology advances, contractor jobs are no longer "listed" with linkage sources, rather they are usually picked up electronically and posted by one out-sourcing agency who then lists the jobs on behalf of the contractor with many other recruitment sites and sources. In other words, recruitment is often not performed at the local level, and relationships are often established through a vendor delivering jobs to multiple sources. A contractor should be permitted to have company-wide outreach partnerships and linkages that count towards local work site effective outreach.

For the above reasons, linkage agreements should not be used due to their administrative burden and the fact that such agreements may not mirror how recruitment is performed. CCE recommends that contractors continue to develop and document their good faith outreach partnerships in a manner that is consistent with modern recruitment and recordkeeping processes.

### **Five Year Recordkeeping Requirements**

The proposed rule also has important consequences for federal contractor record keeping requirements. Specifically, the rule would require contractors to maintain records of referrals for 5 years. Currently, the recordkeeping requirements for federal contractors related to personnel or employment activity at 41 CFR 60-1.12 require contractors to maintain other personnel records (to include hiring, assignment, promotional information, etc.) for a period of 2 years. This requirement is expected to place an undue burden on federal contractors. The successful implementation of the newly proposed recordkeeping requirement will require contractors to hire additional personnel, reconfigure IT requirements, and/or purchase additional software (i.e. databases or modules).

For example, for many contractors the different record keeping time frames will necessitate two separate databases to maintain the records required by 41 CFR 60-1.12 (2 years) and 4212 (5 years). Additionally, the issues associated with record keeping burden of 5 years may be keenly felt by small contractors. Small contractors are more likely to use less sophisticated ATS systems than larger federal contractors. Hence, the tracking of employee referrals may have to be maintained manually, which substantially increases the cost of human capital for small contractors.

Additionally, the rationale behind the proposed rule for referrals indicates that a longer recordkeeping requirement will allow contractors to use historical information to benchmark affirmative action obligations. However, there is no evidence to suggest that the current two year record keeping obligation is not sufficient to establish benchmarks.

Based on the financial and personnel resource burden to the contractor and the speculative added benefit of extending the time frame for recordkeeping, CCE recommends that contractors be required to maintain referral records for 2 years.

## **Affirmative Action Training Requirements**

The proposed regulations also require additional employee training. Under the proposed NPRM, contractors would be required to communicate their Affirmative Action obligations to their workforces, unions, and other entities with which the contractor does business. Contractors would be required to hold annual meetings with employees to discuss the Affirmative Action plans.

Many organizations today operate in a national or international marketplace. Moreover, organizations are expanding programs to address work-life balance issues such as flex time, telecommuting, and alternative work schedules. As technology has expanded, it is not uncommon for meetings to occur via web conferencing, shared online resources, or by email. Many of the features of the modern day workplace make it easier to conduct business, but these features also make company-wide meetings extremely rare and difficult to coordinate. Requiring annual meetings with all employees to discuss one topic is an impractical and unrealistic expectation for the majority of contractors to fulfill.

It is also unclear from the NPRM as to what the expectations of an annual meeting would accomplish relative to a one-time overview (e.g., during new hire orientation) of the obligations contained in the federal contractor's Affirmative Action Plan. Furthermore, such a public meeting might result in a backlash against affirmative action efforts ("No wonder she got the job, all they want to do is hire veterans, regardless of their qualifications") or lowered self-esteem by recipients of affirmative-action programs<sup>2</sup>.

A more effective and appropriate medium to convey the contractor's obligations to stakeholders would be for contractors to provide employees and other stakeholders the opportunity to review the Veterans Affirmative Action Plan(s) by making them available for review at the convenience of the employee and/or applicant. This is a practical and realistic option and still achieves the goal of informing important stakeholders about affirmative action. CCE recommends that OFCCP maintains the current regulatory requirements.

## **Changes to the Desk Audit Time Frame**

The current proposed rule includes language that would allow OFCCP to extend the time frame of a desk audit beyond the time frame outlined in the current scheduling letter. In the current scheduling letter, OFCCP is entitled to evaluate one year of personnel data if the scheduling letter is received within six months of the federal contractor's affirmative action plan date and an additional six months of personnel data if the letter is received at the six month date or later within the year.

The vague language proposed in the NPRM could be interpreted as granting compliance officers the right to conduct a "never ending" audit (i.e., repeated requests for personnel data, no resolution on the status of the company's affirmative action compliance, etc.). Extending the

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<sup>2</sup> There is an extensive research literature, mostly by Madeline Heilman and her colleagues at New York University, on this topic.

temporal scope beyond the current requirements would place an undue burden on federal contractors' resources for any number of actions related to compliance (e.g., remedying potential violations, implementing effective policies, disseminating information within a federal contractor's organization, etc.). In addition, failure to define the boundary conditions of an extended temporal desk audit leaves contractors without guidance on when an extended audit is reasonable, how to prevent an extended audit and without recourse if the desk audit is unjustly extended by OFCCP.

Extending the temporal scope of the desk audit will negatively impact the resources of the federal contractor and ultimately negatively impact the expeditious implementation and effective maintenance of affirmative action and nondiscrimination compliance by federal contractors. For these reasons, CCE recommends that the temporal scope of a desk audit should not be changed.

## **Section 2: Data and Statistical Analysis Considerations**

The proposed affirmative action and nondiscrimination obligations of contractors and subcontractors regarding protected veterans include a number of important changes related to data and statistical analysis. It is unclear whether some of the proposed changes would meaningfully inform on the success of affirmative action and nondiscrimination for protected veterans. In fact, some of the proposed regulations rely on inadequate data and misguided analyses to assess contractor compliance and endorse ambiguous requirements that will likely have unforeseen consequences for other protected groups (e.g., women). This section describes some of the more consequential considerations.

### **Accuracy of Self Report Data**

OFCCP has proposed soliciting veteran status both pre- and post-employment offer. The information that is provided will be used to identify whether protected veterans are being underutilized in the contractor community as well as whether protected veterans are potentially being discriminated against in contractor personnel selection decisions.

In an ideal world, under ideal circumstances, every veteran applicant would know whether he or she is a protected veteran prior to filling out an application or by reading the criteria for protected veteran status. In reality, the possibility exists that a number of veteran applicants will not know whether they are a protected veteran and will choose to self-identify by default merely because they are a veteran.

To minimize the possibility of error, OFCCP has recommended that the definition of each classification of protected veteran accompany the invitations for self-identification. However, in light of the implications for how these data will be used by OFCCP, the potential consequences for veterans and the contractor community, additional steps are recommended to minimize errors in the veteran self- identification process.

For example, the invitation to self-identify asks applicants to voluntarily identify as a protected veteran if the “applicant *believes* that he or she is a protected veteran who *may* be covered by the Act”. This language recognizes the possibility that veterans may not know whether they are a protected veteran and allows for veterans to self-identify even when they are uncertain of their status. Though this language is being used by OFCCP to illustrate what an invitation to self-identify should look like, the language could lead to erroneous self-report data if organizations decide to adopt the language verbatim or develop similar language.

CCE recommends that OFCCP require contractors to adopt unambiguous language that will minimize the possibility of self-identification error (i.e., ...the applicant *knows* that he or she is a protected veteran who is covered by the Act.) and/or provide an option that will allow veterans who are uncertain of their status to report their uncertainty (i.e., I am a veteran. I do not know if I am a protected veteran). Additionally, it is recommended that OFCCP consider requiring contractors to provide the applicant with access to the list of campaigns and expeditions which qualify for veterans’ preference at the time the applicant is asked to self-identify in the pre and post offer stage.

Finally, if a contractor has federal contracts that fall under the requirements of both 60-250 and 60-300, the proposed regulations do not provide guidance on the criteria federal contractors should use to accurately identify the protected veteran status of applicants. For example, the definition of a recently separated veteran under 60-250 ( a one year time frame since the veteran was released/discharged from active duty) differs from the definition of a recently separated veteran under 60-300 (a three year time frame since the veteran was released/discharged from active duty). If 60-250 is retained, it may be necessary to clarify how contractors should word the pre offer and post offer self-identification questionnaire in situations where an applicant, if hired, would be conducting work that is related to contracts that fall under the scope of both 60-250 and 60-300(i.e., Should the three year time period take precedence or should the more conservative one year time frame take precedence? Will contractors need to consider the type of federal contract when posting a requisition and self-identification questionnaire?). CCE recommends that OFCCP eliminate 60-250 and/or provide guidance to federal contractors on this point.

### **Statistical Hiring Benchmark Goals**

The proposed regulations would require contractors to collect and analyze data as it relates to protected veterans for the overall purpose of creating hiring benchmark goals. The proposed analyses would require the review and analysis of the following information:

- To be published on OFCCP website:
  - Percentage of veterans in the civilian labor force (BLS)
  - Raw number of veterans who were participants in the state employment service in the State where the contractor’s establishment is located

- Other sources
  - Referral ratio, applicant ratio, and hiring ratios
  - Contractor’s assessments of outreach and recruitment efforts
  - Any other factors that would affect availability of qualified protected veterans
    - e.g. Nature of contractor’s job openings and/or locations

It is important to note that these proposed sources that are intended to be used to establish benchmarks for protected veterans do not inform on the availability of *protected* veterans; they describe *all* veterans. The BLS data and the raw number of veterans who participated in the state employment office provide information on the number of total veterans in the civilian workforce and the total number of veterans that are registered with the state, not on protected veterans under OFCCP jurisdiction. Therefore, these sources do not provide a meaningful source for the development of a benchmark goal for protected veterans, and CCE recommends that they should not be considered. CCE also recommends that the OFCCP establish or identify a method for the reliable estimation of protected veterans in the labor force (e.g. request that BLS begin collecting this data, partner with VETS to gain access to Vets 100/100A data, etc.) prior to requiring federal contractors to develop benchmarks.

In addition, the “other sources” data components (referral ratio, applicant ratio, hiring ratio, etc.) would require the contractor to conduct establishment specific analyses of applicant, hire, and referral data. However, the NPRM is not clear on how these analyses should be used in establishing benchmarks. This ambiguity also has implications for how these data will be used to evaluate federal contractor performance. Consider the following hypothetical scenario:

- Number of priority referrals = 10
- Total number of referrals = 40
- Number of job openings filled<sup>3</sup> = 175
- Total number of job openings = 200
- Known Protected Veteran Applicants = 50
- Total number of Applicants for Employment = 1,000
- Known Protected Veteran Hires = 5
- Total Number of Hires = 100

Based upon the numbers above, the proposed regulations would require the following four analyses as presented below:

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<sup>3</sup> CCE is unclear of the definition of ‘job opening’ and ‘job filled’ and seeks further clarification on these terms.

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Referral Ratio <sup>1</sup>		Applicant Ratio <sup>3</sup>	
$\frac{\text{Number of Priority Referrals}}{\text{Total number of referrals}}$	$\frac{10}{40} = .25$ or 25%	$\frac{\text{Known Protected Veteran Applicants}}{\text{Total number of Applicants for Employment}}$	$\frac{50}{1000} = .05$ or 5%
Job Fill Ratio <sup>2</sup>		Hiring Ratio <sup>4</sup>	
$\frac{\text{Number of job openings filled}}{\text{Total number of job openings}}$	$\frac{175}{200} = .875$ or 87.5%	$\frac{\text{Known Protected Veteran Hires}}{\text{Total Number of Hires}}$	$\frac{5}{100} = .05$ or 5%

As the analyses above show, the results of the four prescribed analysis yield results ranging from 5% to 87.5%. Given this large range in results, how could a contractor evaluate the results and come to a reasonable conclusion on the appropriate benchmark goal? That is, two people looking at the results above could come to very different conclusions:

**Perspective 1:** A goal of 2.5% should be established given the fact that only 5% of the total applicants are protected veterans. However, the 5% does not take into account those having the requisite skills needed to perform the job.

**Perspective 2:** A goal of 10% should be established given the fact that 5% of the applicants and hires are protected veterans. However, the contractor needs to extend their outreach recruitment efforts during the current AAP year and these numbers should then double.

It is unclear how this scenario would play out during the course of a compliance evaluation where perspective 1 represents the federal contractor position and perspective 2 represents OFCCP.

Essentially, OFCCP is proposing a subjective benchmark development and evaluation standard (i.e., in reviewing the scenario listed above one standard is not legitimately better than the other). This methodology is inherently flawed and CCE recommends an alternate strategy for developing annual hiring benchmark goals.

If possible, CCE recommends that OFCCP partner with the Veterans Employment and Training Services (VETS) to create national, state, and local availability figures based upon annual VETS-100 and VETS-100A reporting. Each year, covered federal contractors and subcontractors are required to submit a VETS-100 and/or VETS-100A report by September 30<sup>th</sup>. This report captures the total number of employees and new hires (over the last 12 months) by protected veteran status. This is the only data source that actually captures the number of protected veterans covered by 4212 by breakdown of veteran status and EEO category. This is the most accurate and discrete protected veteran data available and could easily be prepared for OFCCP by VETS.

Though one could argue that this information provides the number of protected veterans that are currently in the workforce and does not reflect the number of protected veterans that are not employed, a similar strategy has already been implemented with the Special EEO file that is used to develop AAP goals under 60-2 for minorities and females. The census data used for those plans allows us to determine who in the reasonable recruitment area (already employed) has the requisite skills needed to perform the job. Obviously, the VETS-100(A) would not provide us with requisite skills information but it could certainly be broken down by EEO category for a better estimate.

Consider the following based upon data in the aggregate:

According the Veterans Employment and Training Services (VETS), there were 22,416 federal contractors and subcontractors that submitted a report. In the aggregate, the VETS-100A reported the following numbers<sup>4</sup>:

<b>2010 VETS-100A Total Aggregate</b>	
Regular Other Protected Veterans	784,593
Regular Disabled Veterans	155,386
Regular Armed Forces Service Medal	161,759
Regular Recently Separated	124,523

It is not possible to sum the total number of protected veterans from the aggregate numbers due to the fact that some of the protected veterans may identify as multiple protected categories.

Assume that there are 1 million protected veterans currently working for federal contractors and subcontractor as reported in the VETS-100A report. According to the Bureau of Labor Statistics<sup>5</sup>, as of 2010 there were 153,889,000 people in the civilian workforce. As reported by OFCCP, the agency has jurisdiction over roughly 25% of the civilian workforce. All else being equal, one can take the estimated 1million protected veterans working at contractor establishments (in 25% of the workforce) and multiply it by 4 (to represent 100% of the civilian workforce) to estimate that there are 4 million protected veterans in the civilian workforce.<sup>6</sup> Dividing the estimated number of protected veterans (4 million) in the civilian workforce by the total number of employees in the civilian workforce (153,889,000) may be a reasonable estimate of the percentage of protected veterans in civilian workforce, and is 2.599%.

Using the methodology outlined above, a contractor could reasonably set a benchmark hiring goal at approximately 3%. This goal is based on meaningful aggregate data, and can be

<sup>4</sup> These numbers were obtained through the DOL's Veterans Employment and Training Services (VETS). CCE requested the VETS-100A report broken down by EEO category but VETS stated that the information could only be presented in the aggregate.

<sup>5</sup> Report titled *Employment status of the civilian non-institutional population, 1940 to date*.

<sup>6</sup> Note that this estimate does not account for protected veteran representation differences across geographic location, industry, or job type. However, this estimate is no less accurate than any data OFCCP proposes using. In fact, this estimate is likely more accurate than OFCCP data because it incorporates protected veteran-specific data.

established for the entire corporation and cover all establishments. The corporate office would take the responsibility for the development and implementation of nationwide good faith efforts and partnership organizations. Certainly each establishment can participate locally with relevant organizations but the program would be developed on a national basis. This model allows the contractor to spend more time on the outreach, recruitment, and veteran partnership programs, and less time on the analysis of data that likely will not yield meaningful results. In addition, requiring one aggregate contractor goal ensures consistency and accountability across all contractor establishments. CCE recommends that this type of methodology should be used to estimate a single hiring goal for all federal contractors. In addition, CCE would recommend that OFCCP work closely with VETS to provide the public with information submitted in the VETS-100 data broken out by EEO-1 category and geographic area (e.g. national, state, local, etc.).

However, if the proposed rule is accepted in its current form, CCE recommends that OFCCP clarifies a number of definitions. For example, is the definition of “applicant” in the proposed regulations consistent with 60-1.12. Further, the agency would need to clarify the definitions of “job opening” and “job filled”, and whether these definitions include both internal and external job placements.

### **Other protected group considerations**

It is also important to note that OFCCP has stated that “the primary indicator of effectiveness is whether qualified veterans have been hired” to determine the effectiveness of a contractor’s program. Based on the language stated in the preamble to the regulations, this could be interpreted as a requirement for some sort of preferential treatment and hiring quota. Consider the fact that a contractor could implement every recommended strategy and have very few protected veterans during a plan year. It is unclear whether OFCCP would consider this a violation of 4212 because the contractor didn’t hire “enough” protected veterans. CCE recommends clarification on whether a veteran’s preference exists and on the consequences related to not meeting goals.

If the primary metric of interest is the number of hired protected veterans, this standard could have negative unintended consequences for other protected classes that are not veterans. For example, veteran affirmative action and nondiscrimination efforts may be in direct conflict with the affirmative action and nondiscrimination efforts for females. This is simply a function of the fact that the vast majority of protected veterans are male. According to the United States Department of Defense and the US Coast Guard, more than 85% of active duty military are male.<sup>7</sup> According to the Bureau of Labor Statistics, there are 20.2 million men (92%) and 1.8 million women (8%) in the civilian non-institutional population ages 18 and over who are veterans.<sup>8</sup> According to the Department of Veteran Affairs, females make up about 8% of veterans in the United States and Puerto Rico.<sup>9</sup>

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<sup>7</sup> <http://www.womensmemorial.org/PDFs/StatsonWIM.pdf>

<sup>8</sup> <http://www.bls.gov/news.release/vet.nr0.htm>

<sup>9</sup> [http://www.va.gov/WOMENVET/Women\\_Vet\\_Pop\\_FS\\_10\\_10.pdf](http://www.va.gov/WOMENVET/Women_Vet_Pop_FS_10_10.pdf)

Because of the disproportionate gender distribution in the veteran population, meeting hiring goals for protected veterans will likely result in hiring men in the vast majority of cases. In other words, enhancing the affirmative action of veterans by using veteran hiring as a metric may adversely impact females. In this scenario it is likely impossible to meet EEO goals for both groups simultaneously.

Relatedly, it is unclear whether federal contractor veteran affirmative action efforts could be used as an affirmative defense if those efforts result in adverse impact against females. Both case law and EEOC decisions are clear that adverse impact resulting from veterans' preferences required by *statute* are not subject to a Title VII challenge. However, *voluntary* veterans' preferences are subject to such challenge. It is unclear whether an OFCCP regulation would carry statutory protection. If the regulation is ambiguous about whether preferential hiring of veterans is required by OFCCP or merely a voluntary option, a contractor would be legally vulnerable to a Title VII challenge. In the words of EEOC:

*In contrast to the foregoing, however, where an employment preference is conferred upon veterans on the employer's own initiative and is not mandated by statute, the discriminatory impact of the preference is not shielded from scrutiny under Title VII. As the language of Section 712 makes clear, the deference provided by that section applies only to veterans' preferences that are created by law and not to those that are voluntarily accorded to veterans by employers. Falling outside the terms of section 712, voluntary preferences are subject to Title VII adverse impact analysis.<sup>10</sup>*

Clearly, there will always be adverse impact on females based on veterans preference. It is unclear how a preference for veterans might affect EEO outcomes for racial/ethnic minorities, but it is certainly possible that decisions to meet veteran goals could have adverse impact against other groups. CCE recommends that OFCCP consider this issue in evaluating the consequences of implementing the NPRM as it is currently written.

A data analytic example may solidify this notion. Assume that 100 males and 100 females apply to a specific job in a federal contractor organization over the course of an affirmative action plan year. This pool of 200 applicants is analyzed as part of an affirmative action plan. Assume 40 of the 100 males are selected, while 25 of the 100 females are selected. Using the OFCCP's standard "2 standard deviation" Z test, this difference in selection rates is statistically significant at 2.26 standard deviations (or a probability value of .024, which is below .05 and thus meets the general social scientific and EEO standards for statistical significance). This result supports the notion that this difference in selection rates is probably not due to chance and as such the agency would treat this finding as potential evidence of discrimination.

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<sup>10</sup> [http://www.eeoc.gov/policy/docs/veterans\\_preference.html](http://www.eeoc.gov/policy/docs/veterans_preference.html)

However, assume that 9 of the 40 male hires were protected veterans, while 1 of the 25 female hires was a protected veteran. All other applicants were non-veterans. Because of these hiring decisions, the federal contractor met a quantitative veteran goal for this job. If one were to refine the adverse impact analysis and control for veteran status via a statistical technique like logistic regression, the disparity against females is no longer statistically significant. The probability value for gender is now .14 (or a Z value of about 1.1 standard deviations), which is no longer statistically significant. This result suggests that gender discrimination is not the explanation. Has OFCCP considered this scenario, and would the agency agree that achieving a quantitative veteran goal could be a justification for adverse impact against female?

It should be noted that, based on the protected veteran gender distribution, adverse impact against women could be a common finding if the new veterans' regulations are implemented. An examination of DOL's enforcement database<sup>11</sup> from FY 2010 indicates there were 43 individual complaints of discrimination by veterans. Of those complaints, there were 3 violations. Based on these data and the potential negative consequences for other protected groups, the need for regulatory change is questionable. CCE recommends that OFCCP consider this scenario outlined above and indicate how they plan to balance the interests of veterans and other protected groups. More specifically:

- Is a quantitative veteran goal equivalent to a veteran preference?
- Would the agency agree that achieving a quantitative veteran goal could be a justification and/or explanation for adverse impact against females or other protected groups?
- Is there evidence to suggest the need for an overhaul to the current affirmative action and equal employment opportunity regulations for veterans?

One final point is worth noting. Any analyses comparing protected veterans to non-veterans have two natural confounds: race and gender. As a result, simple comparisons of protected veteran rates to non-protected veteran rates are not probative for identifying potential discrimination. For example, if in some instances adverse impact is identified against protected veterans, this finding may more often be a function of legal (i.e., legitimate qualifications, job-related skills, etc.) or illegal (i.e., discriminatory) race or gender differences. More complex statistical modeling would be necessary to understand the phenomena of interest. CCE recommends that OFCCP consider these data analytic challenges.

## **Conclusion**

CCE hopes that this submission has identified some important issues for OFCCP to consider. Protected veterans are a socially important group and CCE commends the agency's desire to strengthen regulatory requirements related to veteran affirmative action and nondiscrimination. At a time when the military is withdrawing from multiple conflicts, it is imperative that service

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<sup>11</sup> <http://ogesdw.dol.gov>

men and women returning home are provided equal employment opportunity and that federal contractors do their due diligence to identify qualified veteran applicants.

It is also critical that regulatory requirements for federal contractors are attainable, fair, and grounded in data that mirror reality and allow for meaningful inferences. We hope that OFCCP considers the challenges for federal contractors, veterans, and the other protected groups that were described in this submission. We anticipate that the constructive comments in this document will stimulate positive dialogue on a variety of important topics.

In conclusion, CCE strongly recommends that OFCCP immediately withdraw the Notice and take additional steps to work collaboratively with the federal contractor community. CCE, the federal contractor community and OFCCP share the same objective: to develop an effective and sustainable regulation that will strengthen non-discrimination and affirmative action for our nation's veterans. This regulation should not impose enormous burdens, rely on inadequate data and misguided analyses to assess contractor compliance, or endorse ambiguous requirements that may have unforeseen consequences for other protected groups (e.g., women).

We thank OFCCP in advance for its consideration of our comments and suggestions. If the Agency should wish to discuss this request, please contact David Cohen, Executive Vice President, at (202) 828-6902 or [dcohen@cceq.org](mailto:dcohen@cceq.org)

Respectfully submitted,



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