

Contractors Await Ruling On Legal Challenge To OFCCP's New Disability Regulations

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As federal contractors prepare to comply with new "Section 503" disability regulations adopted by the Office of Federal Contract Compliance Programs (OFCCP), the enforceability of those regulations has come under a significant legal challenge. Although those regulations are set to take effect in March 2014, a legal challenge to the enforceability of those regulations – which now has the support of the HR Policy Association – may delay that deadline for all contractors.

On Sept. 24, 2013, the OFCCP published its new regulations in the Federal Register that, along with similar requirements for recruiting veterans, will require federal contractors to collect applicant self-identification data to identify disabled persons, and to hire disabled persons to achieve a 7 percent representation goal in all job groups.

On Nov. 19, 2013, Associated Builders and Contractors, Inc. (ABC) sued the OFCCP and the U.S. Department of Labor (DOL), alleging that the agency's new regulations ignore the unique aspects of the construction industry, and seeking declaratory and injunctive relief. In that case, *Associated Builders and Contractors, Inc. v. Shiu*, the parties recently filed cross motions for summary judgment, focusing on arguments pertaining to federal construction contractors.

In January 2014, the U.S. District Court for the District of Columbia permitted the HR Policy Association (HRPA) to file an amicus brief. HRPA's brief raises the stakes of the entire case because its arguments now call into question the OFCCP's basis for setting its 7 percent goal for all federal contractors, including those in the construction industry. In its brief filed on Jan. 13, 2014, HRPA asserts that the OFCCP's Section 503 regulations should be vacated because the 7 percent goal is arbitrary, amounts to an illegal quota, and is based upon flawed Census data.

HRPA's amicus brief focuses on three main legal arguments. First, HRPA argues, the 7 percent goal is arbitrary and capricious because it is based on data obtained through the American Community Survey (ACS) whose questions have no relation to disability standards set forth in the American with Disabilities Act (ADA). Notably, HRPA cites to written comments from both the OFCCP and the EEOC acknowledging that the ACS data does not allow for an accurate assessment of how many disabled individuals exist in the U.S. workforce.

Second, HRPA argues that the 7 percent goal is an illegal quota because the failure to meet the goal would likely result in Conciliation Agreements enforcing that numerical target. Third, HRPA argues that the OFCCP's self-identification requirement directly conflicts with the ADA's prohibition on pre-employment inquiries regarding disabilities. HRPA further argues that relying on applicants to self-identify as "disabled" is an unreliable method to calculate how many applicants and employees actually possess an ADA-qualifying disability.

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At present, no date for oral argument has been set for summary judgment. It is also unknown whether other trade associations will seek permission to file additional amicus briefs. What remains clear is that HRPAs amicus brief significantly raises the stakes for this litigation. Without definite guidance on Section 503's requirements, federal contractors should work with legal counsel to develop strategies for assessing their compliance needs under current regulations.