

Construction Contractor Sues OFCCP To Block New Regulations

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Recently, a construction trade association filed suit in federal court seeking to block the OFCCP's new "Section 503" regulations on recruiting and hiring disabled persons from taking effect. Whether or not injunctive relief is granted, this lawsuit highlights the increased data-collection challenges that the OFCCP's new regulations will require for all federal contractors.

On Nov. 19, 2013, Associated Builders and Contractors, Inc. (ABC) sued the Office of Federal Contract Compliance Programs (OFCCP) and the U.S. Department of Labor (DOL) in the U.S. District Court for the District of Columbia, alleging that the agency's new regulations ignore the unique aspects of the construction industry, and seeking declaratory and injunctive relief.

ABC is a national trade association with 22,000 members from more than 19,000 construction and industry-related firms. In its Complaint, ABC alleges that the OFCCP's newly-enacted regulations should not apply to construction contractors due to the "unique burdens imposed by the new Rule on the construction industry." ABC's Complaint also alleges that the OFCCP's new regulations ignores the "fluid and temporary" nature of construction company workforces. ABC's member organizations specifically object to the OFCCP's new regulations that mandate that federal contractors: 1) collect demographic data to identify the number of disabled persons among their applicants, and 2) engage in affirmative action efforts to meet a goal to achieve a total of 7 percent of disabled persons in their employee ranks.

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 data to identify disabled persons and to hire disabled persons to achieve a 7 percent representation goal in all job groups. (Despite Title VII's prohibition on considering the disability of applicants for employment purposes, the OFCCP has indicated that it will publish specific language that allows contractors to collect such data without violating federal disability discrimination laws. To date, the OFCCP has not published that language.) The new regulations take effect in March 2014.

ABC specifically alleges that by requiring such data collection and a representation goal of 7 percent, the OFCCP exceeded its statutory authority under the Rehabilitation Act of 1973. ABC also alleges that the OFCCP's regulations violate the Administrative Procedure Act (APA) and the Regulatory and Small Business Flexibility Act (RFA) by failing to provide an "adequate, rational explanation for its refusal to exempt the construction industry," and by not conducting "an adequate cost-benefit analysis." ABC's Complaint points out that unlike non-construction service contractors, the construction industry has never been required to conduct job group utilization analyses under Executive Order 11246. To maintain this exemption, ABC's lawsuit seeks an injunction barring the enforcement of the OFCCP's new

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regulations as to all construction contractors.

Because the OFCCP's new regulations create an increased number of data retention and recruitment requirements for federal contractors, the outcome of this lawsuit will be significant. Federal contractors should contact their legal counsel for advice on how best to prepare recruiters and hiring managers to comply with the new regulations. Legal counsel can also assist federal contractors determine the best means for conducting self-audits, reconfiguring HRIS systems to include the new self-ID categories, and adopting other recruiting practices that will lead to increased numbers of veterans and disabled persons in their companies.