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James C. Pierce
Acting Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
Room N3422
200 Constitution Avenue, NW
Washington, DC 20210

VIA EMAIL: ofccp-public@dol.gov
RE: RIN number 1215 AB46 (Proposed new rules implementing the Jobs for Veterans Act)

Dear Mr. Pierce:

TOC Management Services is an employers' association with over 500 member companies in the Pacific Northwest. Approximately 75 of our member companies are federal contractors who are required to maintain affirmative action plans. Some of our federal contractor members are large companies with multiple locations in many states, while others operate only a single worksite.

On behalf of our member companies, please accept these comments from TOC on your proposal to add new veterans regulations implementing the Jobs for Veterans Act (JVA) (71 *Fed Reg* 3352, January 20, 2006). Our comments are organized according to the proposed section numbers.

Compliance with two sets of veterans regulations is unduly burdensome (See 41 CFR §60-300.1(b))

The proposed regulations require contractors with covered contracts signed both before and on or after December 1, 2003, to comply with both the old regulations as well as the new regulations. Each set of regulations uses four categories of protected veterans, with only one of those categories overlapping (other veterans who served in a war or campaign). This would be extremely confusing for employers to track and comply with.

We realize the OFCCP is constrained by the text of the statute(s). However, OFCCP has some flexibility as a matter of enforcement policy. The OFCCP could state that if an employer has federal contracts of at least $100,000 signed on or after December 1, 2003, the employer will be required to comply *only* with the new (JVA) regulations, even if the employer also has other covered contracts that were signed earlier. Employers who have only federal contracts of at least

$25,000 that were signed prior to December 1, 2003, would be covered by the old regulations. This would give employers a clear direction as to which set of regulations to follow, and would avoid the problem of requiring employers to maintain two parallel tracking systems for veterans. In the event that a federal contractor with affirmative action obligations under only the old rules signs a new federal contract worth $100,000 with an effective date that occurs after a new affirmative action plan (AAP) recordkeeping year has begun, we recommend that the contractor have the option of finishing out the recordkeeping year under the old rules. Also, the contractor should have the option of submitting the next VETS-100 Report under the old rules.

The reason for allowing this flexibility is that if an employer is already partway through the AAP recordkeeping year or the VETS-100 reporting period, it will be difficult and in some cases impossible to backtrack and gather accurate data for the new categories. Also, employers will need sufficient lead time to make changes in their data collection forms and tracking systems to implement the new veterans categories. On the other hand, depending on how early in the recordkeeping year or VETS-100 year the new contract becomes effective, some employers may have the desire, resources and ability to switch over to the new categories. For these reasons, allowing employers the option of continuing with the old categories during the current AAP recordkeeping year or VETS-100 year makes sense.

One final item to note is that for many years the VETS-100 data was based on a single snapshot of the current workforce in the third quarter. However, with the requirement to track "recently separated veterans" as well as the VETS-100 Report's relatively new request for data on new hires, an employer's reporting obligation for veterans has been expanded to include personnel activity during a full year. Switching categories mid-stream therefore would be much more burdensome today than it would have been in years past.

Specify that only veterans of the U.S. Armed Forces are covered (See 41 CFR §60-300.2)

The regulations should be clarified to indicate that only veterans of the U.S. Armed Forces, as opposed to veterans of other nations' armed forces, are covered. It has historically been understood that this is the case, but it should be made clear for all of the categories of protected veterans. One option would be to add a separate definition for "Veteran," specifying that this means a veteran of the United States Armed Forces.

An alternative option would be to clarify the definitions for "disabled veteran" and "recently separated veteran." (The definitions for "other veterans" and Armed Forces Service Medal veterans already indicate, in somewhat different terminology, that the rules apply to veterans of the U.S. Armed Forces.) The second part of the definition for disabled veteran, found at §60-300.2(n)(2), could be revised to read, "A person who was discharged or released from active duty <u>in the U.S. Armed Forces</u> because of a service-connected disability." The definition for recently separated veteran, found at §60-300.2(q), could be revised to read, "any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty <u>in the U.S. Armed Forces</u>."

Exclude veterans discharged for specified behavior (See 41 CFR §60-300.2)

Sometimes veterans are discharged from the service based on specified behavior, such as rape or murder, or for being away without leave (AWOL). We believe such veterans should not be entitled to affirmative action protections for their service in the military. We suggest following the standards set out under the Uniformed Services Employment and Reemployment Rights Act (USERRA). USERRA excludes from protection four categories of veterans, including those separated with a dishonorable or bad conduct discharge. See 20 CFR §1002.135, as published in the December 19, 2005 *Federal Register* (70 *Fed Reg* 75246, 75303).

We do not intend this exclusion to mean that an employer could automatically exclude such individuals from employment. As with any criminal conduct or "for cause" termination from prior employment, the employer should consider the nature of the conduct, the relationship to the job, the amount of time that has passed, and evidence of rehabilitation. Also, the employer needs to ensure that its policies do not have an adverse impact on minorities or women, unless justified by business necessity. However, we believe that an individual who is discharged for the types of conduct specified in the USERRA regulations should not be counted as a "veteran" for affirmative action purposes.

Provide guidance on covered wars, campaigns and expeditions (See 41 CFR §60-300.2(p))

The regulations (current and proposed) protect other protected veterans "who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense." Unfortunately, employers have little guidance on what wars, campaigns or expeditions are covered. The best website we have been able to find is http://www.opm.gov/veterans/html/vgmedal2.asp. However, the information is out of date and some of it does not relate to private employers who are federal contractors. How are employers supposed to know who is an "other veteran" covered by these regulations? Our members have received questions from their employees, asking what conflicts are covered by the rules, and they do not have a good resource to provide answers. It would be extremely helpful if the OFCCP could develop such a list, or at least coordinate with other affected agencies (e.g., VETS or the Department of Defense) and offer a link to a continually updated list.

Provide guidance on Armed Forces Service Medal operations (See 41 CFR §60-300.2(r))

Similar to the difficulty of identifying "other veterans," employers also do not have an accurate, up-to-date list of operations that qualify for the Armed Forces Service Medal. The best website we have found is at http://foxfall.com/csm-common-afsm.htm. However, it does not appear to be current, or at least there is nothing to indicate whether it is current. Again, since the OFCCP is proposing to require employers to grant affirmative action protections to Armed Forces Service Medal veterans, we urge the agency to provide employers access to an up-to-date list of those operations.

Clarify "appropriate employment service delivery system" (See 41 CFR §60-300.2(y) and 60-300.5(a)(2))

We recognize that the JVA requires covered contractors to list job openings with the "appropriate employment service delivery system," and the definition in the proposed regulation tracks the language in the statute. The statutory language is confusing, however, to the average employer. How many human resources people would understand what state agency to call when they are told to post their jobs at "a service delivery system at which or through which labor exchange services, including employment, training, and placement services, are offered in accordance with the Wagner-Peyser Act"? Faced with such a definition, where does the employer even begin to look? One of the benefits of regulations is that they can clarify ambiguities in statutes, and provide clearer guidance to regulated parties. We recommend that this definition be revised to state in plain language the name or type of agency with which the employer should list its job openings.

Incorporate new FLSA definitions of exempt workers (See 41 CFR §60-300.5(a)(6)(ii))

"Executive and senior management" jobs are exempt from the requirement to list employment openings with the appropriate government agency. In defining the term "executive and senior management," the current and proposed equal opportunity clause follows the regulations for the executive exemption from overtime under the federal Fair Labor Standards Act (FLSA). However, the FLSA regulations were updated, effective August 23, 2004. The definition for an exempt executive was streamlined, and employers are now following the new FLSA rules. In order to avoid confusion, we recommend updating the equal opportunity clause to coincide with the current FLSA overtime regulations (see 29 CFR §§541.100 and 541.101).

Coordinate final regulations with revisions of the VETS-100 Report

In order to minimize the disruption that will be caused by the transition to the new regulations, we urge the agency to coordinate the effective date of the new regulations with any changes that need to be made to the VETS-100 Report. We realize that the Veterans' Employment and Training Service (VETS) is responsible for the report, but we hope that the OFCCP is planning to work closely with VETS to ensure that employers do not need to maintain duplicate veterans' tracking systems (one to comply with affirmative action requirements, and one to produce the VETS-100 Report).

We believe that it will be necessary to have two different versions of the VETS-100 Report, because some employers will be subject to the current rules and others will be subject to the rules for contracts signed on or after December 1, 2003. The requirement to submit the report also provides another reason why employers with covered contracts signed both before December 1, 2003 and on or after December 1, 2003, should be subject only to the new regulations. Otherwise, they will be required to go through the unnecessary exercise of submitting parallel VETS-100 Reports or (just as undesirable), submitting a VETS-100 Report that is nearly twice the size of the old one because it asks for information on both sets of veterans categories.

Conclusion

I hope this feedback is useful. Again, we believe it is essential for an employer to be governed by only one set of veterans regulations at a time, instead of being subject to two competing sets of

regulations. If you have any questions about these comments, I can be reached at 503-620-1710 x326 or by email at karen_davis@toc.org. Thank you for your time and attention.

Very truly yours,

Karen E. Davis
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TOC Management Services