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IT'S FINAL! FEDERAL CONSTRUCTION CONTRACTORS MUST COMPLY WITH AFFIRMATIVE ACTION OBLIGATIONS FOR INDIVIDUALS WITH DISABILITIES

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Earlier this summer, the U.S. Supreme Court in *Associated Builders and Contractors, Inc. v. Shiu*, U.S., No. 14-1111, cert. denied 6/15/15, declined to review Associated Builders and Contractors, Inc.'s (ABC) challenge to the Department of Labor's Office of Federal Contract Compliance Programs' (OFCCP) final rules that require all federal contractors to implement new affirmative action obligations for individuals with disabilities. The U.S. Supreme Court's decision is significant because it affirmed the government's contention that even federal construction contractors have to comply with the Section 503 of the Rehabilitation Act of 1973 (Section 503) final regulations, which became effective March 24, 2014.

In declining to review ABC's petition, the Supreme Court rejected the association's arguments that:

1. The OFCCP exceeded the authority delegated to it by Congress under Section 503 by requiring contractors to collect disability data from job applicants at the pre-offer stage without regard to whether those job seekers are "qualified" for employment.
2. The OFCCP's new utilization goal was arbitrary and capricious because the agency didn't provide a rational explanation for the goal or for subjecting the construction industry to that requirement.

3. The OFCCP's disability rules contain provisions that were not contemplated by the limited Congressional grant of authority under Section 503.
4. Congress did not authorize the OFCCP to amend the Section 503 rules to include the new data collection or analysis requirements.

As a result, federal construction contractors must now take numerous additional steps to ensure they are in compliance with their affirmative action obligations under Section 503. For example, federal construction contractors should:

- Review and revise their employment policies, including their equal employment opportunity (EEO) clause, to provide that the contractor will "employ and advance in employment individuals with disabilities, and treat qualified individuals without discrimination on the basis of their physical or mental disabilities."
- Revise solicitations and advertisements to state that the company is an equal opportunity employer of individuals with disabilities.
- Incorporate their EEO clause into their contracts by citing to 41 CFR 60-300.5(a) and bolding the text of required language.

- Revise employment policies/procedures to ensure that all Americans with Disabilities Acts Amendments of 2008 (ADAAA) amendments have been made.
- Revise hiring qualification standards to incorporate ADAAA's specific prohibition on the use of qualification standards, employment tests or other selection criteria that are "based on an individual's uncorrected vision" unless the standard, test or other selection criteria is "shown to be job-related for the position in question and consistent with business necessity."
- Revise compensation policies to make it impermissible for the company to reduce compensation provided to an individual with a disability because of the actual or anticipated cost of a reasonable accommodation the individual needs or may request.
- Amend their Affirmative Action Program (AAP) to provide that their full AAP, absent the data metrics required by Section 60-741.44(k) (number of applicants etc.), shall be made available to any employee or applicant.
- Use the OFCCP's published self-identification form to invite applicants (those who meet the basic, minimum requirements) pre-offer to self-identify as an individual with a disability at the same time that demographic data regarding race, gender and ethnicity is recorded. This is in addition to the existing post-offer, self-identification requirement. The pre-offer invitation to self-identify may be included in the company's application materials but must be separate from the application.
- Invite all of the company's employees to voluntarily self-identify as an individual with a disability using the OFCCP's self-identification form at least once every five years.
- Remind employees at least once during the years between the initial and the five-year invitation period that they may voluntarily update their disability status at any time.
- Not compel or coerce individuals to self-identify and keep all self-identification information confidential and in self-contained fields.
- Revise EEO policy in the company's AAP to clarify its duty to provide notice of employee's rights and the company's obligations in a manner that is accessible and understandable to persons with disabilities and to require the company's top U.S. executives' support for the AAP.
- Revise the company's policies to ensure that applicants and employees with disabilities have "equal access to its personnel processes including those through communication technologies."
- Provide necessary reasonable accommodation to ensure applicants and employees with disabilities receive equal employment opportunity in the operation of personnel processes.
- Send written notification of company policy related to its affirmative action efforts to all subcontractors, vendors and suppliers.
- Review and document outreach and recruitment efforts in the prior 12 months to analyze effectiveness and maintain records for three years.
- Implement and disseminate AAP by including it in the company's manual and notify union officials, if any.
- Document and maintain records demonstrating the actions it has taken:
 - o Measure the effectiveness of its AAP.
 - o Indicate any need for remedial action.

- o Determine the degree to which the company's objectives have been attained.
- o Determine whether individuals with disabilities have had the opportunity to participate in all company professional and social activities.
- o Measure the company's compliance with the AAP's specific obligations.
- Document and update annually: (1) for applicants: the total number of applicants for employment and the number of applicants who are known individuals with disabilities; (2) for hires: the total number of job openings, the number of jobs filled and the number of individuals with disabilities hired; and (3) the total number of job openings and the number of jobs that are filled. Retain these records for three years.
- Establish an aspirational utilization goal of seven percent to hire qualified individuals with disabilities.
- When the percentage of individuals with disabilities in one or more job groups is less than the utilization goal, take steps to determine whether and where impediments to equal

employment exist. This includes assessing existing personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its AAP audit and any other areas that might affect the success of the AAP. After conducting this assessment, the company must develop and execute action-oriented programs to correct any identified problem areas.

This is just a sample list of actions that federal construction contractors need to consider taking as a result of the Supreme Court's recent rejection of the ABC's petition.

Due to the OFCCP's increased audit and enforcement activity, it is imperative for federal construction contractors with federal contracts in excess of \$50,000 to review their AAP to ensure they are in compliance with Section 503's requirements. Where federal construction contractors have questions regarding their new obligations, they should contact experienced affirmative action counsel.

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