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Ms. Debra A. Carr
Director, Division of Policy, Planning and Program Development
Office of Federal Contract Compliance Programs
200 Constitution Avenue, N.W., Room C-3325
Washington, D.C. 20210

Re: RIN 1250-AA00, Affirmative Action and Nondiscrimination Obligations of
Contractors and Subcontractors Regarding Protected Veterans

Dear Ms. Carr:

We are writing on behalf of Littler Mendelson, P.C., to comment on the OFCCP's proposal to revise the Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans.

Founded over 60 years ago, Littler Mendelson is the nation's largest law firm dedicated exclusively to the practice of labor and employment law. With over 800 attorneys in 50 offices across the country, Littler Mendelson is devoted to representing management in employment, employee benefits and labor law matters. Littler Mendelson also has a group of attorneys dedicated to representing and assisting clients in matters with the OFCCP. The firm's client base ranges from Fortune 100 companies to small-business owners. The OFCCP's revision of its affirmative action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Protected Veterans is highly relevant to the Firm's OFCCP Practice and significantly impacts the Firm's clients.

We are greatly troubled by the OFCCP's perception that these proposed regulations will further the Secretary of Labor's agenda of finding good jobs for all Americans. We further believe that these regulations directly contradict President Obama's more recent order to review and eliminate unnecessary and burdensome regulations. The burdens that these regulations will place on any contractor with less than \$1,000,000 in contracts is extraordinary, and OFCCP has grossly underestimated the time and costs associated with these proposed changes. These regulations are not going to create revenue-generating jobs for Veterans. They are not going to level the playing field for qualified veterans and ensure equal access. They are going to create layers upon layers of overhead for companies ill-prepared to absorb these costs in the current economy.

OFCCP has to be presuming that all government contractors have dozens of HR personnel, dozens of recruiters, and dozens of HR assistants, all with months of time on their hands if it thinks that companies can absorb these burdens. Our client base is far from that image. Rather, the vast majority of our clients have one person in the Director or Manager role, one person in the Staffing role, perhaps one or two recruiters, and one or two HR assistants – if that. These individuals are responsible for creating job requisitions, meeting with managers to set basic qualifications and preferred qualifications, listing the job on the employer's website, listing the job on the state website, listing the job on the websites that attract qualified candidates, evaluating the expressions of interest, documenting the considered expressions in the applicant tracking system, setting up interviews, providing managers with copies of resumes and applications, gathering interview feedback, making job offers, on-boarding new hires, entering data into HRIS systems, enrolling employees for benefits, administering benefit plans, dealing with time cards, payroll, wage and hour issues, overtime issues, safety issues, FMLA, ADA, other leave issues, employee relations issues, answering reference checks, vetting performance evaluations, terminating employees, implementing compensation adjustments, vetting promotions and demotions, setting up training, conducting training, producing documents in litigation, being deposed for litigation, advancing diversity, querying the HRIS and applicant tracking system, preparing the affirmative action plans, developing action oriented programs, performing internal audits, evaluating the physical and mental qualifications of each and every job in the workplace (each year), meeting with management, and the like, most of which is being done on a day to day basis.

These are not revenue-generating job functions; these are overhead job functions.

It is about the economy, and the proposed changes to 60-300.44 and new section 300.45, in particular, imposing wasteful reporting calculations and hiring benchmarks, are not going to lead to greater veteran employment. They are going to cause small to medium size businesses to let their government contracts lapse because they cannot absorb the overhead. When the costs of compliance go up, companies have three options: (1) stop being a government contractor; (2) pass the higher costs onto the government, which in turn means the government pays more taxpayer dollars for the same services; or (3) reduce the number of jobs in the workplace so that the dollar savings from those wages and benefits will pay for the increased cost of compliance.

None of these leads to greater veteran employment. It is important to add our observation that the current OFCCP leadership seems to believe that the veterans affirmative action regulations have not received the same emphasis and priority from contractors than the affirmative action regulations for women and minorities. We actually agree with this observation. Where we diverge from the Agency is why this has been the case. It is not because the women and minorities affirmative action regulations have placement goals and data tracking obligations. Instead, it is a direct function of the fact that the prior administration had all but ignored compliance with the veterans regulations. OFCCP's Active

Case Management Directive reflected the prior administration's nearly exclusive focus on the data aspects of affirmative action plans. This resulted in OFCCP itself all but ignoring enforcement of the existing veterans regulations. Now, this OFCCP administration is over-reacting to the failures of the predecessor administration and presuming that the lack of emphasis on, and priority of, the veterans affirmative action regulations are due to deficiencies in the regulatory scheme itself, which deficiencies can be remedied only by imposing data tracking requirements that actually are more onerous than those that exist under the women and minorities affirmative action regulations.

Notably, revisions to the women and minorities regulations are not part of OFCCP's regulatory agenda.

Indeed, we can vouch firsthand that the current administration's renewed emphasis and prioritization of the veterans affirmative action obligations have resulted in a significantly greater emphasis on veterans outreach by our clients. It is our view that OFCCP's regulatory revisions are not warranted as the Agency has not evaluated how effective its renewed enforcement initiatives in the area have been in creating greater opportunities for veterans. Indeed, enforcement of the existing regulations is doing and will do much more to create opportunities for veterans than the heavy-handed and incredibly costly and burdensome regulatory changes that the OFCCP is now proposing. This premature move to increase contractors' regulatory burdens is unfortunately a perfect example of poor administrative policy—acting to create more burdens on contractors without ever assessing if the much-less-burdensome approach of enforcing existing regulations will be just as effective—if not perhaps more so as it creates less of a chilling effect because it does not impose unnecessary burdens and costs on contractors.

OFCCP has not offered any evidence in the accompanying regulatory justification as to why the existing regulations are ineffective. OFCCP has no proof that the old regulations do not work. It only has proof that contractors were not paying attention to them, until now. OFCCP should be commanded to offer proof that the old regulations, and its increased enforcement of those existing regulations, are not working before layering on new burdens.

* * *

Our comments go section by section through OFCCP's proposed changes. If we skip over a regulatory section, OFCCP may assume that we have no comment to offer about the proposed changes.

Rescission of 41 C.F.R. Part 60-250

We support the rescission of 41 C.F.R. Part 60-250 in its entirety. We are not aware of any government contractor or subcontractor clients that still have contracts entered into on or before December 1, 2003, which contracts have not been modified at all since then. To our

knowledge, all of our clients' contracts and subcontracts were entered into since December 1, 2003, and they are subject to the regulations codified at Part 300.

Section 60-300.2 Definitions

Littler Mendelson supports the OFCCP's efforts to clarify the definitions, which we agree have confused many clients over the past few years.

The problem still remains that even some veterans do not know whether they are entitled to self-identify as "campaign badge veterans." Several client human resource professionals have tried to create their own reference lists by going to the Department of Defense's web page and periodically updating laminated reference cards or integrating the Department of Defense's list as a link on electronic self-identification web-based portals. The problem with cross-referencing the DOD's lists is that, unlike in federal government, where there is a veteran's preference in employment, there is no such private sector preference. Private sector HR departments are reluctant to link to the DOD's lists (which are the most current list) because the DOD's list explicitly references the federal sector preference. We would strongly support the DOL's integration onto its own website, under a JVA FAQ, for example, a list of covered campaigns that does not cross-link to the DOD's list.

Section 60-300.5 Equal Opportunity Clause

(1) The mandatory job listing

Since the elimination of America's Job Bank, the obligation to list non-executive, non-temporary jobs with an employment service has become extraordinarily burdensome for multi-state employers. There is no uniform format used by all state or local employment services, and OFCCP compliance officers are eager to cite employers who had been duped into believing that using a third party service to ensure the job listing meant that the jobs were actually reaching the employment services. OFCCP compliance officers have known for years, now, that the state and local workforce agencies have particular job listing criteria, and instead of proactively offering compliance assistance on OFCCP's website, the compliance officers wait until the company is under audit, and then cite them for violating the mandatory listing requirement. State and local governments are cutting back the level of services they offer in these times of fiscal uncertainty, and for OFCCP to push government contractors towards these resource-challenged agencies makes no economic sense.

Indeed some of our clients are being cited for violations even when they attempted to post their jobs with state often because the state has very specific requirements about how it will accept postings, and typically these requirements are not well publicized. The states are frequently the actors that cause the process to break down, but rather than work with the states to ensure ease of compliance, OFCCP instead cites contractors for violations. For OFCCP to have eliminated America's Job Bank—the federal solution—and then do nothing to

ensure that the states are a truly cooperative party in the remaining scheme is an administrative failure. And who gets cited for violations? Not the states, but the contractor who actually is attempting to do the right thing.

We think this regulatory obligation of having to list the jobs with the state and local employment service delivery systems ought to be eliminated, in its entirety. Instead, contractors ought to be obligated to demonstrate that their jobs actually are being posted on the sites that veterans themselves admit they use when they are searching for jobs. For those service men and women currently in the military, who leave the military, and use the military's own outplacement services, those outplacement sources are far more timely, meaningful and efficient to link qualified veterans searching for jobs than the local employment service systems currently set up. The notion that veterans would need to log on and check the employment website of 50 different states, or even more localized websites, is burdensome and frustrating for all parties involved – the states, contractors, and most importantly, the veterans themselves.

Over the course of the last several years since the dissolution of America's Job Bank in 2007, many Industry Liaison Group meetings have featured representatives from VETS, other organizations that pride themselves on being bona fide liaisons between the government contractor community and military members and their families, and the military outplacement offices, themselves. We in the contractor community know that there are vehicles out there that work, and the local employment service delivery system offices do NOT work. Ask the veterans, themselves – when they are searching for jobs, are the state and local employment service delivery systems effective in helping them? We do not oppose the general notion of having to list jobs and make them available to veterans, but we would urge OFCCP to alter the concept of the mandatory listing, altogether.

We doubt that we will be able to persuade OFCCP to abandon the listing entirely, but why not allow the contractors, or even the veterans themselves, to determine which organizations are doing the most effective job of connecting qualified veterans with job openings? There is no doubt in our minds that compliance officers will be able to measure contractor good faith efforts because those candidates who indeed are hired are going to be far more likely to divulge to their employer (once hired) how they found out about the jobs. Although it may be somewhat burdensome to integrate into current application forms and online systems the question, "How did you find out about this job," even integrating that question into the application process is far less burdensome than listing every job with every local employment service. Given what OFCCP is seeking to do in strengthening 60-300.44(f), dealing with outreach and external dissemination, that is a **much** better vehicle to achieve the desired result of improving the employment of qualified veterans than these state job website listings.

It does not take 30 total minutes per contractor to comply with this requirement. Perhaps it takes 30 minutes PER jurisdiction PER job to (a) find the state or local jurisdiction's website,

(b) read through the state or local jurisdiction's online process for creating a User ID and password, (c) input the employer's job requirements into the state or local jurisdiction's format, including making certain that you have the employer's correct FEIN because when multiple businesses operate out of the same physical location and have different FEINs, you have to know which business has the vacancy, (d) check that the listing has been uploaded, (e) print a picture of the screen (because without the picture of the print screen, most OFCCP compliance officers will not believe the contractor when it says its jobs were being listed), and (f) store the screen print in the electronic job file. OFCCP has not taken into account that if an employer is searching for a sales person – who technically could perform the job from anywhere in the country -- under OFCCP's current thinking, the HR person or Recruiter would have to repeat this process dozens of times.

To complicate matters further, OFCCP's regulations require that the employer count the employee in the AAP of its manager. 41 C.F.R. Section 60-2.1(d)(1). In a hypothetical example, an employee is applying for a job in New Jersey, and the employee's manager is physically located in the company's New York establishment. When the OFCCP selects the New York establishment for an audit, and looks at how many individuals were hired, the NJ hire has to get counted in the NY AAP. Now the HR official responsible for gathering materials for the audit is required not only to confirm that NY's employment service delivery system has its jobs listed, but is also responsible for confirming, downloading, and proving that the job that was advertised in NJ was properly listed. She doesn't have the User ID or password for NJ. She has NY. Now she needs to contact her colleague in NJ to get proof that this hire – in NJ, reporting into NY, was indeed listed on the NY state website. The listing obligation doesn't comport with the way AAPs are prepared.

Recruiters are finding it brutally burdensome to comply with the Internet Applicant definition, as it is. It's going to be even more burdensome if OFCCP imposes interval listings on these same employers. If the employer has to list with the local employment service, wait to receive priority referrals from veterans, then post separately with those job boards and web sites that are likely to yield qualified candidates, the record keeping and tracking associated with those job listing obligations are going to be very time consuming, burdensome, and costly.

We urge OFCCP to re-think the mandatory job listings insofar as they are tied to local or state employment service delivery systems. The system is broken, and this is not the right fix. **Meaningful** outreach in 300.44(f) is the right approach.

(2) The (Apparent) Lack of a Central Listing of Government Contractors

Separate and apart from the listing itself, we find it extremely disingenuous for the state employment services to say that there is no centralized list of Federal contractors that they can consult in order to determine if a listing employer is a Federal contractor. The Obama Administration has spent time, effort and taxpayer resources on improving the utility of

databases such as www.usaspending.gov. The Federal Procurement Data System has a new Google-like search feature that makes it very easy to search for a company's name and identify recent contracts.

(3) The Imposition of Referral Metrics

We strongly oppose new paragraph 5 to the EO clause, which will require contractors to maintain records for five years on the total number of referrals it receives from state employment services, the number of priority referrals of protected veterans, and the ratio of protected veteran referrals to total referrals.

First, the tracking of referrals should be maintained by the state employment agencies, not the contractors. On the contractors' side of this equation, we are at the complete whim of the applicant as to whether he or she will disclose honestly and accurately how he or she learned about the vacant job we are advertising.

The simple fact that a state agency referred a candidate does not ensure that the candidate is going to accurately and completely follow a company's job application instructions, but yet OFCCP is imposing on the company the mandatory obligation to record the individual on its applicant log and the reason why the veteran was not hired, when this person may not have been considered for employment for failing to complete the application properly. The HR person will have to enter the veteran's name on the spreadsheet, the agency that referred him/her, and record that the reason the veteran was not considered was because the veteran failed to complete the application process.

The notion that contractors ought to prioritize a candidate simply because that individual is a veteran, and may not be the most qualified person for the job, is fundamentally abhorrent to the notion of equal employment and the further notion that OFCCP is seeking to bar reverse discrimination claims "brought by individuals who do not fall under one of the categories of veterans protected by 60-300" is just as unpalatable. Many of our clients are very concerned that with men predominating among the ranks of veterans, these new obligations are going to work to the disadvantage of otherwise qualified females.

Second, we see no reason to implement a five-year record retention obligation as opposed to the current two-year record retention obligation. It does not improve the likelihood that qualified veterans will be employed. It only increases the burden and costs to contractors.

(4) The obligation to list the EO clause in full

The obligation to list the clause in full ought to differ when it is the federal agency letting out the initial contract than when it is a private employer flowing the clause down to vendors, suppliers, purchasers and other subcontractors. The federal agencies, themselves, ought to be obligated to list the clause in full when they let out a contract. If the clause is not in there, companies ought to be able to rely on the absence of the provision to excuse

them from these obligations. It should not be that the absence of the clause still means that the contractor is obligated to comply with it, pursuant to 41 C.F.R. Section 60-1.4(e).

But assuming that OFCCP is not going to retreat from its position under 60-1.4(e), why should OFCCP care whether the clause is written out in full or incorporated by reference, because it certainly is less burdensome for contractors to incorporate it. The NLRA rights clause was initially proposed to be incorporated verbatim in every contract, and the DOL agreed to permit that clause to be incorporated by reference. To our knowledge, having the clause incorporated instead of being set out in full has not resulted in any covered subcontractors being unaware of their NLRA obligations. Currently, all the regulatory obligations are permitted to be incorporated by reference. We fail to see the need to create a new burden for the veterans affirmative action regulations that would require this clause to be listed verbatim.

The concern on the part of the contractor community is that the veterans obligations do not apply to every downstream vendor, supplier and purchaser. As OFCCP well knows, certain obligations are imposed on subcontractor companies only if they meet (1) the dollar thresholds, currently a single subcontract for more than \$100,000, (2) the employee thresholds, and as to subcontractors, (3) the goods or services they supply are "necessary to the performance" of the government contract.

Although employee thresholds are fairly easy to determine, dollar thresholds are not. Many companies manufacture product or sell services to companies that have both government contract and commercial operations. It is not clear, at all, when a product is sold to a company that has both types of operations whether the subcontractor's goods or services in fact are being sold to the federal agency.

Because the legal interpretation of "necessary to the performance of the contract" is far from clear, most government contractors include in every contract an incorporation by reference clause with the words "as applicable," leaving it to the subcontractor to work with the prime contractor if it needs to determine for itself whether the goods or services it is supplying are necessary to the performance of the prime contract above it.

Repeating the clause, in full, will not resolve the unresolved issue of whether the subcontractor indeed is performing work necessary to the performance of the contractor above it, and it is too intricate an issue to leave to the determination of contract or procurement professionals in every workplace.

If a hospital has an agreement to provide medical services to federal employees pursuant to its HMO contract with the prime contractor above it, but it renders NO medical services in a 12-month period to federal employees, which of its vendors and suppliers need to have the clause inserted in their contracts?

In the next year, the hospital performs four surgical procedures on federal employees, the value of which exceed \$100,000. Which of its approximately 1600 suppliers above the \$50,000 threshold are performing work "necessary to the performance of the contract"? What about a hospital supply company – none of whose supplies were used at all in the four surgical procedures involved in the four FEHBP beneficiaries? Is the procurement person supposed to know which companies need to get the full EO clause in their contracts ahead of time? What about all the multi-year supplier and vendor agreements already in place when a prime contractor decides to enter into a government contract? Do they get new contracts with the EO clause in them? In the middle of the multi-year agreement, or after those existing agreements expire?

Which contracts get the EO clause? All of them?

In response to OFCCP's justification that the clause ought to be included verbatim because it heard from subcontractors at town hall meetings that they had no idea they were covered subcontractors until OFCCP audited them, we find such justification specious. As demonstrated by our examples and the question we pose above, OFCCP's regulatory change does not address that problem. Its only effect is to create more paperwork and additional burden on contractors.

Section 60-300.41 Availability of Affirmative Action Programs

Currently, because the Veterans AAP does not contain any data metrics or company confidential data on the number of hires or applicants, making the program available to non-employees (that is, applicants), is not potentially detrimental to an employer's business.

If OFCCP resists the extensive contractor opposition to the metrics that are about to be imposed, and requires that such metrics be included in annual AAPs, then this section on the availability of AAPs also must be revised.

If the metrics proposals are adopted, this section should read, "Representative portions of the affirmative action program, that do not contain company confidential data, shall be made available to any employee or applicant upon request. The location and hours during which the program may be obtained shall be posted at each establishment. In the event that the contractor has employees who do not work at a physical establishment, the contractor shall inform such employees about the availability of the affirmative action program by other means."

Section 60-300.42 Invitation to Self-Identify

The OFCCP's proposal that government contractors ask candidates to self-identify as a protected veteran is going to cost a lot more to implement than OFCCP has estimated, but at the fundamental core, it's not the invitation to self-identify that concerns our clients; it's

what OFCCP wants government contractors to do with the information that is troublesome. OFCCP has not thought this through.

Companies are going to need a lot of lead time to implement a change to the self-identification process. IT solutions to online application systems are going to require development time, money and resources, and even 90 days is not going to be enough time for some companies that do not have the internal resources to do it themselves. The screen shots themselves need to be altered, and candidates are not going to know how OFCCP defines protected veteran. Companies will need to link to the definition of the four categories, and in turn link to the campaigns for which badges have been awarded. The databases into which the applicant tracking system feeds will need to be modified to accept the additional data.

Section 60-300.44 Required contents of affirmative action programs

1. Section 60-300.44(a) Policy Statement

Little's US clients with foreign parents object to the notion that the CEO is the one and only person who must indicate his or her support for the affirmative action program. We instead support a slightly revised statement, which still gets to the OFCCP's legitimate concern that a very high-level executive reaffirm his or her commitment to affirmative action and nondiscrimination. The third sentence would read instead:

"The policy statement shall indicate the support of the top U.S. executive's support for the contractor's affirmative action program (such as the Chief Executive Officer or the President of a U.S. Division of a foreign parent), provide for an audit and reporting system"

We make this comment against the backdrop that despite our explicit, written direction to an OFCCP District Office to send its scheduling letter and closure letter to the President of all U.S. operations, OFCCP completely ignored the company's and counsel's instructions and sent the letter to the Chief Executive Officer in Canada. International companies with U.S. Operations typically designate a top executive in charge of their U.S. Operations. That person ought to suffice, rather than having to get the foreign CEO's signature.

2. Section 60-300.44(b) Review of Personnel Processes

OFCCP explains in its justification for the changes that "OFCCP's efforts to enforce this requirement in recent years have been complicated by contractors' various, subjective interpretations of what constitutes 'periodic' review."

OFCCP has not engaged in any efforts to enforce this requirement prior to 2010, and certainly not during the Bush Administration OFCCP.

OFCCP is trying to impose two different tracking obligations: (1) the reasons why protected veterans were rejected from employment or promotion and (2) the reasons why projected veterans were rejected from training. It is an entirely different proposition to track all vacancies for which a protected veteran was considered and rejected and all promotions versus tracking only all training programs for which a protected veteran was considered and rejected. The former carries with it substantial and significant burden; the other we believe is relatively minimal burden because we are not aware of companies that are refusing to train protected veterans because of their veteran status. If OFCCP is intent on converting this section from permissive to mandatory, remove the obligation for government contractors to have to record the reason for every single protected veteran's rejection from employment and promotion or this section will be extremely burdensome to administer and track. As further noted in the parallel comments we submitted in response to OFCCP's proposed revisions to the Scheduling Letter, most clients do not track noncompetitive promotion "pools." They have no way of knowing when a protected veteran was considered, but not given, a noncompetitive promotion.

3. Section 60-300.44(c)

How, specifically, does OFCCP expect an employer to find the resources, both in terms of cost and time, to review every year, year after year, the physical and mental qualifications of thousands of jobs? If the jobs do not change from year to year, why does the employer have to review them? If an employer hires 250 call center operators each year, is OFCCP expecting evidence that the HR person reviewed the physical and mental requirements of the same job 250 times? What evidence is OFCCP expecting from employers to prove that the review took place? Will a copy of the reviewed job description suffice, with the reviewer's initials and date? What if the employer has 300 different jobs? Does this really need to be checked each year if only a handful of those jobs changed or evolved in any way?

OFCCP wants to require employers to list the physical and mental job qualifications for each job opening during the AAP year and provide an explanation as to why each requirement is related to the job to which it corresponds. OFCCP asserts that such qualifications "should already be available from the contractor's job postings," but OFCCP is not correct in making such an assumption. Most companies' job advertisements do not list every physical and mental qualification of the job. For example, if a company is seeking a financial analyst, the company is more likely to describe the education, types of prior relevant experience, and software familiarity it seeks in the successful candidate. It is not going to prepare a job vacancy announcement to upload into Career Builder that identifies how long the successful person will be required to sit behind a desk, whether the work environment is quiet or noisy, or how much bending, standing, stooping, or lifting is involved. Does the employer really need to identify 'ability to concentrate on numbers, formulas and calculations' as an explicit mental job requirement? Is OFCCP going to cite the employer under this section if it doesn't list every mental requirement needed for the position?

If OFCCP is now going to spend time during an audit going through boxes and boxes of looseleaf binders with job descriptions, questioning the physical and mental requirements of each and every job opening – not jobs filled – jobs open, it is going to needlessly prolong every compliance review.

4. Section 60-300.44(f)

The concept of a linkage agreement in and of itself is not burdensome, and on behalf of our client base we are cautiously optimistic that the DOD TAP resources will prove to be a good source of qualified candidates, along with the Employer Resources section of the National Resource Directory. But we fail to see why the OFCCP cannot impose the number of linkage agreements on companies without mandating how many of which type the contractor is required to use? The regulation reads like an I-9 form -- one from Column A or one from Column B and one from Column C. What happens if it turns out for a contractor that having two (or even three) from column B, only, works well for the company? Will the contractor be found in violation of the regulations?

Insofar as the notification to subcontractors are concerned, prime contractors already are including the EO clause in their contracts. Why is there a separate, subsequent notification required?

We have a single (one) hospital client that ran an accounts payable query at the \$50,000 level. It came up with 6,800 recipients. At the \$100,000 level, there were over 5000 names still on the list. OFCCP's burden estimate states that it would take the contractor five (5) minutes to prepare the notification and notify its subcontractors via the Internet in a group email, and 1 minute to add or subtract any additions or deletions to the group. It would take our client substantially more than five minutes to create this alleged email list.

OFCCP also proposes that the contractor document its linkage agreements and the activities it undertakes in order to comply with paragraph (f) for five (5) years. We see no reason to expand the current requirement of two years.

With regard to (f)(2), OFCCP's explanation states that the "[t]he efforts listed in paragraph (f)(2) are largely identical to the efforts that are suggested in paragraphs (f)(2) through (f)(5) and (f)(7) through (f)(8) of the current rule." "Largely" seems to gloss by new paragraph (f)(2)(vi), which imposes the new requirement that "[t]he contractor, in making hiring decisions, **shall** consider applicants who are known protected veterans for **all** available positions for which they may be qualified when the positions(s) applied for is unavailable." Some of our larger clients have thousands of positions open, world-wide. It is not possible for our clients to consider every protected veteran for every vacant position for which the protected veterans might be qualified, including positions the veterans never applied for.

This requirement seems to us to be a *de facto* rescission of the Internet Applicant rule and OFCCP FAQs thereunder, which give contractors discretion to apply neutral criteria – including whether a candidate actually expressed interest in a particular position – in determining who to consider for each job title it fills.

Subsection (f)(2)(vi) needs to be rescinded. It is not possible to be able to consider veterans for all jobs that may be open throughout a company with operations all over the world.

5. Section 60-300.44(g)

OFCCP needs to acknowledge that not all employers have a policy manual, and those that do may have it available only on their intranet. We would recommend that OFCCP consider modifying 300.44(g)(2)(i) to read as follows: “Include it in the contractor’s policy manual or on the company’s intranet where similar human resource and EEO pronouncements are found;”

6. Section 60-300.44(k)

First, the contractor community has no reassurances, at all, that referral agencies are going to separate accurately priority veteran referrals from other referrals before sending them to the contractor to be tracked. We also recall that several state agencies in the not-too-distant past were found to have violated the Executive Order and the Uniform Guidelines on Employee Selection Procedures by deciding on their own to use unapproved tests or unvalidated selection criteria as a basis for vetting referrals. Not surprisingly, many contractors are wary of having such partnerships being imposed on them as a future condition of doing business with the federal government.

Even assuming all these valid concerns could be fully resolved, OFCCP seeks to impose eleven (11) annual computations on government contractors, only three of which make sense to us.

The eleven computations are as follows:

1. The number of priority referrals of veterans protected by this part that the contractor received from applicable employment service delivery systems(s);
2. The number of total referrals that the contractor received from applicable employment service delivery system(s);
3. The ratio of priority referrals of veterans to total referrals (referral ratio);
4. The number of applicants who self-identified as protected veterans pursuant to § 60-300.42(a), or who are otherwise known protected veterans;

5. The total number of job openings and total number of jobs filled;
6. The ratio of jobs filled to job openings;
7. The total number of applicants for all jobs;
8. The ratio of protected veteran applicants to all applicants (applicant ratio);
9. The number of protected veteran applicants hired;
10. The total number of applicants hired; and
11. The ratio of protected veterans hired to all hires (hiring ratio). The number of hires shall include all employees as defined in § 60-300.2

We object to collecting data on all but (9), (10), and (11). Everything else contravenes existing regulatory obligations pursuant to the Internet Applicant definition and record keeping obligations under 60-1.12(a).

Number 1 requires the contractor to track veterans who mis-self-identified or misunderstood whether they were entitled to priority referral, are not qualified, veterans who are referred after the close date of the job, and veterans who do not complete the employer's application process correctly, among other meaningless data points.

Number 2 includes individuals mentioned in our objections to number (1), and also includes applicants who the contractor may never get around to considering if the number of expressions of interest far exceeds the recruiters' ability to get through all of them in a reasonable amount of time or if the client has elected to use an approved data management technique to limit the number of individuals considered.

Number 3 suffers from the same defects as (1) and (2), for the reasons noted above.

Number 4 includes applicants who are not qualified and may not have been actually considered by the employer for a particular position.

Number 5 includes jobs cancelled and jobs for which applicant flow data has begun to be collected but for which no selection decision yet has been made.

Number 6 suffers from the same defects as (4) and (5).

Number 7 exceeds contractors' obligations under the Internet Applicant definition (§ 60-1.3) and contradicts the record keeping obligations (§ 60-1.12).

Number 8 requires contractors to track individuals who did not meet the basis qualifications for the position (again, in contravention to the record keeping requirements of § 60-1.12).

Section 60-300.45 Contractor-established benchmarks for hiring

We oppose the imposition of the OFCCP's hiring benchmarks because these metrics have no relationship at all to the population of qualified candidates eligible for employment.

Benchmarking qualified hires against (1) the percentage of (both qualified and unqualified) veterans in the civilian labor force and (2) the number of (both qualified and unqualified) veterans who were participants in the state employment service in the state where the contractor's establishment is (which ignores 60-2.1(d)), is a meaningless number, and is not going to encourage government contractors to hire veterans, at all.

For five years, we have trained HR departments and recruiting departments on how to comply with the OFCCP's definition of Internet Applicant. OFCCP knows that not every candidate who expresses an interest in employment actually is considered for the vacancy, especially in these economic times when dozens (if not hundreds) of candidates are expressing an interest in vacant jobs. Recruiters don't get around to looking at all the expressions of interest that come in. But of those that actually are considered, they can determine who is qualified and who is not qualified.

The better benchmark is the (a) the total number of considered candidates who were contacted for an interview, and the total number of considered candidates who are veterans who were contacted for an interview, (b) the percentage of qualified veterans who were interviewed compared to the percentage of qualified non-veterans who were interviewed, and (c) the percentage of interviewed veterans who were hired. This is a much less onerous approach and probably every bit as effective, if not more so, than imposing incredibly burdensome data tracking requirements on contractors. With OFCCP's approach, rather than focusing on the outreach and recruitment of veterans, which is what OFCCP is trying to achieve, our clients are more likely to spend resources on the data tracking requirements. An emphasis on qualitative, rather than quantitative, measures will mean that the contractor community will emphasize the qualitative over the quantitative. OFCCP's proposed approach will cause contractors to emphasize the data tracking minutia to the detriment of tangible, meaningful, successful outreach. Robust enforcement of the already existing regulatory scheme will best achieve OFCCP's ends and do so in a way that does not create massive new regulatory burdens – the cost of which for many of our clients will exceed the \$100,000 contract threshold that triggers compliance with these requirements.

If the Department of Labor wants to promote the hiring of veterans, it has to start off with the proposition that what it is really interested in is the hiring of qualified veterans. Show the contractor community that the OFCCP has no intention of spending its time during audits second-guessing the hundreds of day-to-day decisions that recruiters and HR

personnel made as to who was qualified, and who was not qualified, for the vacant jobs. Treat the recruiters and HR personnel making these decisions as professionals, and measure their ability to bring qualified veterans in the door from the point at which these veterans were determined to be qualified.

In order for OFCCP to justify benchmarking hires against such meaningless data, OFCCP has to believe that government contractor recruiting departments are intentionally weeding out qualified veterans, simply because they are veterans, and we find that notion preposterous. There is simply no evidence of this. Moreover, OFCCP has done nothing to measure the effectiveness of its renewed emphasis on the existing veterans regulations, after the prior administration largely ignored them for eight years.

Section 60-300.60 Compliance evaluations

Littler Mendelson opposes the new sentence being added to 60-300.60(a)(1)(i) regarding the temporal scope of audits. OFCCP is not entitled to examine information after the date of the scheduling letter, and the Administrative Law Judge (ALJ) held so in OFCCP v. Frito-Lays [sic], Inc., 2010-OFC-00002 (July 23, 2010).

Contrary to OFCCP's statement that this language does not represent a change in policy or new contractor obligations, it is the **complete opposite** of what the current state of the law is, and OFCCP's justification claim that this is a "long-held position" was explicitly **rejected** by the ALJ: "Considering the lack of evidence that OFCCP has ever insisted on this type of data, it would appear that OFCCP's position in this matter [that it can extend the review period of an audit past the date that the audit was initiated] is a marked departure from how OFCCP has interpreted its own regulations and has conducted its compliance reviews in the past."

Moreover, as an ALJ has held differently regarding OFCCP's women and minorities regulations, this change will create one standard in veterans audits and a different standard in women and minorities audits, as OFCCP has not amended its women and minorities regulations, to change them from how the ALJ in Frito-Lay interpreted them.

We have at least half a dozen clients with open audits dating back to 2007. That's four years it has taken OFCCP to get through these audits (and counting). If these clients were expected to be holding onto data from 2005 and 2006 (supporting the 2007 audit), as well as four intervening years of audit data, the storage costs would be exorbitant.

OFCCP cannot be permitted to begin an audit and allow these audits to run forever with no ending date. Contractors need a data beginning period and a data ending period. The beginning period is two years prior to the letter's date, and the ending period is the letter's date.

OFCCP already has the ability to ascertain whether violations have continued or have been remedied – the Conciliation Agreement process. If any company has been found to have violated any of the laws or regulations that OFCCP enforces, OFCCP can resolve the violations via conciliation agreement, and these conciliation agreements have progress reports. The contractor can be compelled to submit current data, or future data, for a defined period of time (1 year, 2 years, 3 years) to show OFCCP that the violations for which it has been cited are no longer occurring. But in order to enter into the conciliation agreement phase of the audit, OFCCP has to reach conclusions on the data it receives. This process has worked for the past 33 years, and we see no justifiable basis to alter it.

Section 60-300.80 Recordkeeping

For the reasons set forth above in our discussion of 300.44 (f)(4), (k), and 300.45(c), we oppose extending the current two year record keeping obligation to a five-year record keeping obligation. All this is going to do is increase contractor record retention storage costs and exponentially expand the length of OFCCP audits. There is going to be so much data to get through that the compliance officers are not going to be able to close any audit in under a year.

Section 60-300.81 Access to Records

Perhaps OFCCP has gotten better at maintaining the confidentiality of contractor records, but we of course know better from personal experience. As recently as 2009, a compliance officer in OFCCP's South Carolina area office sent contractor confidential applicant and hire data out of the OFCCP's secure systems to her personal home email account on BellSouth's servers, among other problems we have encountered first-hand. It took OFCCP nearly a week to track down what happened to the data and to report back to the contractor about the extent of the security breach.

Moreover, we also can provide first-hand evidence of compliance officers losing information that our clients have sent to OFCCP for audits. On too many occasions to count on two hands, and more so in the Midwest Region than any other region, we have been called upon to re-send information that OFCCP should have in its possession, but strangely cannot locate. The notion that the government cannot keep track of the records that contractors submit for audits refutes the OFCCP's basis for wanting records in the format it dictates.

If the contractor wants to send the records via encrypted CD, it should not be up to OFCCP to demand that the information be emailed unencrypted. If the contractor wants to send PDFs, it should not be up to the OFCCP to demand that the contractor send hard copies. The time and cost involved in producing records must be taken into account, and the United States federal government should not be imposing this record production format on private companies.

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Contractors should not be required to produce records to OFCCP in the format selected by OFCCP. Contractors should be permitted to determine the form and manner in which their own records are being produced to OFCCP.

Thank you for the opportunity to comment on the OFCCP's proposal to amend the Veterans' regulation. We appreciate your consideration of our comments. Please do not hesitate to contact us should you have any questions.

Respectfully submitted,

LITTLER MENDELSON, P.C.

cc: Littler Mendelson OFCCP Practice Group