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D.C. Circuit Upholds OFCCP's Disability Regulations

By Allen Smith 12/16/2014

Office of Federal Contract Compliance Programs (OFCCP) regulations requiring certain steps to improve federal contractors' employment of people with disabilities has survived a legal challenge at the federal appellate court level.

The U.S. Circuit Court of Appeals for the District of Columbia Circuit ruled Dec. 12, 2014, that the U.S. Department of Labor (DOL) did not exceed its statutory authority or act arbitrarily under Section 503 of the Rehabilitation Act when it required contractors to invite job applicants to disclose if they have a disability. The DOL also acted within its authority by adopting a "utilization goal" of 7 percent to serve as a target for the employment of individuals with disabilities, the appeals court ruled.

Section 503 requires federal contractors to "take affirmative action to employ and advance in employment qualified individuals with disabilities."

Reasons Behind the Regs

For years, the Labor Department required only that contractors invite individuals who were offered jobs to advise the contractors if they believed they were covered by the Rehabilitation Act. Doubting that the existing regulations were sufficiently advancing the employment of qualified individuals with disabilities, the DOL revised its regulations to require contractors to extend this invitation to job applicants and analyze the resulting data.

The revised regulations, issued Sept. 24, 2013, estimated that 5.7 percent of the civilian labor force has a disability. An additional 1.7 percent were estimated to be discouraged from participating in the workforce because of discrimination. Adding these figures together, the OFCCP arrived at a utilization goal of 7.4 percent, then rounded down to 7 percent.

"The goal is not a rigid and inflexible quota which must be met," but rather "is intended solely as a tool," the OFCCP noted in its final rule.

For contractors with 100 or fewer employees, the goal applies to the employer's entire workforce. For larger contractors, the goal applies to each job group in the workplace.

Challenges Rejected

Associated Builders and Contractors Inc. (ABC), a trade association representing construction firms that has many federal contractor members, sued in district court, alleging that the final rule is beyond the OFCCP's statutory authority and is arbitrary and capricious. The district court granted summary judgment to the OFCCP (/legalissues/federalresources/pages/ofccp-rule-upheld.aspx), and the appeals court affirmed.

ABC noted that Congress repeatedly amended the Rehabilitation Act without disapproving OFCCP's implementation of the statute, suggesting tacit approval of the agency's old interpretation. The appeals court disagreed. "Although the previous regulations included neither a pre-job-offer data-collection requirement nor a utilization goal, OFCCP never said it lacked authority to include such requirements or that it would not do so in the future," the D.C. Circuit said. "In other words, although OFCCP did not make use of its full panoply of powers with the earlier regulations, powers are not lost by being allowed to lie dormant."

ABC also advanced, and the court rejected, several challenges that the 2013 regulations were arbitrary and capricious:

- ABC said the OFCCP has failed to explain the need for the final rule, with the agency noting only that the continuing disparity in employment between nondisabled individuals and people with disabilities exists in the workplace population as a whole, not among federal contractors. But the appeals court held that the OFCCP "had no obligation to make such a particularized finding."
- ABC claimed the data collection on job applicants is meaningless because there is no way to tell if they are qualified. However, "the word 'qualified' refers to the beneficiaries of affirmative action; it does not limit the kind of affirmative action OFCCP can require," the court said.
- ABC asserted that the OFCCP has not explained how the new data collection will help anyone better monitor contractors' hiring of qualified individuals with disabilities. But the appeals court disagreed, saying that the "OFCCP has more than satisfied its obligation to provide a reasoned explanation and to draw a connection between the problem (the low workforce participation of individuals with disabilities) and the regulatory solution (more refined data collection)."
- ABC said that when calculating the "discouraged worker effect," the OFCCP rejected evidence that many people with disabilities are unable to work because of the "disqualifying

nature of their disabilities." However, the court observed that the "OFCCP knew that the underemployment of individuals with disabilities could have different causes and concluded that at least a portion of the gap is due to discrimination."

The OFCCP has recognized that "while not perfect, the goal will provide a yardstick against which contractors will be able to measure the effectiveness of their equal employment opportunity efforts," the appeals court noted.

This decision is *Associated Builders and Contractors Inc. v. Shiu*, No. 14-5076 (D.C. Cir. 2014).

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