

CHRO Views on OFCCP's Disability Affirmative Action Proposal

**Chief Human Resource Officer Concerns
With the U.S. Department of Labor's
Office of Federal Contract Compliance Programs
Notice of Proposed Rulemaking Implementing the
Non-Discrimination and Affirmative Action Regulations of
Section 503 of the Rehabilitation Act of 1973**

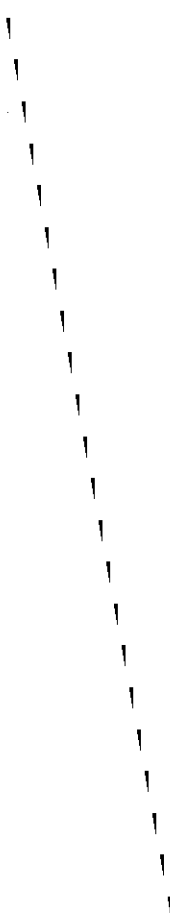
September 5, 2012
12-63





Table of Contents

I. Broad CHRO Concerns About the Proposal	Page 1
Negative Impact on Corporate Culture of Inclusion	Page 1
Fundamental Change in Affirmative Action	Page 3
Proposed Rule Is Impossible to Comply With	Page 4
Impact of Substantial New Compliance Costs on Economic Recovery	Page 5
Questioning the Value of Federal Contracts	Page 5
Failure to Seek Consensus	Page 6
II. Utilization “Goal”/Quota	Page 7
Lack of Reliable Data	Page 7
Applying the “Goal” to Each Job Group	Page 8
Impact on the Existing Workforce	Page 8
Failure to Recognize Other Constraints on Employer’s Hiring Options	Page 9
Dilution of Efforts to Hire Those Most Difficult to Employ	Page 9
Social Security Disincentives	Page 10
III. Self-Identification and Consideration of Applicants for Other Positions	Page 11
Compelled Violation of Americans with Disabilities Act	Page 11
Lack of Reliability Undercuts Required “Goals”	Page 11
Getting Employees and Applicants to Respond Accurately	Page 12
Annual Surveying of Employees	Page 12
Consideration of Applicants for Other Positions	Page 13
Confidentiality Concerns	Page 14
IV. New Administrative and Paperwork Burdens	Page 17
Internet Applicant Rule	Page 17
V. Formal Reasonable Accommodation Procedures Beyond the Requirements of the ADA	Page 19
Rigid Timeframes for Processing Requests	Page 19
Mixed Responses to Formalized Processes	Page 19
VI. Linkage Agreements and Other Outreach	Page 21
Concerns Regarding Capacity	Page 21
VII. Conclusion	Page 23



About the Association

HR Policy Association is the lead organization representing chief human resource officers of major employers. The Association consists of more than 335 of the largest corporations doing business in the United States and globally, and these employers are represented in the organization by their most senior human resource executive. Collectively, their companies employ more than 10 million employees in the United States, nearly 9 percent of the private sector workforce, and 20 million employees worldwide. They have a combined market capitalization of more than \$7.5 trillion. These senior corporate officers participate in the Association because of their passionate interest in the direction of human resource policy. Their objective is to use the combined power of the membership to act as a positive influence to improve public policy, the HR marketplace, and the human resource profession. For more information visit www.hrpolicy.org.



I. Broad CHRO Concerns About the Proposal

General Elements

The Proposed Rule Would Require Federal Contractors To:

- Attain a 7% “goal” for individuals with disabilities in each job group. DOL is also considering a 2% “goal” for those with undefined “severe disabilities.”
- Invite job applicants to “self-identify” pre-offer as having a disability and those who self-identify must be considered for other available positions.
- Conduct an annual survey of existing employees to “self-identify.”
- Adopt rigorous new procedures for providing a “reasonable accommodation” for employees with disabilities.
- Maintain written records of all employment decisions involving individuals with disabilities, including rationales.

On December 7, 2011, the U.S. Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) published a notice of proposed rulemaking (NPRM) that would substantially revise the affirmative action and non-discrimination requirements regarding individuals with disabilities for federal contractors under Section 503 of the Rehabilitation Act. [For a brief overview of the proposal, see the “General Elements” on this page.] The immediate reaction of our members—the chief human resource officers of over 335 major companies, most of which are federal contractors—was one of the highest levels of concern about a proposed policy we have ever heard in the 45 year history of the association. It was clear that our members believed that the proposal would fundamentally transform affirmative action from a focus on federal contractors’ good faith efforts to a rigid system of numerical “goals” that would operate very much like quotas.

Despite the sweeping changes being proposed by the 50-page proposal, federal contractors were initially only given 60 days to submit comments—a period which was later extended by 14 days, despite requests from the business community and key Members of Congress for a more meaningful extension.

During that 74 day period HR Policy had extensive contacts with its members, including several conference calls with their affirmative action compliance experts, and we eventually filed two sets of extensive comments before the deadline. However, it was clear that we had only touched the surface of our members’ concerns.

Thus, throughout May and June of 2012, we conducted a series of day-long regional meetings (in Atlanta, Boston, Chicago, Minneapolis-St. Paul, and Washington, DC) in which over 120 representatives from our member companies participated, providing us substantial input on the potential impact of the proposed regulations. This position paper represents that input, as well as the results of our annual CHRO survey conducted in February 2012. [The survey covered a number of topics but the results concerning the OFCCP proposal are highlighted herein.]

Negative Impact on Corporate Culture of Inclusion. The NPRM raises a number of both broad and specific objections but the one over-arching concern is its impact on the ability of companies to maintain a culture of inclusion. In their policies regarding individuals with disabilities, companies put the focus on their abilities, seeking to minimize the impact and visibility of their disabilities through “reasonable accommodations” that enable them to perform “the essential functions of the job.” This is not only to ensure compliance with the requirements of the Americans with Disabilities Act (ADA)—from which these phrases are drawn—but because it is simply good human resource policy.

This culture of inclusion not only draws individuals with disabilities into the workforce but it enables the companies to benefit from the unique skills and talents of the individual that their disability may otherwise preclude. As one company observed, “We have spent years trying to get the workforce to think about abilities not disabilities. This will run counter to that and we will be bringing attention to issues that are not relevant to performance of the job.” Interestingly, the virtual workplace has further diminished the visibility of disabilities and thus the likelihood of discrimination. One company noted that its hiring managers often hire individuals without even having a face-to-face meeting with them. One can assume that such instances will only increase in coming years.

The requirement in the NPRM that companies initiate procedures for encouraging both applicants and current employees to self-identify and therefore highlight their disabilities runs completely counter to this approach. Indeed, that is one of the fundamental reasons why asking applicants to “self-identify” is unlawful under the ADA. As one company observed, “self-identification surveys will create a culture of distrust,” noting that “the workforce already distrusts what we do with the medical information that is collected.”

Moreover, by also requiring companies to meet specific utilization “goals”—which likely will operate as *de facto* quotas—within each job group, the companies themselves are incentivized to encourage applicants and employees to proclaim their disabilities simply so that the company can ensure compliance with the rigid artificial thresholds dictated by OFCCP. Furthermore, as will be discussed further below, the requirement that the confidentiality of the self-identification by applicants be maintained is a doomed aspiration. The rigorous procedural requirements that come into play once an applicant self-identifies, requiring a consideration that is distinctive from other applications, will often make it widely known throughout the company that the applicant has a disability.

The requirement that federal contractors adopt meticulous, formalized procedures for handling requests for “reasonable accommodations” of disabilities will have a similar impact on the culture of inclusion. The ADA already contains strict standards that companies ignore at their legal peril. But the reality is that most companies are already engaged in very proactive approaches to providing accommodation, often without distinguishing those driven by “disabilities” that meet the legal ADA definition. While there are wide variations in company practices in this area, a consistent guideline is to maintain the balance between meeting employee needs and minimizing the differences among employees. In contrast, the rigid requirements of the NPRM would highlight those differences while turning what is currently a process of reaching mutual

**CHRO Survey 2012
Question 1**

OFCCP describes the proposal as a "sea change" in its enforcement of the affirmative action requirements of Section 503. It says the "purpose is to establish a benchmark," not a "quota." But if a job group fails to meet the benchmark, enforcement actions will lead to conciliation agreements that impose numerical goals. How do you view the practical impact of the 7 percent requirement if the proposal became a final regulation?

- 32% It is not a benchmark, it is a quota
 - 50% It is a benchmark, but contractors will need to treat the requirement as a quota to avoid enforcement actions and debarment
 - 6% We do not see this requirement as a quota; rather, we believe that as long as we are making good faith efforts to reach the 7 percent level our company will not become subject to OFCCP enforcement actions
 - 4% Other
 - 8% No opinion
-

accommodation of personal and business needs into a potentially confrontational approach that focuses on whether all aspects of the formal procedures are being followed.

Consistently throughout our meetings we heard a concern that most workplace situations involving accommodations for disabilities are handled through traditional HR procedures, ensuring consistency with the corporate culture which is invariably heavily influenced by HR practices and procedures. As one company observed, "This would shift all responsibilities to the compliance side which will take it away from the personal interfaces that define HR. We are currently using good business/HR practices, but will migrate to a total compliance program that is focused on hitting the numbers. Thus, the compliance function will become more important than the HR function."

Fundamental Change in Affirmative Action. HR Policy and its members strongly support affirmative action and the goal of including qualified individuals with disabilities in the workforces of government contractors. Indeed, HR Policy members have been at the forefront of employer efforts to adopt and expand on the basic principles of fundamental fairness and a "level playing field" for all applicants and employees. At every stage in the long history of affirmative action, HR Policy members have been leaders in achieving the goals of affirmative action by recruiting and hiring people on a non-discriminatory basis without regard to membership in any protected group.

Thus, companies have successfully developed and embraced affirmative action in a manner that meets its goals of including those historically excluded without crossing into the "reverse discrimination" that quotas inevitably entail. This is a very delicate balance. That balance would be destroyed by the NPRM, which would establish a precedent potentially affecting all areas of affirmative action.

The OFCCP has sought to downplay this concern, providing assurances that the NPRM would not establish "quotas" but instead "aspirational but enforceable goals." Our member companies are not convinced by this rhetoric and, whether it is intended by OFCCP as such or not, all indications are that the "goals" would effectively become quotas. (Thus, hereinafter we will use the word "goals" in quotes.) In the annual CHRO survey, conducted two months after the proposal was issued, giving our members sufficient time to analyze its potential impact, 32 percent said they believe it is in fact a quota and an additional 50 percent said they would treat it as one. Only 6

percent answered that it is neither a quota nor would they treat it as one. [See Question 1.] When asked this question in our regional

CHRO Survey 2012
Question 2

[OFCCP's proposal] requires that contractors must establish a goal of having 7 percent of all employees in each of your company's job groups be persons with disabilities. How difficult will it be for your company to achieve this goal?

- 80% Virtually impossible
- 20% Very difficult, but achievable
- 0% Do not anticipate any difficulties achieving the goal

Question 3

OFCCP is considering requiring that 2 percent of all employees in each of your company's job groups be persons with severe disabilities. How difficult will it be for your company to achieve this additional goal?

- 84% Virtually impossible
 - 16% Very difficult, but achievable
 - 0% Do not anticipate any difficulties achieving the goal
-

meetings, the percentages were even higher, with total unanimity in some meetings.

The reality is that OFCCP is a very powerful enforcement agency, with numerous enforcement tools and remedies at its disposal, including the ultimate “death penalty” of debarment from federal contracts. Based on its historical track record under administrations of either party, our members’ experience with the agency leaves them with a firmly held belief that, if the agency finds they have not met their “goals”—however “aspirational” they may be—the agency will then leave no stone unturned in rooting out what it believes is the cause of the company’s failure, effectively requiring the company to prove its innocence. The only way to avoid this prosecutorial attention would be to meet or exceed the “goals.”

As one company noted, “The concern is from a conciliation perspective. Maybe they don’t get you on this but ultimately some other misstep will cause you to enter into a conciliation agreement and we are concerned about having any markers on our record. OFCCP calls it an aspirational goal, but failure to meet the goal will lead to enforcement actions.”

Proposed Rule Is Impossible to Comply With. Even in the face of the aggressive enforcement of the NPRM’s new requirements they anticipate from OFCCP, no company that participated in our meetings believes that successful compliance would be possible. Not a single company believed it would be able to meet the utilization “goals” in every single job category in every single establishment. [This was even stronger than the results of the CHRO survey. See Questions 2 and 3.] They reach this conclusion through a combination of: 1) disbelief that there is a sufficiently available qualified workforce in each job group and 2) a recognition that, in many job groups involving significant physical or intellectual capacity, many individuals with certain disabilities will be categorically excluded, thus shrinking the pool even further.

Moreover, they question why the administration is not putting a greater focus on the removal of existing disincentives in the Social Security Disability Insurance program that effectively precludes 8.8 million individuals who receive disability payments from participating in the workforce because their benefits are conditioned on their abstaining from employment if they make more than \$12,120 per year. This effectively imposes a cap on the number of individuals with disabilities who are available to work more than 30 hours per week year-round.

Even in job groups where they may in fact reach the goals, the companies are convinced they not will be able to prove it to OFCCP. The self-identification requirement relies totally on the willingness and ability of applicants and employees to self-identify their disabilities. There are numerous impediments to this reliance, starting with the murky legal definition of “disability” that even the legal community struggles with, and ending with a strong reluctance by many with disabilities to disclose them, for a variety of reasons.

In addition to asking applicants, the NPRM requires employers to demonstrate compliance with the utilization “goals” through an annual survey of existing employees, asking them to indicate anonymously whether or not they have a disability. Employee surveys are notorious for having low levels of participation and, in this case, the employer would have no way of knowing who did and did not participate, let alone whether they answered the question truthfully. Thus, even if the goals could be achieved, there is no certainty or even reasonable expectation that it could be demonstrated to OFCCP investigators. (The concerns regarding the self-identification requirements are discussed more thoroughly in section III below.)

**CHRO Survey 2012
Question 4**

OFCCP estimates that the compliance cost for the proposed rule will be \$473 for each establishment or facility a federal contractor may have.

Do you believe this cost estimate is:

82%	Too low
17%	Not sure
1%	Too high
0%	About right

This has led many companies to question the value of pouring significant resources into a compliance effort that is doomed to failure. Some believe that their best course may be to continue with their current good faith efforts under Section 503 along with strict compliance with the Americans with Disabilities Act and hope to avoid an OFCCP audit.

Impact of Substantial New Compliance Costs on Economic Recovery. Companies are of a unanimous view that the imposition of significant new compliance costs at a time of a fragile economic recovery makes no economic sense and creates yet another disincentive to creating jobs in the United States. The proposal would impose immense new paperwork and data collection burdens on the contractor community for what our members believe is likely to be an almost negligible result in hiring individuals with disabilities. The time and costs involved would inevitably draw away from resources devoted to “growing the business” which in turn could increase employment. Because no company has yet implemented the NPRM’s requirements, estimates of the potential costs varied significantly, though all agreed that the \$473 per establishment estimated by OFCCP was ludicrously low. [See CHRO survey question 4.] Many also questioned how OFCCP could be adding such significant costs for federal contractors at a time when they are being pressed by their federal contracting agencies to reduce their costs.

Questioning the Value of Federal Contracts. Because of these costs—and the exposure to substantial new potential non-compliance liability—a number of companies questioned whether they would continue to maintain their federal contracts if the NPRM is

implemented. For some companies, this would not be an issue because of the enormous volume of business they do with the federal government. However, for others, particularly those in certain industries such as retail and hospitality, that volume is a small portion of their overall revenues. As one company noted, “You don’t want to turn away business but at some point you cross the line where the cost of the business exceeds the benefits.” We heard repeatedly from those companies that their continued participation in those contracts is now an open question because of the NPRM. Because only a small percentage of their workforce is engaged in federal contract activity, their entire workforce is subjected to the regulatory rigors of the OFCCP, which are already substantial. Their questioning of those contracts should thus come as no surprise. Yet, if they were to back away, it would significantly reduce the healthy competition that now exists for the federal contracts for which they compete.

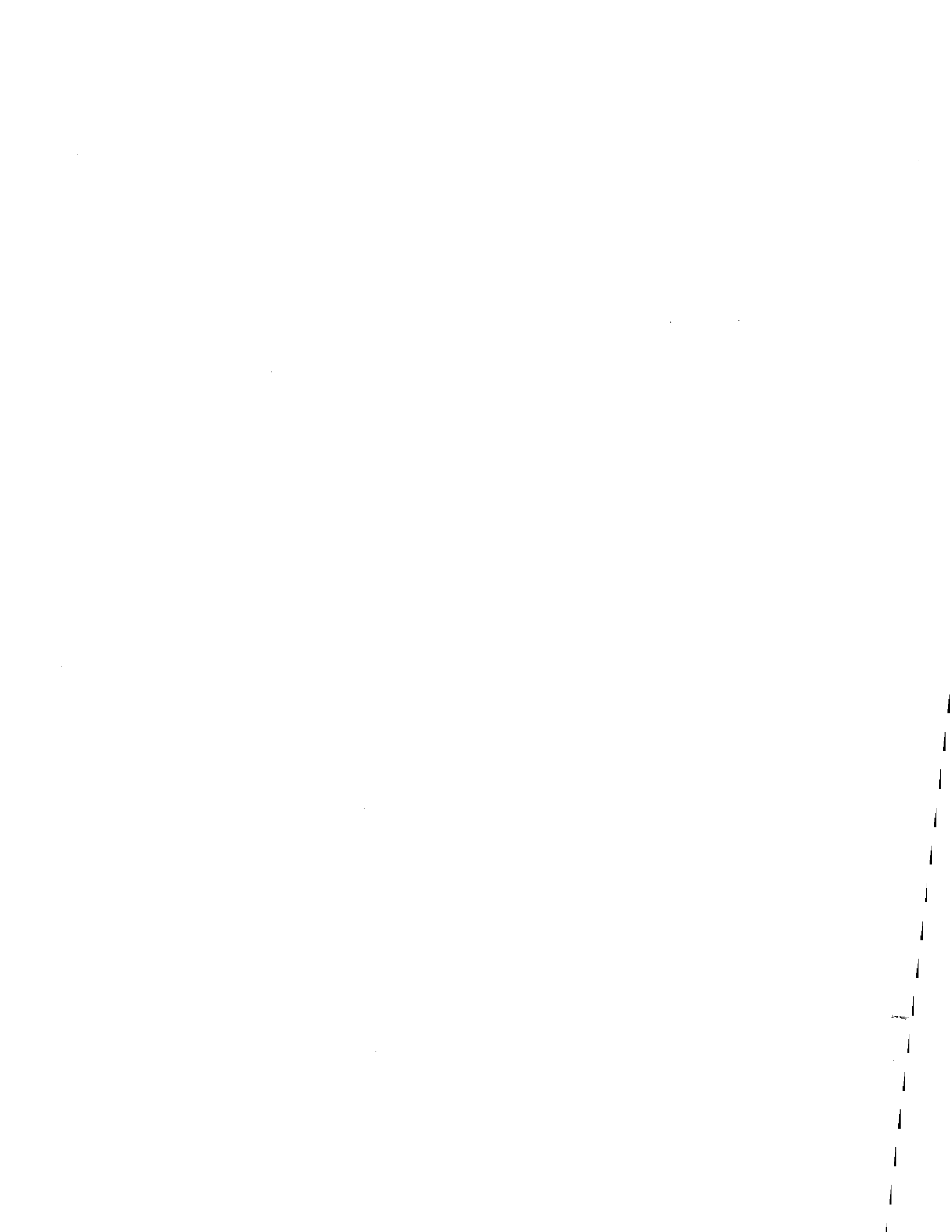
Failure to Seek Consensus. Finally, our members find OFCCP’s approach both frustrating and insulting to what they consider their good faith efforts to employ and integrate individuals with disabilities into their workforce—efforts that even OFCCP is not questioning other than to say they are “not enough.” Thus, when OFCCP suggests that they go beyond good faith efforts, they question what is meant by that. They are concerned that, rather than working with them to find out ways to achieve better results, OFCCP believes it can increase the employment of individuals with disabilities by administrative fiat. Yet, in the past, when our member companies have been called upon to help improve federal employment disability policies—as in the case of the Americans with Disabilities Act Amendments Act of 2008—they have responded by sitting down with disability advocates to fashion a workable approach. They believe that the failure of the OFCCP to adopt such a collaborative approach to improving the 503 regulations is the principal cause for the set of unworkable proposed rules for which compliance is impossible.





**ANNUAL FEDERAL CONTRACTOR REPORTING
COMPARISON TABLE
January 31, 2011**

Category	2010 VETS-100A	2010 VETS-100	2009 VETS-100A	2009 VETS -100	2008 VETS-100A
Total Federal Contractors	13,536	8,880	13,011	11,919	
Single Establishments	9,664	6,461	10,618	9,717	
Multiple Establishment Organizations	5,665	3,543	7,340	4,861	
Multiple Establishment Hiring Organizations	208,435	85,998	144,896	76,631	
Multiple State Consolidated Reports	61,626	17,099	26,684	13,964	
Total Reports Submitted	285,390	113,101	190,190	105,251	
Regular Vietnam Era Veterans		217,600	n/a	199,055	
Regular Special Disabled Veterans		49,368	n/a	45,800	
Recently Hired Vietnam Era Veterans		15,968	n/a	14,285	
Recently Hired Special Disabled Veterans		8,131	n/a	7,436	
Regular Other Protected Veterans	784,593		669,265	n/a	r
Regular Disabled Veterans	155,386		154,002	n/a	r
Regular Armed Forces Service Medal	161,759		142,677	n/a	r
Regular Recently Separated	124,523		118,263	n/a	r
Recently Hired Other Protected Veterans	133,333		116,769	n/a	r
Recently Hired Disabled Veterans	54,601		50,053	n/a	r
Recently Hired Armed Forces Service Medal	58,056		51,332	n/a	r
Recently Hired Recently Separated Veterans	52,118		49,194	n/a	r





- Our mission is to create workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and promoting affirmative action and equal employment regulatory compliance.

**A Review of OFCCP Enforcement Statistics Related to
Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance Act**

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July 2012

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Executive Summary

In 2011, the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) proposed to revise the regulations implementing the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and Section 503 of the Rehabilitation Act (Section 503). In light of these proposed changes, the Center for Corporate Equality (CCE) conducted an evidence-based analysis of enforcement data related to charges of discrimination against protected veterans and individuals with disabilities. If the proposed regulations are implemented they would redefine affirmative action and significantly increase the emphasis on anti-discrimination policies for these protected groups. This study seeks to answer the question of whether there is evidence available to support the implementation of the proposed changes. That is, do the data indicate that systemic discrimination against protected military veterans and the disabled is occurring at a rate high enough to justify major changes in the regulations that govern VEVRAA and Section 503?

Three publicly available data resources were used to summarize and interpret OFCCP's enforcement of VEVRAA and Section 503 since fiscal year 2004. These three sources include two Department of Labor databases of OFCCP compliance evaluations and complaint investigations, as well as CCE's database of OFCCP compliance reviews that resulted in a conciliation agreement alleging discrimination against a protected group. The data cover almost a nine-year period and presumably include a universe of approximately 285,390 federal contractor establishments. These data sources were analyzed using descriptive statistics to summarize historical enforcement patterns from September 2004 to June of 2012. Results are organized into two different types of OFCCP enforcement; proactive compliance evaluations and reactive complaint investigations. We found several interesting findings.

With regard to Complaint Investigations:

- Of the approximately 285,390 federal contractor and subcontractor establishments:
 - OFCCP fielded 871 veteran and/or disability complaints between 2004 and June of 2012. Of these 871 complaints, 60 (6.89%) resulted in a violation, an average of 6.67 violations per year.
 - Approximately 95% of all complaints closed without a finding of discrimination involving protected veterans and/or individuals with disabilities.
 - Importantly, the vast majority of these 60 settlements were technical violations (e.g., record-keeping), rather than violations indicating systemic discrimination.

OFCCP Enforcement Summary

- Based on analyses of complaint data from 2004 to June 2012, it is estimated that less than 0.021% of the 285,390 federal contractor establishments are likely to have a finding of discrimination with regard to protected veterans or individuals with disabilities.

With regard to Compliance Evaluations:

- From 2007 through 2011, OFCCP conducted 22,104 compliance reviews of federal contractor establishments. Of those, OFCCP alleged discrimination against protected veterans and individuals with disabilities in three (less than 1 tenth of a percent) instances.
- Two of the cases alleged discrimination against protected veterans, while one alleged discrimination against disabled veterans.

After considering the number of violations that result from routine compliance evaluations as well as complaint investigations, it is estimated that less than one percent of federal contractor establishments are likely to have a finding of discrimination against protected veterans or individuals with disabilities. While the data in this report do not prove, nor disprove, the existence of discrimination against protected veterans and individuals with disabilities, the above results fail to provide the evidence needed to make an evidence-based policy decision such as those proposed in the regulations. These results suggest that discrimination against protected veterans and individuals with disabilities, especially with regard to hiring, is not a frequent finding by OFCCP and may not support the major shift in policy that the proposed regulations would necessitate. It is important to note that this report is not a criticism of the agency or the quality of its work. Instead, it is an attempt to neutrally summarize the findings of OFCCP's audit and enforcement efforts.

Introduction

The Center for Corporate Equality (CCE) is a national, non-profit research organization focused on Equal Employment Opportunity. Our mission is to help leaders from various human resource functions harness their natural synergies, understand a breadth of EEO topics, and work together to promote affirmative action and equal employment compliance in their workplaces. Toward this end, CCE conducts research and publishes reports on EEO enforcement, emerging legal topics, and methodological issues.

In response to the return of our military service members, the federal government has proposed various initiatives intended to increase veterans' employment opportunities in the civilian workforce. Relatedly, employment opportunity for individuals with disabilities is an important topic for the current administration and is also the focus of current initiatives.

As a result, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) announced two Notices of Proposed Rulemaking (NPRM) to amend and revise regulations related to individuals with disabilities and protected veterans. Specifically, on April 26, 2011, OFCCP proposed to revise the federal regulations implementing the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) and on December 9, 2011, OFCCP proposed to make similar revisions to the federal regulations implementing Section 503 of the Rehabilitation Act (Section 503). VEVRAA prohibits discrimination against, and requires affirmative action to employ, the veterans that fall into one or more of four categories.¹ Section 503 prohibits discrimination against, and requires affirmative action to employ, individuals with disabilities.

The current requirements of Section 503 and VEVRAA have an anti-discrimination component but primarily focus on affirmative action efforts to engage in positive outreach and recruitment to employ and advance members of these protected groups. Thus, many of the current requirements focus on effective outreach, recruitment and good faith efforts; activities which serve to increase the qualified applicant pool for contractors. If the proposed regulations are implemented a major shift would occur, redefining affirmative action, while placing significant emphasis on anti-discrimination. While the proposals would increase the current requirements to engage in affirmative action and eliminate discrimination, they would clearly increase the latter as much if not more than the former. The proposed rules would, for example, require employers to track in detail the disability and veteran status of all job applicants and employees, provide a written justification for why each disabled or veteran applicant was not hired, and annually conduct statistical analyses of both employment and hiring data. Above and beyond the proposed

¹ VEVRAA covers disabled veterans, recently separated veterans, armed forces service medal veterans and other protected veterans.

regulations' requirement to develop relationships with local groups, few, if any of the new requirements, would have any direct impact on the applicant flow and subsequent hiring for either veterans or individuals with disabilities².

A recent article in the *New York Times* succinctly addressed the issue of government policies and the utilization of the behavioral sciences³. In the article, economist Richard H. Thaler proposed two mantras when it comes to forming new policies:

- If you want to encourage some activity, make it easy
- You can't make evidence-based policy decisions without evidence

Given this major shift in policy and focus to anti-discrimination efforts, one would expect that past enforcement of Section 503 and VEVRAA shows evidence of significant, if not widespread, discrimination against protected veterans and individuals with disabilities.

OFCCP's proposed rulemakings for both VEVRAA and Section 503 do not provide past enforcement data (i.e., evidence) as part of the impetus for the changes to the regulations⁴. Thus, in an effort to address the question of whether there is evidence to support either an increase or shift in discrimination patterns against protected veterans or individuals with disabilities, this report summarizes several OFCCP sources of enforcement data related to protected veterans and persons with disabilities. These sources include data regarding OFCCP compliance evaluations and complaint investigations of federal contractors and subcontractors. The data cover almost a nine year period and include a universe of approximately 285,390 federal contractor establishments⁵ (see Appendix A). Presumably, the data from these two methods would reflect a need for increased anti-discrimination requirements for contractors and are behind the shift in policy that the proposed regulations reflect.

² Proposed changes, in addition to the detailed tracking of applicants (and employees for training opportunities), include: local job posting requirements (national posting does not fulfill requirement), statistical analysis of efforts (referral ratios, applicant ratio, job fill ratio, and hiring ratio), increased record-keeping requirements (5 years), and solicitation of status pre and post-offer for applicants and annually for employees.

³ Thaler, R. H., (2012, July 8). Watching behavior before writing the rules. *The New York Times*, p. BU4. (<http://www.nytimes.com/2012/07/08/business/behavioral-science-can-help-guide-policy-economic-view.html?pagewanted=all>)

⁴ Rather, the agency cited the unemployment rates for the members of these groups in the NPRM preambles. According to the Bureau of Labor Statistics (BLS), the 2009 unemployment rate for veterans 18 to 24 years old was 21.1% (in comparison to 16.6% for non-veterans in the same age group). It should be noted that this refers to all veterans and not just those covered under VEVRAA. Additionally, the Section 503 NPRM preamble reported BLS data that captured the 2010 unemployment rate for working age individuals with disabilities in the workforce as 14.8% compared to 9.4% for working age individuals without disabilities (note, BLS reports that only 21.8% of working age people with certain functional disabilities are included in the labor force).

⁵ Federal contractor establishments were used, rather than total companies, because affirmative action plans (and thus audits) are establishment based.

In the current study, we seek to answer the question of whether there is evidence to support the implementation of the currently proposed changes to the regulations governing Section 503 and VEVRAA. The goal of this study is not to prove (or disprove) that discrimination is occurring, but rather to investigate whether the current, available data support the acceptance of rules that require such a major shift in policy. It is important to note that this report is in no way a criticism of the agency or the quality of its work; CCE reports and interprets the available data without making assumptions or unreasonable inferences.

Method

Data Overview

This report predominately utilizes three sources of information to summarize and interpret enforcement of VEVRAA and Section 503 since fiscal year 2004. Each of these sources provides a different piece of information for the enforcement of these two important regulations over the last nine years. Although there may be other data to consider, CCE exhausted the relevant (and available) data to address whether evidence exists to support the proposed regulations. The following sections summarize each of the data sources, including the method of collection and any possible ambiguity or error that may have existed within the source. Interpretation of these sources occurs in the following section. The data sources utilized were:

- OFCCP enforcement database: *Complaint Investigations* (2004-2012)
- OFCCP enforcement database: *Compliance Evaluations* (2004-2012)
- *CCE database* of OFCCP compliance reviews that resulted in a conciliation agreement alleging discrimination against a protected group (2007-2011)

To add some context to the databases, there are approximately 285,390 federal contractor and subcontractor establishments that are subject to routine compliance evaluations (i.e. audits) and possible complaints.

Complaint Investigations

The first data source utilized was an OFCCP enforcement database for complaint investigations⁶ made publically available by the Department of Labor (DOL). A complaint investigation occurs when a protected individual, or group of individuals, files a complaint with the OFCCP against a federal contractor establishment. This source provides useful information with regard to the question of whether

⁶ http://ogesdw.dol.gov/raw_data_catalog.php

OFCCP Enforcement Summary

or not discrimination has previously occurred, as all 285,390 contractor establishments are susceptible to have complaints filed each year. The available database includes records from fiscal year 2004 through “present.” It is assumed that “present” refers to June 5, 2012 as that is the last reported “update date” on the website. However, the website does not define what “update” means, so it is unclear if the data reflect activity as of June 5, 2012 or if the cutoff date is an earlier point of time. Based on data in the compliance evaluation database discussed below, we believe the “present” data reflect September 1, 2011 to June 1, 2012. The website reports that it is updated monthly.

The database includes information regarding the basis of the complaint (e.g., gender, race, veteran status) as well as the investigative authority. OFCCP enforces Executive Order 11246, Section 503 of the Rehabilitation Act, and the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA), thus each complaint investigation is covered by one of these three investigative authorities. As Table 1 shows, there were 1,124 complaints investigated and closed from 2004 through present. The majority of complaints were under the investigative authority of VEVRAA or Section 503 (40.21% and 35.05% respectively), with the remaining 25 percent under EO 11246 or “other”. The database did not define what “other” refers to for the investigative authority.

Table 1. Summary of OFCCP Complaint Investigations: Investigative Authorities (2004-2012)¹

Investigative Authority	# of Complaints	% of Total Complaint Investigations
VEVRAA	452	40.21%
503	394	35.05%
Executive Order 11246	260	23.13%
Other ²	18	1.60%
Total	1124	100.00%

¹2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

²Not defined in OFCCP database

Those complaints that involved protected veterans and/or individuals with disabilities were the main focus of this study. To determine if the complaint involved a veteran claim or an individual with a disability claim, the investigative authorities as well as the basis for the complaint were considered. As Table 2 shows, complaints could be filed with a basis of discrimination for veteran or disability. If the complaint did not include a “yes” under at least one of the two categories of interest, it was not included as a “disability-related” or “veteran-related” complaint. Overlap exists between the basis of the complaint, and the investigative authority for the complaint, within and across the two groups (i.e., protected veterans and individuals with disabilities), so the basis columns cannot be summed to reach the total number of “related” complaints for the year. It should be noted that there is not a complete overlap

between related columns. That is, all complaints covered under Section 503 do not necessarily have a basis of disabled and all complaints involving disability were not necessarily filed under Section 503 (see Appendix B for a detailed breakdown of investigative authority and basis for veteran and/or disability-related complaints). Only complaints related to disability or veteran status are included in Tables 1 and 2.

Table 2. Summary of OFCCP Complaint Investigations: Basis of Veteran or Disability (2004-2012)¹

Fiscal Year	Alleged Discrimination on the Basis of Veteran Status	Alleged Discrimination on the Basis of Disability	Total Veteran- and Disability-Related Complaints ²
2004	73	65	124
2005	66	50	114
2006	53	50	93
2007	54	40	85
2008	79	70	134
2009	39	48	69
2010	41	50	80
2011	62	63	110
2012 ¹	22	43	62
Total	489	479	871

¹2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

²Overlap exists between the basis of the complaint, and investigative authority for the complaint, within and across the two groups (i.e., protected veterans and individuals with disabilities), so the investigative authority counts (from table 1) and basis counts cannot be summed to reach the total of complaints for the year.

Tables 3 and 4 show, by fiscal year, the number of filed complaints that are considered veteran or disability-related. From 2004 to present, there were 141 veteran- and disability-related complaints that overlapped; thus, there are 871 unique complaints that involve veterans and/or individuals with disabilities over the almost nine year period (Table 5). In addition to the investigative authority and basis of alleged discrimination for the complaint, the enforcement database also reports whether the complaint resulted in a finding of a violation (Tables 3-5). It should be noted that the database does not specify whether or not the violation is a technical violation (i.e., no monetary remedies, typically just reporting requirements) or a finding of discrimination (e.g., payment of back pay, payment of benefits). However, the database does specify the categorical type of violation (e.g., hiring, termination, failure to accommodate). Table 6 provides a count of the violations found in veteran and/or disability-related complaint investigations. Tables 3-6 are discussed in further detail in the analysis section.

Database Integrity Issues

It should be noted that there are some data inconsistencies within the database. For example, there were 17 complaints where the basis is “disabled” yet the complaint is not labeled under Section 503 or

VEVRAA as the investigative authority. Instead, the investigative authority is listed as Executive Order 11246 or “other”. Additionally, there are 8 complaints where the basis of the complaint is veteran status, yet EO 11246 or “other” was listed as the investigative authority rather than VEVRAA or Section 503. Similarly, there are 13 complaints where Section 503 is listed as the investigative authority, yet the basis of the complaint is not related to disabled or veteran status. Additionally, some of the violations are not intuitive given the basis of the complaint. For example, in one case the basis of the complaint was veteran status yet the violation was for pregnancy leave. There are two possibilities for this inconsistency; either there is an error in the database or the violations were found during an investigation although they were not the basis of the initial complaint.

Further, there may be duplicate records in the database (i.e., same company, location, fiscal year, and basis). At a minimum, 79 records within the complete database appear to be a duplicate, yet due to abbreviated names or address, not all duplicate records are easily identifiable. That being said, CCE is unable to determine if these 79 are true duplicates or whether more than one complaint of the same nature was filed at a facility during the same fiscal year. Due to the inability to differentiate between a duplicate record and an instance in which two complaints were filed at the same location within a year, these duplicate records were included in the analyses.

Compliance Evaluations

In addition to complaint investigations, OFCCP also conducts routine compliance evaluations based on an administratively neutral selection system of federal contractor establishments. The DOL also makes an enforcement database of compliance evaluations⁷ publicly available that is housed separate from the complaint investigation database. As with the complaint investigation database, the compliance evaluation database covers fiscal years 2004 to present and it is assumed that “present” refers to June 2012. Unlike the complaint database, the compliance evaluation database includes a closure date, of which the latest closure date is June 1, 2012; so it is assumed that June 1, 2012 is the cutoff date for the current data⁸. Similar to the complaint file, the compliance evaluation file also includes company information and the types of found violations. However, the compliance evaluation file does not include information regarding the protected class for audits that close with a violation. Thus it is impossible to

⁷ http://ogesdw.dol.gov/raw_data_catalog.php

⁸ Another issue to note is that the public enforcement database has appeared to fluctuate depending on when the records were pulled. CCE has pulled the database previously, but when comparing a year of data to an old pull, the records do not match up exactly (note, this occurs for all years and not just the current fiscal year at the time of the data pull). For example, in 2011 CCE pulled the OFCCP database to use for another purpose. At that time, the reported number of compliance evaluations for fiscal year 2010 was 4,960; however, the most recent pull of the database reports 4,942 compliance evaluations for 2010. As with the data issues noted above, it is unknown whether this reflects an error. Without evidence to remove data reflecting these issues, CCE believes the data to be the best that are available and appropriate for analysis.

identify specific cases related to protected veterans or individuals with disabilities. To inform on this issue, CCE has performed other data collection methods to build a database that will be discussed in the next section.

Unlike the complaint investigation database, the compliance evaluation database includes the type of closure for each audit, identified as one of the following: closure letter, conciliation agreement, consent decree, or financial remedy. A closure letter is issued when an audit closes in full compliance with no violations. If the audit did not end with a closure letter, a notice of violation (NOV) was issued that resulted in a voluntary conciliation agreement, court-ordered consent decree, or financial remedy. Each of these NOV's results in the federal contractor being required to engage in follow-up reporting activities. For those violations that involve alleged discrimination, financial remedies are included. Appendix C provides the counts for the total number of compliance evaluations closed during each fiscal year from 2004 to present, as well as the manner in which they closed (i.e., closure letter or notice of violation).

CCE Database: OFCCP Settlements Alleging Discrimination

In addition to reviews of the public enforcement database, CCE annually submits a Freedom of Information Act (FOIA) request to OFCCP, requesting a copy of all conciliation agreements or consent decrees that included violations that alleged discrimination against a protected group. Conciliation agreements that result in technical violations only (e.g., record-keeping, failure to post with the state) are not reviewed as a part of CCE's annual analysis. Instead, the focus is on those violations where there is a finding of discrimination and some sort of financial settlement is paid to victims for alleged discrimination in hiring, compensation, promotions, or terminations. CCE has annually requested these data since fiscal year 2007 in order to inform the public about the types of audits and OFCCP strategies that end with a conciliation agreement or consent decree.⁹ The actual conciliation agreements and consent decrees provide detailed information about each violation and remedy, and thus the CCE database will be used to provide context to the publically available OFCCP databases discussed above.

For the current study, those conciliation agreements from 2007 through 2011 that involved systemic discrimination against protected veterans and/or individuals with disabilities were reviewed (Table 7). Conciliation agreements can be the result of an administratively neutral scheduled compliance evaluation or complaint investigation. These data provide a piece of information that was lacking from the compliance evaluation database (i.e., protected class members) and thus allows those veteran- and

⁹ CCE submitted an additional FOIA request on May 24, 2012 requesting all conciliation agreements and consent decrees alleging discrimination against protected veterans and individuals with disabilities from 2004 through present. To date, CCE has not received the requested information. Once this information is received, the report will be updated to reflect the additional data.

disability-related settlements to be identified. It also provides information to identify whether the complaint investigations with violations included systemic discrimination violations or only technical violations.

In reviewing the annual enforcement database and those records obtained through FOIA requests, CCE noticed that not all conciliation agreements that are listed in the public enforcement database as having a financial agreement (see Appendix C) were sent to CCE, specifically for fiscal year 2011. Specifically, there were 17 financial remedies identified in the database that were not received. After further inquiry with OFCCP, CCE received these missing conciliation agreements and noted that a label of “financial remedy” in the OFCCP database does not necessarily mean that discrimination was identified where remedies for protected class members was present. Instead, OFCCP included estimated financial remedies that a contractor anticipated using to implement the remedy for a technical violation as part of the settlement dollars that OFCCP obtains each year. Thus, in some cases, OFCCP reports settlements that do not go to victims of discrimination. For example, in one of the conciliation agreements obtained through the follow-up request, the violation states that the contractor failed to “provide access for mobility-impaired applicants and potential employees seeking employment”. The remedy was to modify the entrance to its Human Resources office to provide access for individuals with mobility disabilities; the estimated modification cost was \$385. OFCCP has coded this cost as a financial remedy even though the amount was not paid to an individual or class of victims. In another example, the contractor received a violation where the remedy included building modifications such as doorbells and restroom modifications to provide access for individuals with mobility disabilities. These changes were estimated to cost \$20,512.08. Again, this conciliation agreement did not include monetary retribution for victims of discriminations, but rather building modifications and technical violations. This classification of estimated building modification costs as a financial remedy should be considered when interpreting results from Appendix C, especially for 2011, as the number of contractors with a financial settlement is likely less than what is reported in the enforcement database. These data issues reinforce the importance of using the CCE database when interpreting enforcement statistics from the complaint investigation and compliance evaluation databases.

Analyses

Complaint Investigations

Tables 3 and 4 provide detailed information about the number of complaints investigated and closed each year for protected veterans and individuals with disabilities, as well as the number of violations resulting from those investigations. In reviewing the annual breakdown of veteran- and disability-related

OFCCP Enforcement Summary

complaints, the number of complaints filed per year remains fairly consistent. Note that, based on Table 3, veteran complaints are declining and approaching an all-time low with only 22% of complaints in 2012 related to veteran status¹⁰. This is interesting given the number of veterans returning from combat, the high-profile nature of the issue, and the fact that OFCCP is the only agency to enforce VEVRAA.

The percentage of veteran-related complaint investigations that resulted in a violation each year ranged from 1.30% to 15.63%, with an overall percentage of 7.18%. Considering all 1,124 complaints that were filed over the almost nine year period, only 3.29% were veteran-related and closed with a violation. To put this into context, approximately 97% of all complaints filed over the last eight plus years closed without a finding of discrimination in regard to discrimination against protected veterans.

Table 3. Veterans-Related Complaint Investigations by Year (2004 - 2012)¹

Fiscal Year	# of Veteran-Related Complaint Investigations	Veteran Complaints Resulting in a Violation	% of Veteran Complaints	% of Total Complaints	Total Complaint Investigations ²
2004	77	1	1.30% (1/77)	0.61% (1/165)	165
2005	71	3	4.23% (3/71)	2.27% (3/132)	132
2006	57	2	3.51% (2/57)	1.87% (2/107)	107
2007	55	2	3.64% (2/55)	1.83% (2/109)	109
2008	83	6	7.23% (6/83)	3.51% (6/171)	171
2009	39	6	15.38% (6/39)	7.06% (6/85)	85
2010	46	5	10.87% (5/46)	4.67% (5/107)	107
2011	64	10	15.63% (10/64)	6.94% (10/144)	144
2012 ¹	23	2	8.70% (2/23)	1.92% (2/104)	104
Total	515	37	7.18% (37/515)	3.29% (37/1124)	1124

¹2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

²Total complaints in the database include non-veteran or disability-related complaints (e.g., race, gender, etc.). Note, there is overlap between the veteran- and disability-related complaints

The percentage of disability-related complaint investigations that resulted in violations each year ranged from zero percent to 17.31%, with an overall percentage of 7.44%. Considering all 1,124 complaints there were filed over the almost nine year period, only 3.29% were disability-related and closed with a violation. As noted in the veteran-related complaints, we see that approximately 97% of complaints closed without merit with regard to discrimination against individuals with disabilities.

¹⁰ It is important to keep in mind that 2012 only represents approximately nine months of data (i.e., September 1, 2011 to June 1, 2012) and thus the totals may look different once the fiscal year ends.

Table 4. Disability-Related Complaint Investigations by Year (2004 - 2012)¹

Fiscal Year	# of Disability-Related Complaint Investigations	Disability Complaints Resulting in a Violation	% of Disability Complaints	% of Total Complaint	Total Complaint Investigations ²
2004	66	0	0.00% (0/66)	0.00% (0/165)	165
2005	53	1	1.89% (1/53)	0.76% (1/132)	132
2006	53	2	3.77% (2/53)	1.87% (2/107)	107
2007	41	1	2.44% (1/41)	0.92% (1/109)	109
2008	73	7	9.59% (7/73)	4.09% (7/171)	171
2009	48	4	8.33% (4/48)	4.71% (4/85)	85
2010	52	9	17.31% (9/52)	8.41% (9/107)	107
2011	65	6	9.23% (6/65)	4.17% (6/144)	144
2012 ¹	46	7	15.22% (7/46)	6.73% (7/104)	104
Total	497	37	7.44% (37/497)	3.29% (37/1124)	1124

¹2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

²Total complaints in the database include non-veteran- or disability-related complaints (e.g., race, gender, etc.). Note, there is overlap between the veteran- and disability-related complaints for each year

As discussed in the methods section, there is an overlap between 141 of the veteran and disability-related complaints, thus there are 871 complaints total that are veteran and/or disability-related (Table 5). Of these 871 complaints, 60 resulted in a violation, with an average of 6.67 violations per year. As noted in the following section, the vast majority of these complaints involve technical violations rather than an allegation of discrimination. Based upon these data, from 2004 to present, only 6.89% of disability and veteran-related complaints that were investigated and closed were found to have merit. Further, these findings represent only 5.34% of all complaints filed from 2004 to present. Thus, approximately 95% of all complaints closed without a finding of discrimination involving protected veterans and/or individuals with disabilities. Notably in 2012, 8 of 62 veteran and disability-related complaints (12.9%) have settled with a notice of violation.

Table 6 summarizes the type of violations found as a result of veteran and disability-related complaints. For both groups, the most common violation was “other”, which was not defined by the OFCCP enforcement database. After that, terminations, accommodations, and hiring were the most common violations. As noted in Table 6, 14 of the complaints that result in a violation were both veteran- and disability-related, thus the veteran and disability columns do not necessarily sum to the total number of violations found for the unique complaints filed. Additionally, one complaint may result in more than one type of violation. For example, in one of the disability-related complaints, there was a violation for

Table 5. Overview of Veteran- and Disability-Related Complaint Investigations and Violations (2004 - 2012)¹

Type of Complaint	Complaints			Violations				
	# of Complaints	Avg. # Complaints Per Year	Median # Complaints Per Year	# of Complaints Resulting in a Violation	Avg. # Violations Per Year	Median # Violations Per Year	% Resulting in a Violation	% Resulting in a Violation
Veterans and/or Disability Complaint Investigations ²	871	96.77	93	60	6.67	7	6.89% (60/871)	5.34% (60/1124)
Non-Veteran or Disability Related Complaints (i.e., race, gender) ³	253	28.11	27	31	3.44	3	12.25% (31/253)	2.76% (31/1124)
Total Complaints	1124	124.89	109	91	10.11	9	8.10% (91/1124)	8.10% (91/1124)

¹2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

²There are 141 complaints that overlap for veteran- and disability-related, so there are 871 total complaints that are veteran, disabled or both

³Non-Veteran or Disability complaints represent the remaining filed complaints under other bases of discrimination (e.g. race) or investigative authority (e.g., EO 11246)

termination, layoff, harassment, job benefits, retaliation, accommodation, and “other”. Interestingly, Table 6 shows that over almost nine years, there were only 10 veteran and/or disability –related complaints that resulted in a hiring violation, with six hiring violations per related complaint. Further, when looking at unique veteran-only related complaints (i.e., those with no overlap with disability status), there are only 4 violations for hiring since 2004. This is surprising given the current administration’s focus on discrimination in hiring against veterans.

Table 6. Type of Found Violations as a Result of Complaint Investigations for Veteran- and Disability-Related Complaints (2004-2012)¹

	Protected Veterans	Individuals with Disabilities	Total ²
Terminations	6	11	13
Accommodations	6	9	11
Hiring	6	6	10
Promotions	4	3	7
Job Benefits	--	4	4
Wages	3	2	4
Retaliation	1	2	3
Layoffs	--	2	2
Demotions	2	--	2
Harassment	1	2	2
Recall	1	--	1
Seniority	1	--	1
Pregnancy Leave	1	--	1
Religious Observance	1	1	1
Other³	14	11	21

¹2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

²There is overlap between 14 veteran and disability-related complaints that result in a violation, thus the veteran and disability columns may not add to the total number of violations for these two groups. Additionally, a complaint can close with more than one violation, so the individual columns cannot be totaled to the total number of complaints with violation(s).

³Not defined in OFCCP database

Compliance Evaluations

As noted in the methods section, Appendix C summarizes the enforcement database for the compliance evaluations opened and closed from 2004 to present. The compliance evaluation database does not provide information regarding protected classes (e.g., veterans, individuals with disabilities, females, etc.), thus veteran- and disability-related compliance evaluations cannot be specifically identified through the database, as is possible with the complaint investigation database. As Appendix C shows, 84.18% of compliance evaluations ended with a closure letter between 2004 and present. The remaining

15.82% of compliance evaluations resulted in a notice of violation, which OFCCP coded in the database as a conciliation agreement (13.88%), consent decree (0.08%), or financial remedy (1.86%).

Importantly, there are a declining percentage of compliance evaluations closing with a letter of compliance in later years as compared with earlier in the time period. Thus, the number of conciliation agreements has increased, with the most drastic increases occurring in 2011 and 2012. The number of audits that close with financial agreements also appears to have increased over time which is likely the result of the current administration's practice of citing a building modification cost as a financial remedy in the database (as discussed in the data methods section above) versus a finding of discrimination.

CCE Database: OFCCP Settlements Alleging Discrimination

As noted previously in the data methods section, CCE annually requests the conciliation agreements and consent decrees from OFCCP that allege systemic discrimination against a protected group. As Table 7 shows, from 2007 to 2011 there were four instances in which a protected veteran or individual with a disability received financial remedies as a result of alleged discrimination. There were no conciliation agreements or consent decrees in 2007 or 2009 that resulted in monetary relief for protected veterans or individuals with disabilities. The four conciliation agreements in Table 7 represent 1.12% of the total systemic settlements from 2007 to 2011. Table 7 outlines the type of violation, protected class, and type of review for each case to provide context for the settlements.

The conciliation agreement from 2008 collected monetary relief for protected veterans. The company received a violation for a failure to "hire any protected veteran applicants ... although there were qualified candidates" for the job title in question. Back pay and interest were paid to affected class members. As Table 7 reflects, there were no findings of systemic discrimination in 2009. However, it should be noted there was a conciliation agreement included in the FOIA request for 2009 that CCE deemed inappropriate to include in our annual report. In reviewing the violation, it appears that the company failed to "provide directions for entrance into its facility to individuals with known physical limitations and modifications to its restrooms". Thus, the "remedy" is the estimated costs of those building and restrooms modifications. Remedies were not paid to individuals with disabilities, thus this conciliation was not included in Table 7.

Table 7. Findings of Discrimination by OFCCP as a Result of all Audits (Compliance Evaluations and Complaint Investigations)¹ (2007-2011)

Fiscal Year	Type of Violation	Protected Class	# of Audits with Findings of Discrimination	Type of Review
2007	--	--	0	--
2008	Hiring	Veteran	1	Compliance Evaluation
2009	--	--	0	--
2010	Hiring	Veteran	1	Compliance Evaluation
2011	Hiring	Disabled Veterans	2	Compliance Evaluation
	Termination & Retaliation	Individual with a Disability		Complaint Investigation

¹Findings were obtained through a FOIA request by CCE for all OFCCP cases that settled and alleged systemic discrimination against a protected group

The conciliation agreement in 2010 was for a failure to employ protected veterans. Included in the description of the failure to hire violation is the company’s failure to “immediately list” (i.e., post) with the state employment office. Typically this posting violation is listed as a technical violation, separate from any disparate treatment or impact violations. The violation further explains that data from the state employment office was used to conduct the hiring adverse impact analyses. This is atypical as analyses should include those job seekers who apply to a position and are considered applicants per the Internet Applicant Regulation. Instead, this violation considered the constructed pool of applicants to be the 79 protected veterans enrolled with the state office, even though they never applied to a position at the organization. The conciliation agreement asserted that the failure to post with state prevented qualified veterans from applying to open positions with the organization and thus should be considered in the pool. This selection rate of 0% for veterans was compared to the actual applicant pool of “non-veterans” selection rate in order to determine whether there was impact. The organization was thus required to pay back pay and interest to veterans who registered with the state, but never actually applied to the organization. As noted above, this violation and remedy are atypical.

As Table 7 shows, there were two conciliation agreements in 2011 with violations for alleged systemic discrimination. The first conciliation agreement was for a failure to hire disabled veterans. Specifically, the company did not uniformly apply its selection procedures and criteria for employment of disabled veterans. Note that this company also received a technical violation for obtaining disability status

OFCCP Enforcement Summary

from applicants prior to making an offer¹¹, yet this information was used in order to perform the selection rate analysis of veteran applicants.

The second conciliation agreement in 2011 was the result of a filed complaint (not randomly scheduled compliance evaluation). It may not be appropriate to interpret this violation in conjunction with the other three conciliation agreements; however the complaint did result in remedies paid to the complainant for what the OFCCP considers to be retaliation and termination violations (as reported in Table 6 above). The violation states that the company failed to reemploy the complainant after long-term disability when it failed to interview or select for a posted position “in retaliation for engaging in protected activity”. Because the violation is unclear and has several redacted sections, it is difficult to interpret. However, this complaint is recorded in the OFCCP enforcement database as having a violation for termination and retaliation. It is also unclear exactly what remedies the complainant received. The remedy states that \$24,640 of the \$99,000 that the company was required to pay, is for reimbursement for medical insurance premiums and expenses. The remedy does not specify to how the remaining \$74,360 was applied (e.g., back pay, interest, benefits, etc.).

OFCCP and CCE Databases

To provide an accurate picture of all available enforcement activity and findings of discrimination, data from the DOL enforcement databases for complaint investigations and compliance evaluations, as well as the data by CCE on systemic discrimination settlements, have been combined in Tables 8 and 9. Table 8 summarizes the total compliance evaluations completed from 2007 to 2011. Analysis is limited to these four years as the CCE database does not provide data for 2004-2006 or 2012. As noted in Table 8, from 2007 to 2011 only three compliance evaluations closed with an alleged finding of discrimination against veterans. These three findings constitute 0.014% of all compliance evaluations. Additionally, only one compliance evaluation closed with an alleged finding of discrimination for individuals with disability, which constitutes 0.005% of all compliance evaluations. Overall, out of 22,104 compliance evaluations conducted from 2007-2011, only three closed with an alleged finding of discrimination for protected veterans or individuals with disability¹². These three findings represent 0.014% of all compliance evaluations conducted from 2007 through 2011.

¹¹ Both ADA and Section 503 preclude employers from inquiring into disability status prior to an offer of employment.

¹² The conciliation agreement in 2011 was for disabled veterans, thus there is overlap for the findings in 2011 giving only 3 total from 2007 to 2011.

Table 8. Estimated Percentage of Federal Contractor Establishments with findings of Discrimination involving Protected Veterans and/or Individuals with Disabilities based on Compliance Evaluations (2007-2011)¹

Fiscal Year	Total Evaluations Completed ²	Veterans		Individuals with a Disability		Total ³	
		#	%	#	%	#	%
2007	4,923	0	0.000%	0	0.000%	0	0.000%
2008	4,325	1	0.023%	0	0.000%	1	0.023%
2009	3,907	0	0.000%	0	0.000%	0	0.000%
2010	4,942	1	0.020%	0	0.000%	1	0.020%
2011	4,007	1	0.025%	1	0.025%	1	0.025%
Total	22,104	3	0.014%	1	0.005%	3	0.014%

¹Results based on the CCE Database, so time period only include 2007-2011

²Based on Enforcement Database: Compliance Evaluations. Numbers are reported in Appendix C.

³Based on numbers reported in table 7. Does not include the 2011 conciliation agreement that was the result of a complaint investigation. This is included in the number of findings reported for complaint investigations in 2011.

Table 9 provides an overview of the number of complaint investigations related to veterans or individuals with a disability that result in a violation. Additionally, it estimates the percentage of federal contractor establishments that you would expect to result in findings of discrimination based on the total number of contractor establishments in the country. Because every location is subject to having at least one complaint filed each year, the percentage of findings based on actual complaints was compared to the total number of contractor establishments. The estimated number of federal contractor establishments¹³, 285,390, was obtained from the Veterans Employment and Training Services (VETS) and is based on the number of establishments for which contractors completed VETS100A reports in 2010 (see Appendix A). This helps to estimate the percentage of federal contractor establishments that are likely to have a violation if investigated. Based on findings of violations from veteran-related complaints from 2004 to present, approximately 0.013% of federal contractor establishments are likely to have a finding of discrimination. The findings for disability-related complaints are also likely to be found in 0.013% of federal contractor establishments. Considering the unique veteran and disability-related complaints that resulted in a violation (60), only 1 in every 4,756 (0.021%) federal contractor establishments are likely to have a finding of discrimination for protected veterans and/or individuals with a disability.

¹³ For a variety of reasons (e.g. incorrect filing, no filing) the number of estimated federal contractor establishments is likely a gross underestimation. For estimation purposes, the total number of reports submitted for the 2010 VETS100A was used as the estimated number of contractor establishments.

Table 9. Estimated Percentage of Federal Contractor Establishments with Violations Involving Protected Veterans and/or Individuals with Disabilities based on Complaint Investigations (2004-2012)

Fiscal Year	Estimated Number of Federal Contractor Establishments ¹	Veterans Complaints Resulting in a Violation ²		Disability Complaints Resulting in a Violation ²		Total	
		#	%	#	%	#	%
2004	285,390	1	0.000%	0	0.000%	1	0.000%
2005	285,390	3	0.001%	1	0.000%	4	0.001%
2006	285,390	2	0.001%	2	0.001%	2	0.001%
2007	285,390	2	0.001%	1	0.000%	3	0.001%
2008	285,390	6	0.002%	7	0.002%	11	0.004%
2009	285,390	6	0.002%	4	0.001%	7	0.002%
2010	285,390	5	0.002%	9	0.003%	12	0.004%
2011	285,390	10	0.004%	6	0.002%	12	0.004%
2012	285,390	2	0.001%	7	0.002%	8	0.003%
Total	285,390	37	0.013%	37	0.013%	60	0.021%

¹Number of federal contractor establishments is based on 2010 VETS100A output. This is likely an underestimation of the number of federal contract establishments

²Based on numbers reported in table 7. Does not include the 2011 conciliation agreement that was the result of a complaint investigation. This is included in the number of findings reported for complaint investigations in 2011.

Based on the findings in Tables 8 and 9, it is estimated that fewer than one percent of federal contractor establishments are likely to have a finding of discrimination for protected veterans or individuals with disabilities in either a routine compliance evaluation or complaint investigation.

It should be noted that the findings of systemic discrimination from the CCE report only provides information from 2007-2011 for Table 8, whereas the enforcement databases provide information from 2004 to present (Table 9). However, based on the low frequency of findings in the CCE database for protected veterans or individuals with disabilities from 2007 to 2011 we suspect there are few, if any, that are missing. Even taking into consideration these limitations, CCE feels that the estimates provided in Tables 8 and 9 give appropriate context to the enforcement over the last nine years.

Conclusion

This report leveraged multiple data sources to assess current levels of OFCCP enforcement related to protected veterans and persons with disabilities. A limitation of this research is the missing information from 2004 to 2006 for the CCE database. However, CCE has recently submitted a FOIA to OFCCP seeking to obtain all settlements with findings of discrimination against protected veterans and/or

OFCCP Enforcement Summary

individuals with disabilities from 2004 to present. A follow-up report will be produced once the data are received.

Given the available data, there does not appear to be an inference of support for the proposed regulations. While the data in this report do not prove, nor disprove, the existence of discrimination against protected veterans and individuals with disabilities, the above results fail to provide the evidence needed to make an evidence-based policy decision like those proposed in the regulations. These results suggest that discrimination against protected veterans and individuals with disabilities, especially with regard to hiring, is not a frequent finding by OFCCP and may not support the major shift in policy that the proposed regulations would necessitate.

Appendix A.
Annual Federal Contractor Reporting Comparison Table (January 31, 2011)

Category	2010 VETS-100A	2010 VETS-100	2009 VETS-100A	2009 VETS -100	2008 VETS -100
Total Federal Contractors	13,536	8,880	13,011	11,919	22,159
Single Establishments	9,664	6,461	10,618	9,717	18,943
Multiple Establishment Organizations	5,665	3,543	7,340	4,861	8,690
Multiple Establishment Hiring Organizations	208,435	85,998	144,896	76,631	46,903
Multiple State Consolidated Reports	61,626	17,099	26,684	13,964	10,177
Total Reports Submitted	285,390	113,101	190,190	105,251	84,713
Regular Vietnam Era Veterans		217,600	n/a	199,055	341,000
Regular Special Disabled Veterans		49,368	n/a	45,800	62,020
Recently Hired Vietnam Era Veterans		15,968	n/a	14,285	32,007
Recently Hired Special Disabled Veterans		8,131	n/a	7,436	15,466
Regular Other Protected Veterans	784,593		669,265	n/a	n/a
Regular Disabled Veterans	155,386		154,002	n/a	n/a
Regular Armed Forces Service Medal	161,759		142,677	n/a	n/a
Regular Recently Separated	124,523		118,263	n/a	n/a
Recently Hired Other Protected Veterans	133,333		116,769	n/a	n/a
Recently Hired Disabled Veterans	54,601		50,053	n/a	n/a
Recently Hired Armed Forces Service Medal	58,056		51,332	n/a	n/a
Recently Hired Recently Separated Veterans	52,118		49,194	n/a	n/a

Appendix B.
**Summary of Complaints that Include Protected Veterans
or Individuals with a Disability (2004-2012)¹**

Fiscal Year	Disability-Related Complaints		Veteran-Related Complaints		Total Veteran- and Disability-Related Complaints ²
	Section 503 Authority	Disabled Basis	VEVRAA Authority	Veteran Basis	
2004	52	65	70	73	124
2005	43	50	69	66	114
2006	44	50	46	53	93
2007	31	40	50	54	85
2008	58	70	75	79	134
2009	38	48	29	39	69
2010	34	50	43	41	80
2011	53	63	51	62	110
2012 ¹	41	43	19	22	62
Total	394	479	452	489	871

¹2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

²Overlap exists between the basis of the complaint, and investigative authority for the complaint, within and across the two groups (i.e., protected veterans and individuals with disabilities), so the basis and investigative authority columns cannot be summed to reach the total of complaints for the year. It should be noted that there is not complete overlap between related columns (i.e., all complaints covered under Section 503 do not necessarily have a basis of disabled and vice versa), so all related columns are represented.

Appendix C.
Summary of All OFCCP Enforcement Outcomes as a Result
of Compliance Evaluations¹ (2004-2012)²

Fiscal Year	Closure Letter ³		Notice of Violation						Total Compliance Evaluations
			Conciliation Agreement		Consent Decree		Financial Remedy		
	#	%	#	%	#	%	#	%	#
2004	4938	93.63%	277	5.25%	0	0.00%	59	1.12%	5274
2005	1921	90.61%	146	6.89%	0	0.00%	53	2.50%	2120
2006	3559	88.64%	383	9.54%	0	0.00%	73	1.82%	4015
2007	4390	89.17%	471	9.57%	0	0.00%	62	1.26%	4923
2008	3701	85.57%	539	12.46%	5	0.12%	80	1.85%	4325
2009	3204	82.01%	618	15.82%	9	0.23%	76	1.95%	3907
2010	4019	81.32%	839	16.98%	3	0.06%	81	1.64%	4942
2011	2898	72.32%	999	24.93%	9	0.22%	101	2.52%	4007
2012 ²	1497	65.80%	697	30.64%	1	0.04%	80	3.52%	2275
Total	30127	84.18%	4969	13.88%	27	0.08%	665	1.86%	35788

¹Data is from the Enforcement Database for Compliance Evaluations; this does not include complaint investigations

²2012 does not represent a full fiscal year. It is estimated to represent 9 months of enforcement.

³Closure letters are issued when an audit closes in full compliance (i.e., no violations)