



**DirectEmployers
Association**

Recruiters Take Center Stage in OFCCP Compliance Plans:

The Eight Things Recruiters are Now Often Doing

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INTRODUCTION

- ❑ There is no legal requirement for recruiters to do any of these “EIGHT THINGS;” this is just a compilation of what our Members ask EVERY day
- ❑ We are seeing HR leaders continue to broaden the opportunities for recruiters to tackle some of these responsibilities because they are so well positioned to do so
- ❑ It is all up to you and your managers, but we are giving you the list and explanations of compliance responsibilities a lot of recruiters are now handling
- ❑ John and I are today going to go through the “Eight Things” one-by-one and then invite your questions and comments on each one as time allows. So let’s get started...

COMPLIANCE ACTIVITY #1 – Listing Your Jobs

- ❑ OFCCP VEVRAA Rules require that you provide “Priority Protected Veteran Referrals,” or that you ask the Career One-Stops to provide Protected Veteran Referrals
- ❑ To do so, you MUST “list” (not “post”) all of your jobs except for executive positions, internal promotional positions, or temporary positions, lasting for fewer than three days, on a daily basis with each of the Career One-Stops closest to the location of the job
- ❑ This has actually proven to be a very good service for veterans since the unemployment rate for Protected Veterans had dropped below the non-veteran unemployment rate (obviously before the pandemic)

COMPLIANCE ACTIVITY #1 – Listing Your Jobs

- ❑ You must prove to OFCCP that you have “listed” all of your jobs whenever you are subjected to an OFCCP Compliance Evaluation
 - If you have a lot of jobs on a daily basis, it is difficult for you to list them manually
 - That is where companies like DirectEmployers come in handy
 - We do that on an electronic basis every night for you
- ❑ IMPORTANT: “Listing” your jobs is totally different from “posting” your jobs
- ❑ If you “post” your jobs, but do not “list” your jobs, you have just bypassed the administrative mechanism the federal and state governments have designed to allow for a “Priority Referral” of “listed” jobs for unemployed Protected Veterans

COMPLIANCE ACTIVITY #1 – Listing Your Jobs

Covered
Federal
Government
Contractors
are **required**
to LIST their
jobs.



COMPLIANCE ACTIVITY #1 – Listing Your Jobs

❑ You MUST “list” your available jobs in the manner and format permitted by the States – the state sets that requirement...NOT the Career One-Stop

❑ OFCCP DOES NOT require covered Government contractors to “post” their jobs – it is not in the regulations and is therefore, **not required**.

- Indeed, the states will not post all jobs, but that's ok
- “Listing” your jobs is the MUST HAVE; “Posting” your jobs is a NICE TO HAVE
- DE both “lists” your jobs and then later, also “posts” your jobs where the states allow for job postings

❑ And to be complete and avoid confusion, DE also lists your jobs, upon your request, with state Vocational Rehabilitation Counselors...although that is not required by OFCCP Rules...but, it is a (BIG) Nice to Have for companies trying to hire Individuals with Disabilities

COMPLIANCE ACTIVITY #1 – Listing Your Jobs

❑ **Recruiter Roles as to “Listing Jobs”:**

- 1) Ensure a Job Description exists for the job the company wants to “list” if the company wants to electronically list its available jobs
- 2) Try to remember to always include your EEO Tag Line at the TOP of your job description as some state job banks have character limitations that will delete part of the actual job description AND your tag line
- 3) Ensure the available Job Description is up-to-date and complete.
- 4) Confirm the correct location is on the job on your website (to permit electronic scrapping and “listing” in the Career One-Stop closest to the job)

COMPLIANCE ACTIVITY #2 – Disposition Codes

- ❑ OFCCP Rules neither require nor specify the contents of so-called Disposition Codes
- ❑ “Disposition Codes” are unique to each company; not standardized in a federal Rule
- ❑ Many ATs contain pre-packaged Disposition Codes...but they require you to customize them to your particular jobs
- ❑ This is because OFCCP's Rules require the Contractor to annually undertake statistical “Disparity Analyses” comparing the percentages of rejection of each “Protected Group” against the “Most Favored Protected Group” (i.e. % of Whites rejected verses the % of Asians rejected)
 - However, one REMOVES from the statistics comparing the percentage of “Applicants for Hire” vs the percentage Offered a Job all:
 - (a) Persons Expressing Interest who were “Not Applicants,” and
 - (b) “Applicants” rejected for a legitimate non-discriminatory reason(s)
- ❑ So, you can see that credible Disposition Codes are necessary to explain away any “bad statistics”

COMPLIANCE ACTIVITY #2 – Disposition Codes

❑ **NOTE 1:** How many are “too many” Disposition Codes?

- Should be a collaborative discussion between Legal/HR/Compliance/Recruiting
 - Lawyers want you to have LOTS of Disposition Codes
 - HR will default to the same five for all candidates
 - 10 to 15 is probably the right answer

❑ **NOTE 2:** You should record EVERY Disposition Code which applies to stop the advance of a candidate through your selection system

- OFCCP may not credit Disposition Code #1, but may understand and credit the rejection due to reason #2

COMPLIANCE ACTIVITY #2 – Disposition Codes

□ Disposition Codes typically document four things:

- **NOT AN APPLICANT:** Only “Applicants” and “employees” have legal rights, so if a Person Expressing Interest (“PEI”) is NOT an “Applicant,” that non-applicant cannot be the victim of unlawful discrimination (discussed more below)
- **REASON FOR REJECTION OF TRUE APPLICANTS:** If the person who expressed interest is an “Applicant,” what was the “legitimate non-discriminatory reason(s) for rejection?” (discussed more below)
- **THE COMPANY OFFERED THE APPLICANT A JOB**
- **THE APPLICANT REJECTED THE JOB THE COMPANY OFFERED**

COMPLIANCE ACTIVITY #2 – Disposition Codes

❑ **Recruiter Roles as to Disposition Codes**

- Help design, define and customize the company's Disposition Codes
- Help “fine tune” the Disposition Codes once established to ensure “fit”
- Calibrate application of each kind of Disposition Code with other recruiters to insure homogenous understanding and application across multiple recruiters
- Review Disposition Codes each time one or more essential functions of the job for which you are recruiting changes to ensure the Disposition Codes are still relevant and up-to-date as to the evolving job or as to the addition of a new job
- Periodically Spot Check the application of the Disposition Codes other recruiters apply to insure your consistency of application with theirs

COMPLIANCE ACTIVITY #3 – Not an “Applicant” Codes

- ❑ Not all PEI are “Applicants” as the law defines that word
- ❑ Four different legal things have to be true, simultaneously, before the law will find a PEI to be an “Applicant”:
- ❑ **MUST HAVE SUSTAINED INTEREST**
 - Candidate did not no-show the interview
 - Candidate interested in shift, pay, location, etc.
 - Candidate did not take another job, etc.
- ❑ **MUST BE MINIMALLY QUALIFIED**
 - “Basic” Qualifications required under Internet Applicant Rule
 - OFCCP cannot, however, depart from Title VII substantive law
 - So, “minimum qualifications” required, as a matter of law
 - To be an “Applicant,” PEI need not be “better” qualified...just minimally qualified
 - Minimum years of relevant experience requirements, job tenure, relevant training, degree requirements, i.e., law degree, electrical engineering degree, CPA, etc.

COMPLIANCE ACTIVITY #3 – Not an “Applicant” Codes

❑ A POSITION MUST BE AVAILABLE

- If requisition closed out before the company could consider the PEI, then no position was available
- If requisition never materialized or was withdrawn, then no position was available

❑ THE EMPLOYER CONSIDERED THE INDIVIDUAL FOR THAT OPEN POSITION

- “Consider” means to weigh and balance
- Just opening an e-mail to see what has arrived and to document same is not “consideration” for employment - YET (it is just opening the mail)
- Many employers employ “Data Management Techniques” to manage a flood of applications and avoid rendering every PEI an “Applicant”
 - First 25 Applicants in queue
 - Consider only every 50th application, etc.

COMPLIANCE ACTIVITY #3 – Not an “Applicant” Codes

❑ Recruiter Roles to Document who is NOT an “Applicant”

- Identify and use the appropriate Disposition Codes to document the underlying reason(s) for your decision not to further advance the PEI through your selection system
- If there are multiple recruiters hiring for the same job, be sure to calibrate against each other to insure consistent application of selection standards
- “Notes” or “No Notes”?
 - Defense lawyers typically LOVE recruiter notes (tells the story)
 - Many HR managers/in-house counsel are queasy (not sure what they will find)
 - Always remember...if notes are taken, they must be kept!
- Make sure your documentation files are “digital,” and not just electronic. (PDF is an electronic document but is not digital: a computer cannot read it)
- Review at the end of each day and each week whether your Disposition Codes are saving properly, and can be retrieved (should an OFCCP audit ensue and OFCCP demand your Disposition Code files...as often occurs as to “evergreen” jobs with high PEI number counts)

COMPLIANCE ACTIVITY #4 – Non Discriminatory Reasons for Rejection of an “Applicant”

- ❑ Once the PEI is an Applicant, the company needs to document the “legitimate non-discriminatory reason(s) for rejection”
- ❑ Need enough detail to allow someone to put themselves in your shoes and understand the legitimate non-discriminatory reason(s) which led you to stop the advance of the candidate through your selection system – usually years later
- ❑ NBQ, or “Not Best Qualified” is often a flashpoint and weak Disposition Code many courts cannot support, depending upon how evident the legitimate reason is from a review of the totality of the recruitment/selection file
- ❑ Typically, you will need the specific reason the candidate was NBQ. i.e., Harry had more experience than Sally; sales experience described in application overstate upon interview, etc.

COMPLIANCE ACTIVITY #4 – Non Discriminatory Reasons for Rejection of an “Applicant”

❑ **Recruiter Roles to Document Non-Discriminatory Reasons for Rejection of an “Applicant” (sound familiar)???**

- Identify and use the appropriate Disposition Codes to document the underlying reason(s) for your decision not to further advance the (now) Applicant through your selection system
- If there are multiple recruiters hiring for the same job, be sure to calibrate against each other to insure consistent application of selection standards
- “Notes” or “No Notes”?
 - Defense lawyers typically LOVE recruiter notes (tells the story)
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COMPLIANCE ACTIVITY #5 – Documenting Data Metrics

- ❑ OFCCP Rules since March of 2014 require covered Government contractors to compile so-called “Data Metrics” for both Individuals with Disabilities and Protected Veterans
- ❑ Then you calculate the selection rates to determine what percentage of Protected Veterans or Individuals with Disabilities you actually hired
- ❑ These “Data Metrics” position you to prepare your annual “Effectiveness Reviews” of your outreach and recruitment efforts in the prior year

DATA METRICS FOR INDIVIDUALS WITH DISABILITIES

41 C.F.R. § 741-300.44(k)

		2017	2018	2019
1	Total number/% of "Applicants" who self-identified as Individuals with Disabilities	3 of 100 (3%)	20 of 325 (6.2%)	__ of __ (__%)
2	Total number of job openings in AAP Year in establishment	3	10	—
3	Total number of jobs filled	3	10	—
4	Total number of "Applicants" ¹ to the establishment	100	325	—
5	Total number/% of Disabled "Applicants" hired	0 of 3 (0%)	2 of 10 (20%)	__ of __ (__%)
6	Total number of "Applicants" hired	3	9	—

[1] "Applicants" constitute individuals who: (1) expressed interest and maintained that interest through the Company's consideration of the individual; (2) in a position for which the individual met all minimum qualifications; (3) whom the Company considered for an offer of employment; and (4) for whom there was an available position.

DATA METRICS FOR PROTECTED VETERANS

41 C.F.R. § 60-300.44(k)

		2018	2019	2020
1	Total number/% of "Applicants" who self-identified as a protected veteran	__ of __ (__%)	__ of __ (__%)	__ of __ (__%)
2	Total number of job openings in AAP Year in establishment	__	__	__
3	Total number of jobs filled	__	__	__
4	Total number of "Applicants" ¹ to the establishment	__	__	__
5	Total number/% of Protected Veteran "Applicants" hired	__ of __ (__%)	__ of __ (__%)	__ of __ (__%)
6	Total number of "Applicants" hired	__	8	__

[1] "Applicants" constitute individuals who: (1) expressed interest and maintained that interest through the Company's consideration of the individual; (2) in a position for which the individual met all minimum qualifications; (3) whom the Company considered for an offer of employment; and (4) for whom there was an available position.

COMPLIANCE ACTIVITY #5 – Documenting Data Metrics

❑ Recruiter Roles as to Data Metrics

- Data Metrics are important navigational tools for recruiters to determine whether:
 - they have thrown the net broadly enough to find qualified Individuals with Disabilities, and;
 - they have thrown the net broadly enough to find qualified Protected Veterans...
 - in the percentages that are presumed to be available to the company at that time

COMPLIANCE ACTIVITY #6 – Preparing Recruiters for OFCCP Audits

- ❑ In OFCCP audits, OFCCP often asks recruiters about company selection processes:
 - What standards and procedures you use to process out of the selection process those who are not “Applicants”
 - How you reject those Applicants who are not the better or best qualified
- ❑ OFCCP will also ask what you have done to make your selection process accommodate candidates:
 - In the interview room, completing required paperwork, as to cognitive or physical disabilities, etc.
 - Accommodations for the vision-impaired, other requested accommodations
- ❑ DE’s Recruit Rooster has recently begun to check websites for customers to ensure they are accessible to the blind and vision impaired, for example

COMPLIANCE ACTIVITY #6 – Preparing Recruiters for OFCCP Audits

❑ Recruiter Roles in Defending OFCCP Audits:

- Recruiters increasingly play a vital role to explain the selection, rejection and accommodation of Applicants during the hiring process
- Recruiters should write down every step in your selection process to make sure you have catalogued each step and may confidently explain the selection processes, start-to-finish
 - Develop a written Employment Policy for everyone in the selection process
 - Ensure ALL recruiters are saying the same thing to the OFCCP and there is a common understanding and routine that each recruiter follows
- If you are uncomfortable being interviewed, ask your HR department/lawyers to give you a mock interview to prep you (“batting practice”)

COMPLIANCE ACTIVITY #7 – Required Training of Recruiters

- ❑ OFCCP's Section 503 and VEVRAA Rules require covered Government contractors to annually train recruiters (among others) about the rights of Individuals with Disabilities and Protected Veterans.

COMPLIANCE ACTIVITY #7 – Required Training of Recruiters

❑ Recruiter Roles as to Training Obligation:

- Read your company's Affirmative Action Plan(s) for Individuals with Disabilities and for Protected Veterans
- Get training in non-discrimination as it pertains to selection for Hire
- Get training about accommodating PEIs and Applicants with Disabilities
- The DirectEmployers Academy will soon have training videos available for recruiters, too
- Make sure HR asks you to “sign-in” for training and keeps records of the date of the training, the course title, training materials and your attendance (I have had to turn this in during an audit)!

COMPLIANCE ACTIVITY #8 – Understanding Placement Goals, Utilization Goals and “Benchmarks for hiring”

- ❑ How are “Goals” different from a “Benchmark” and why does each OFCCP program use a different name to describe a “Goal”?
- ❑ Placement Goals for Minorities and Women (Executive Order 11246)
 - Percentage Goal
 - Based on the availability of Minorities/Women your AAP calculates to be available at that time for the AAP establishment in question
 - The Placement Goal tells recruiters what percentage of Minorities and Women are available in the marketplace for recruiters to consider for hire
 - “Goals” are not “Quotas”: Recruiters do not have to “hit the percentage” in hiring...only show “Good Faith Efforts” to recruit minorities and women in percentages about equal to the percentage the AAP calculates to be available
 - Once minorities/women are in the Applicant Pool, non-discrimination rules apply

COMPLIANCE ACTIVITY #8 – Understanding Placement Goals, Utilization Goals and “Benchmarks for hiring”

❑ Utilization Goals for Individuals with Disabilities (Section 503)

- OFCCP has calculated for recruiters that 7% of candidates for all “Job Groups” are disabled
 - OFCCP assumes that Individuals with Disabilities are evenly distributed from top to bottom among all of the Job Groups in your AAP
 - The “Data Metrics” for Individuals with Disabilities reveals to you whether you are recruiting Individuals with Disabilities in percentages equal to or greater than the 7% Utilization Goal, for each Job Group your AAP has identified
 - The idea is that if recruiters keep bringing Individuals with Disabilities into the Applicant Pool to comprise about 7% of it, that non-discrimination will cause the contractor to hire Individuals with Disabilities about 7% of the time, and with enough hires the workforce will eventually comprise about 7% Individuals with Disabilities

COMPLIANCE ACTIVITY #8 – Understanding Placement Goals, Utilization Goals and “Benchmarks for hiring”

- ❑ “Benchmarks for hiring” (VEVRAA) for Protected Veterans reveals to you whether you are recruiting Protected Veterans in percentages equal to or greater than the (currently) 5.7% “Benchmark for hiring” OFCCP has calculated for you are available to your workforce as a whole
 - Unlike the Utilization Goal for Individuals with Disabilities, which is a goal for each Job Group in your AAP, the “Benchmark for hiring” is a measurement across the entire AAP establishment
 - The idea is that Protected Veterans comprise about 5.7% of your Applicant Pool, the contractor will hire Protected Veterans about 5.7% of the time, and with enough hires the workforce will eventually comprise about 5.7% Protected Veterans

COMPLIANCE ACTIVITY #8 – Understanding Placement Goals, Utilization Goals and “Benchmarks for hiring”

❑ **Recruiter Roles as to OFCCP’s Goals and “Benchmarks for hiring”:**

- Recruiters should know the various percentage Goals of available Minorities and Women and of Individuals with Disabilities and the Benchmarks for hiring percentage (which tends to change annually)
- Recruiters should then periodically (but at least annually) compare their percentage recruitment of each of these various Protected Groups against the various availability calculations to ensure the recruiter is finding and luring these various Protected Groups into the company’s Applicant Pool in the percentages the company or OFCCP claims are available in the marketplace
- Any activities taken to improve your percentage of Protected Groups into your organization also counts as outreach, which also, must be measured at least annually for Protected Veterans and Individuals with Disabilities (although we strongly recommend you review it quarterly)



THANK YOU!