AGENDA

Myth 1: Newest Surprise and Confusion: The new OFCCP Post-Offer Self-ID form requires Kors to invite Protected Veterans to disclose which of the four species of Protected Veteran they are…………p. 7

Myth 2: OMB Switcheroo #2: The Vietnam Era Veterans Readjustment Assistance Act of 1974 is now “VEVRAA”…………………………………………………………p. 11

Myth 3: The new OFCCP audit Scheduling Letter revoked OFCCP’s prior exercises of regulatory and prosecutorial discretion to allow Kors to “Phase-In” AAPs and Subpart C……………………………………….p.13

AGENDA (CON’T.)

Myth 4: There are “Good Faith Effort” requirements in the new OFCCP § 503/4212 Regulations………………………………………………………p. 24

Myth 5: Goals are the same under § 503/4212 and EO 11246………………………………………………………………………………………………….p. 39

Myth 6: Kors Measure Goal Attainment The Same Way Under § 503/4212 and EO 11246……………………………………………………………………………p. 44

Myth 7: Self-identification Pursuant to OFCCP’s New § 503/4212 Regulations is Like the EO 11246 Self-ID…………………………………………………………….p. 47
AGENDA (CON’T.)

Myth 8: OFCCP’s New § 503/4212 Regulations Impose Only One “Effectiveness” Review ………..p. 50

Myth 9: § 503/4212 Annual Audit Is An Old Requirement Just Repeated In OFCCP’s New Regulations............................................................................. p. 56

Myth 10: Contractors Are Failing At Outreach To Protected Veterans .....................................p. 58

Myth 11: Federal Kors Will Want To Calculate Their Own Protected Veterans Benchmark...........p. 63

AGENDA (CON’T.)

Myth 12: Bad Things Will Happen To Kors Which Miss Their Benchmark .........................p. 65

Myth 13: D. Copus’ Blood Pressure Doesn’t Rise When Law Firms/HR Vendors Start The “Chicken Little” Speech Selling Fear Of OFCCP Debarments...........................................................................p. 66

I Want To Use My Lifeline: Available Resources…p. 67
MYTH 1: NEWEST SURPRISE AND CONFUSION: THE NEW OFCCP POST-OFFER SELF-ID FORM REQUIRES KORS TO INVITE PROTECTED VETERANS TO DISCLOSE WHICH OF THE FOUR SPECIES OF PROTECTED VETERAN THEY ARE

New reality: OFCCP Post-Offer Self-ID requirement will follow V.E.T.S. reporting form: no subgroup reporting

- OFCCP had announced in Spring 2014 that the Post-Offer 4212 Self-ID form would require identification of the four species of Protected Veterans (in contradistinction to the Pre-Offer Self-ID which prohibits same)

MYTH 1: NEWEST SURPRISE AND CONFUSION: THE NEW OFCCP ... (CON’T.)

- V.E.T.S. then published on September 25, 2014 its final V.E.T.S 4212 regulations and sent to OMB its proposed new VETS-4212 form
- The proposed VETS-4212 form then became visible to the public in mid-October and called for reporting on the number of Protected Veterans (in gross: no sub-categories)
MYTH 1: NEWEST SURPRISE AND CONFUSION: THE NEW OFCCP... (CON’T.)

• OFCCP’s regs thus now require only a count of PVs (as a whole: no subgroups) on Kor Post-Offer Self-ID forms. See 41 CFR § 60-300.42 (b) “Post-offer.”

“... the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she belongs to one of more of the specific categories of Protected Veterans for which the contractor is required to report pursuant to 41 CFR Part 61-300.” *** (emphasis added)

MYTH 1: NEWEST SURPRISE AND CONFUSION: THE NEW OFCCP... (CON’T.)

• Note: Kor may (not required) exercise its discretion to deploy a Post-Offer, Pre-Employment inquiry to job offerees asking (not requiring) them to identify which of the 4 Protected Veteran categories they fall into

  ▪ Why would Kor want to do that?
    ➢ Hint: “Recently Separated PV” issue
MYTH 2: OMB SWITCHEROO #2: THE VIETNAM ERA VETERANS READJUSTMENT ASSISTANCE ACT OF 1974 IS NOW “VEVRAA”

- New reality: “VEVRAA” is now “4212”
  - OFCCP adopted “VEVRAA” as its nomenclature in March 24, 2014 503/VEVRAA regulations
  - OMB has now changed the terminology at both OFCCP and at V.E.T.S.

MYTH 2: OMB SWITCHEROO #2 (CON’T.)

- Witness:
  - OFCCP new audit Scheduling Letter: “Section 4212 (VEVRAA)”
  - OFCCP Power Points now titled “4212”
  - V.E.T.S new PV reporting form is “VETS-4212”
  - Changes. Changes. Changes… to AAP name? to AAP language? To writings you now need to ponder about OFCCP’s compliance obligations…
MYTH 3: THE NEW OFCCP AUDIT
SCHEDULING LETTER REVOKED OFCCP’S PRIOR EXERCISES OF REGULATORY AND PROSECUTORIAL DISCRETION TO ALLOW KORS TO “PHASE-IN” AAPS AND SUBPART C

- Reality: The new OFCCP Scheduling Letter will defer to and continue OFCCP’s exercises of:
  - Regulatory discretion to allow Kors to “Phase-In” their 503/4212 AAPs, and
  - Prosecutorial discretion to allow Kors to “Phase-In” all of “Subpart C” of the new 503/4212 Rules

MYTH 3: THE NEW OFCCP AUDIT SCHEDULING LETTER REVOKED (CON’T.)

- So, three situations will present themselves:
  **Scenario 1)** All new 503/4212 data not ripe:
  Kor either did not “Phase-In”, or the “Phase-In” has now concluded (because the Kor has now developed new 503/4212 AAPs after March 24, 2014) → all of subpart C now effective → But, all newly required data not yet ripe during the Kor’s “transition AAP.”
MYTH 3: THE NEW OFCCP AUDIT
SCHEDULING LETTER REVOKED (CON’T.)

e.g. List of data not yet ripe OFCCP requests in its October 15, 2014 Itemized Listing:

1) Section 503
   - Para 7: results of effectiveness review = .44(f);
   - Para 8: documentation of actions re audit reporting = .44(h);
   - Para 9: “data metrics” = .44(k);
   - Para 10: utilization analysis = .45
   - Para 21: annual self-assessment = .44(b);

2) Section 4212
   - Para 11: results of effectiveness review = .44(f);
   - Para 12: documentation of actions re audits/reporting = .44(h);
   - Para 13: “data metrics” = .44(k);
   - Para 14: documentation hiring benchmark = .45(b)(2);
   - Para 21: annual self assessment = .44(b);
   - Para 22: assessment of physical/mental qualifications = .44(c)
Scenario 2) “6-Month” Data Are Ripe, the Rest Are Not Yet Ripe

- There are 6 paragraphs of the Itemized Listing requiring a 6-month update, but only 4 are applicable as of today as to Section 503/4212 and only as to all AAPs dated on or AFTER March 24, 2014 and BEFORE April 28, 2014
  - Note: November 4, 2014 (today) minus 180 days = April 28, 2014

So, if your new-style 503/4212 AAP is 6 months old, or older, you need to cough up the 6-month reports.

Scenario 2) “6-Month” Data Are Ripe (con’t.)

- Here is the index of the 6 six-month report paragraphs:
  - Para 9: “data metrics = .44(k);”
  - Para 10: utilization analysis = .45;
  - Para 13: “data metrics” = .44(k);
  - Para 14: documentation of hiring Benchmark and current year results
MYTH 3: THE NEW OFCCP AUDIT  
SCHEDULING LETTER REVOKED (CON’T.)

Scenario 2) “6-Month” Data Are Ripe (con’t.)

- Para 17: Progress towards goals update (requires update, but not applicable to 503/4212 data):
  - applies only to E.O. 11246 AAP
  - is NOT applicable in transition year to §503 AAP, at any rate, because you have no Utilization Analysis and thus no goal; and
  - is not applicable to 4212 Benchmark since it is “not a goal” and Kors have no “action-oriented program” requirements
- Para 18 Disparity Analyses (for “applicants and hires”, promotions and terminations) apply only to Executive Order 11246 Program and not to 503/4212

MYTH 3: THE NEW OFCCP AUDIT  
SCHEDULING LETTER REVOKED (CON’T.)

Scenario 3) Kor Phased-In → no new 503/4212 Subpart C requirements attach (yet) until Phase-In complete

- Subpart C includes sections: .40
  - .41
  - .42
  - .43
  - .44
  - .45
  - .46
  - .47
MYTH 3: THE NEW OFCCP AUDIT SCHEDULING LETTER REVOKED (CON’T.)

Scenario 3) Phase-In → no new 503/4212… (con’t.)

- Look above: all the Itemized Listing paragraphs applicable to 503/4212 are Subpart C requirements

Review/recap:

- **Section 503**
  - Para 7 = .44(f)
  - Para 8 = .44(h)
  - Para 9 = .44(k)
  - Para 10 = .45
  - Para 21 = .44(b)

- **Section 4212**
  - Para 11 = .44(f)
  - Para 12 = .44(h)
  - Para 13 = .44(k)
  - Para 14 = .45
  - Para 21 = .44(b)
  - Para 22 = .44(c)

LOOKING FORWARD IN TIME

So, when Phasing-In is over (latest possible § 503/4212 AAPs Phase-In date was March 23, 2014 which delayed Subpart C through March 23, 2015), then:

1) OFCCP audit Scheduling Letters received after Phase-In completed might:

- First demand data not yet ripe (because this is a transition AAP and 6 months might have not yet have elapsed in life of this transition AAP)
- After 6 months into transition AAP, the four 6-month update sections will attach
- After 12 months of transition AAP, first “fully loaded” AAP will be subject to full force of OFCCP audit Scheduling Letter
LOOKING FORWARD IN TIME (CON’T.)

Here is my suggested response to OFCCP’s new audit Scheduling Letter as to its request for “not yet ripe data”:

“We have supplied no documents in response to paragraphs 7-10 and 21 (§ 503) and 11-14 and 21 & 22 (§ 4212) of the Itemized Listing attached to OFCCP’s [DATE] audit Scheduling Letter. OFCCP’s Section 503/4212 regulations do not yet require the Company to develop these data and they are thus not yet ripe for OFCCP review.”

MYTH 4: THERE ARE “GOOD FAITH EFFORT” REQUIREMENTS IN THE NEW OFCCP § 503/4212 REGULATIONS

- Where is that regulatory citation to GFEs?

Background:
- Clinton Administration homogenized 503/4212; Obama Administration balkanized them from each other, and from EO 11246 architecture
- Executive Order 11246 Regulatory Architecture
  1) 41 CFR § 60-2.17(a): Contractor must apply “every good faith effort to make all aspects of the entire Affirmative Action Program work.” (emphasis added)
  2) 41 CFR § 60-2.17(c): As part of contractor’s duty to develop “action oriented programs,” it must “demonstrate” that it has made “good faith efforts to remove identified barriers, expand employment opportunities, and produce measurable results.” (emphasis added)
MYTH 4: GOOD FAITH EFFORTS (CON’T.)

§ 503/4212 Regulatory Architecture:

• What happens if the Kor misses its “Utilization Goal” (§ 503) or “Benchmark” (4212)?
  • § 503: You have to do some things (described below)
    • See 41 CFR § 60-741.45 (“Utilization goals”)[§ 503]
    • 4212: There is no obligation or penalty for failing to reach the “Benchmark for hiring.” Really!
      • See 41 CFR § 60-300.45 (“Benchmark for hiring”) [4212]

MYTH 4: GOOD FAITH EFFORTS (CON’T.)

§ 503 Regulatory Architecture:

- “Utilization Analysis”
- “Identification of Problem Areas”
- “Action-oriented Programs”
+ “Annual Effectiveness Evaluation”

“The Kor must develop and execute action-oriented programs designed to correct any identified problem areas. These action-oriented programs may include the modification of personnel processes to disabilities, alternative or additional outreach and recruitment efforts from among those listed in § 60-741.44(f)(1) and (f)(2) and/or actions designed to correct the identified problem areas and attain the established goal.” (emphases added)
MYTH 4: GOOD FAITH EFFORTS (CON’T.)

Plus, you **also** have to undertake the annual “outreach” effectiveness review

- See 41 CFR § 60-741-44 (f)(3)
  - Plus, must factor in data metrics set out in 41 CFR § 60-741.44 (k) as part of “effectiveness” review
- If you are “not effective,” what happens?
  \[\rightarrow (f)(1) \text{ or } (f)(2) \text{ (note underscoring, BTW)}\]

MYTH 4: GOOD FAITH EFFORTS (CON’T.)

So, all Section 503 roads lead contractors to (f)(1)/(f)(2)

If action-oriented program

\[\downarrow \text{ from among } (f)(1) \text{ and } (f)(2)\]

If no effective outreach

\[\downarrow \text{ from among } (f)(1) \text{ or } (f)(2)\]

What happens if you are “effective” in your outreach, but did not achieve your UG?

\[\rightarrow (f)(1) \text{ and } (f)(2)\]

Likewise, if you achieve your UG but are not effective, what happens?

\[\rightarrow (f)(1) \text{ or } (f)(2)\]

It’s all about outreach and outreach and outreach

BTW: What happens if you escalate to (f)(1) and (f)(2) and still are “not effective?”

FOX, WANG & MORGAN
Wait a Minute! Timeout!

Detour! What Are Those (F)(1) and/or (F)(2) “Things?”
**MYTH 4: GOOD FAITH EFFORTS (CON’T.)**

What do (f)(1) and (f)(2) require?

“(f) External dissemination of policy, outreach and positive recruitment. (4212 reg; § 503 regs are parallel)

(1) Required outreach efforts.

(i) The contractor shall undertake appropriate outreach and positive recruitment activities such as (emphasis added) those listed in paragraph (f)(2) of this section that are reasonably designed to effectively recruit protected veterans. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (f)(2) (emphasis added) of this section or that its activities will be limited to those listed. The scope of the contractors’ efforts shall depend upon all the circumstances, including the contractor’s size and resources and the extent to which existing employment practices are adequate.”

**MYTH 4: GOOD FAITH EFFORTS (CON’T.)**

What does (f)(1) and (f)(2) require? (con’t.)

“(ii) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.

(2) Examples of outreach and recruitment activities. (emphasis added) Below are examples of outreach and positive recruitment activities referred to in paragraph (f)(1) of this section. This is an illustrative list, and contractors may choose from these or other activities, as appropriate to their circumstances.

(i) Enlisting the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for veterans, in order to fulfill its commitment to provide meaningful employment opportunities for such veterans” ***
MYTH 4: GOOD FAITH EFFORTS (CON’T.)

4212 Regulatory Architecture

- Benchmark
  - No (f)(1) and (f)(2) required for this failure
- But, annual “effectiveness review” of outreach operates independently of whether you reached the Benchmark: 41 CFR § 60-300.44 (f)(3):
  - “Assessment of external outreach and recruitment efforts.”
    - Must evaluate among other things “data metrics:” 41 CFR § 60-300.44 (k) “Data Collection Analysis”
    - If “not effective” → (f)(1) or (f)(2)

So, 4212 looks like this:

If no effective outreach
from among
(f)(1) or (f)(2)

If action-oriented program
(f)(1) and (f)(2)
MYTH 4: GOOD FAITH EFFORTS (CON’T.)

Do you have to do all of the actions (f)(1) and (f)(2) list?

No.

Repeat: No.

The § 503 story

A) 41 CFR § 60-741.45 [§ 503 Utilization goals]:

“(f) Action-oriented programs. The contractor must develop and execute action-oriented programs designed to correct any identified problem areas. These action-oriented programs may include the modification of personnel processes to ensure equal employment opportunity for individuals with disabilities, alternative or additional outreach and recruitment efforts from among those (emphasis added) listed in § 60-741.44 (f)(1) and (f)(2), (emphasis added) and/or other actions designed to correct the identified problem areas and attain the establishment goal.”

B) 41 CFR § 60-741.44 (f)(3) [§ 503 “Assessment”]:

“If the Kor concludes the totality of its efforts were not effective in identifying and recruiting, (emphasis added) qualified individuals with disabilities, it shall identify and implement alternative efforts (emphasis added) listed in paragraphs (f)(1) or (f)(2) (emphasis added) of this section in order to fulfill its obligations.”
MYTH 4: GOOD FAITH EFFORTS (CON’T.)

The 4212 story
A) 41 CFR § 60-300.44 (f)(3) [4212 “Assessment”]:
“If the Kor concludes the totality of its efforts were not effective in identifying and recruiting, (emphasis added) qualified Protected Veterans, it shall identify and implement alternative efforts (emphasis added) listed in paragraphs (f)(1) or (f)(2) (emphases added) of this section in order to fulfill its obligations.”

B) 41 CFR § 60-300.45 [4212 goals]:
Whoops!
- There are no goals
- So, what does this mean?
- You do nothing if you fail your “Benchmark for hiring”
- It means you only do something if you are “not effective”
MYTH 5: GOALS ARE THE SAME UNDER § 503/4212 AND EO 11246

Q: If you achieve and attain your E.O. 11246 goals (i.e. achieve “parity”), can you stop?
A: No.
• It’s a recruitment goal, so you have to constantly know the percentage availability, year in and year out

MYTH 5: GOALS ARE ALL THE SAME (CON’T.)

Q. If you achieve and attain your 503/4212 UG/Benchmark (i.e. achieve “parity”), can you stop annual effectiveness evaluations while maintaining outreach?
A: Technically, no. But, I cannot imagine OFCCP will care if you stop evaluations when you have the result.
• The Utilization Goal is a quota, so once achieved, and maintained, you have the result, and process becomes irrelevant, as a practical matter.
  ➢ But, you could slip back if you stop hiring individuals with a disability... so, there is a policy reason to seek to continue to achieve 503’s Utilization Goal
MYTH 5: GOALS ARE ALL THE SAME (CON’T.)

WHOA! Quota. That sounds harsh. OFCCP says “It ain’t so.”

FOX: “A rose by any other name is still a rose.”

The UG is a quota because there is a penalty if you fail it: you have to do something.

It’s a so-called “soft quota” since the “something” you have to do is not “hit the number” (a “hard-on-the-docks” quota) but you have to figure out why you failed and then do something from (f)(1) and (f)(2)

BTW, do you have to figure out why you failed if you always end up doing (f)(1) and (f)(2), regardless?

• Yes. (You do that in the Utilization Analysis and during the annual effectiveness assessment.)

MYTH 5: GOALS ARE ALL THE SAME (CON’T.)

Here is what you have to do under § 503 when you miss the UG:

See 41 CFR § 60-741.45(e) (“Identification of problem areas.”) (§ 503):

“When the percentage of individuals with disabilities in one or more job groups *** is less than the utilization goal established in paragraph (a) of this section, the contractor must take steps to determine whether and where (emphasis added) impediments to equal employment opportunity exist. When making this determination, the contractor must assess its personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its affirmative action program audit, and any other areas that might affect the success of the affirmative action program.”

41 CFR § 60-741.45 (f):

“Action-oriented programs. The contractor must develop and execute action-oriented programs designed to correct any identified problem areas.”
MYTH 5: GOALS ARE ALL THE SAME (CON’T.)

4212’s “Benchmark” regulation is vacuous

- The regulation has no obligation other than to “set” “hiring Benchmarks” “on an annual basis”
- OFCCP regulations even leave out any “trigger” language
  - At best, the “sense” of OFCCP’s 4212 Benchmark regulation is that it implies Kors should hire at the Benchmark %
- No Utilization Analyses
- No Action-Oriented Programs
  - No GFEs, as a result
- No goal (gives meaning to OFCCP’s statement that the Benchmark is “not a goal”)

MYTH 6: KORS MEASURE GOAL ATTAINMENT THE SAME WAY UNDER § 503/4212 AND EO 11246

- Reality: No.
- EO 11246: Goal achieved if Kor employs at-issue protected group within 80% or 2 standard deviations of most favored group

  • See 41 CFR § 60-2.15 (b): “When the percentage of minorities or women employed in a particular job group is less than would reasonably be expected given their availability percentage in that particular job group, the contractor must establish a placement goal in accordance with § 60-2.16.” (emphasis added)

  • So, choices: “any difference”; 80%; a statistical measure of chance (2 SDs or Fisher’s Exact)
MYTH 6: KORS MEASURE GOAL ATTAINMENT THE SAME WAY (CON’T.)

− § 503: Utilization Goal: Goal achieved only if Kor employs $\geq$ the UG % in the at-issue job group (i.e. “any difference rule”)
  - See 41 CFR § 60-741.45 (a)(b): “(a) Goal. OFCCP has established a utilization goal of 7 percent for employment of qualified individuals with disabilities for each job group in the contractor’s workforce, or for the contractor’s entire workforce as provided in paragraph (d)(2)(i) of this section. (b) Purpose. The purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of individuals within each job group in its workforce or within the contractor’s entire workforce as provided in paragraph (d)(2)(i) of this section ***.” (emphasis added)

MYTH 6: KORS MEASURE GOAL ATTAINMENT THE SAME WAY (CON’T.)

− 4212 Benchmark for hiring: No goal requirement, so nothing against which to measure Kor’s selections or incumbency
  - However, assuming OFCCP’s regulation implies an obligation, does that obligation apply to recruitment? (ala EO 11246) or to total employment in a job group (ala § 503)?
  - Neither. If there is any requirement, they are “Benchmarks for hiring” (i.e. a selection requirement)

Q: How does a Kor know if it has met or failed to meet the Benchmark?
  - Any difference? 80%? 2 Standard Deviations?

A: Kors (and OFCCP) do not know.
  - Since there is no regulatory requirement as to what contractor should do with a Benchmark other than “set” it, there is no legal duty to meet or fail.
MYTH 7: SELF-IDENTIFICATION PURSUANT TO OFCCP’S NEW 503/4212 REGULATIONS IS LIKE THE EO 11246 SELF-ID

- Reality: No.
- EO 11246 Self-ID architecture:
  - Invites “minorities”/women to Self-ID
  - When: Pre-interview? (unclear)
  - No Post-Offer Self-ID (other than for EE0-1/IPEDs)
  - May use form, or not to accomplish Self-ID
  - Form, if used, may be of Kor’s design

MYTH 7: SELF-ID’S ALL THE SAME (CON’T.)

- Compare the § 503 Self-ID architecture:
  - Mandatory OFCCP-provided form
  - Must use form for 4 different OFCCP-required Self-IDs (and may use for a fifth regulatory requirement)
    (1) Pre-Offer
    (2) Post-Offer
    (3) For EE survey required during the first year after Subpart “C” attached to contactor
    (4) Five year intervals after Subpart “C” requirements attached to Kor ➔ EE survey
    (5) “Tweener” “reminder” to employees they may update their prior Self-IDs (may use mandatory OFCCP Self-ID form)
MYTH 7: SELF-ID’S ALL THE SAME (CON’T.)

- Compare 4212 Self-ID architecture:
  - Invite PVs to Self-ID
  - Kor may use form of its own choosing
  - “Kor must make only 2 different invitations:
    (a) Pre-Offer
    (b) Post-Offer
  - Notes:
    In light of OMB switcheroo, OFCCP’s mandated Pre-Offer and Post-Offer self-ID forms will be the same.
    If Kor elects to pursue more Post-Offer detail, Pre- and Post-Offer Self-ID forms will vary (nothing wrong with that).

MYTH 8: OFCCP’S NEW § 503/4212 REGULATION IMPOSE ONLY ONE “EFFECTIVENESS” REVIEW

Effectiveness 1 & 2: The “Macros” “Effectiveness” Requirement

“Measure Effectiveness:”

“(h) Audit and reporting system. (1) The contractor shall design and implement an audit and reporting system that will:
(i) Measure the effectiveness of the contractors affirmative action program;...”

See 41 C.F.R. § 60-741.44(h) [§ 503]
See 41 C.F.R. § 60-300.44(h) [4212]
MYTH 8: ONLY ONE “EFFECTIVENESS” REVIEW (CON’T.)

Effectiveness 3 & 4: The “Micro” “Effectiveness” Requirement

“Self-evaluation” of Kor’s Outreach and Recruitment Efforts

See 41 C.F.R. § 60-741.44(f)(3) [§ 503]
See 41 C.F.R. § 60-300.44(f)(3) [4212]

“(3) Assessment of external outreach and recruitment efforts. The Contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous twelve months to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities.” (emphases added) (Con’t.)

MYTH 8: ONLY ONE “EFFECTIVENESS” REVIEW (CON’T.)

“The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor’s conclusion as to whether each effort was effective. Among these criteria shall be that data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor’s conclusion as to the effectiveness of its outreach efforts must be reasonable as determined by the OFCCP in light of these regulations... (emphases added). If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified individuals with disabilities, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.” (emphases added)
WAIT! TIMEOUT!

DETOUR! WHAT ARE THOSE 44(k) DATA METRICS AGAIN?
**WHAT ARE THOSE 44(k) DATA METRICS AGAIN? (CON’T.)**

41 CFR § 60-300.44(k) (§ 503 Rules are parallel):

“(k) **Data collection analysis.** The contractor shall document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years:

1. The number of applicants who self-identified as protected veterans pursuant to § 60-300.42(a), or who are otherwise known as protected veterans;
2. The total number of job openings and total number of jobs filled;
3. The total number of applicants for all jobs;
4. The number of protected veteran applicants hired; and
5. The total number of applicants hired.”

NOTE: Same 5 data metrics for § 503 but as to Individuals With Disabilities

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**MYTH 9: 503/4212 ANNUAL AUDIT IS AN OLD REQUIREMENT, JUST REPEATED IN OFCCP’S NEW REGULATIONS**

**Answer** = Wrong. It’s a new requirement.

What do you now have to do as part of this new annual audit of your § 503/4212 AAPs?
MYTH 9: SELF AUDIT IS AN OLD REQUIREMENT (YAWN!) (CON’T.)

“(h) Audit and reporting system. (1) The contractor shall design (emphases added) and implement an audit and reporting system that will:

(i) Measure the effectiveness of the contractor’s affirmative action program;
(ii) Indicate any need for remedial action;
(iii) Determine the degree to which the contractor’s objectives have been attained;
(iv) Determine whether known individuals with disabilities have had the opportunity to participate in all company sponsored educational training, recreational, and social activities;
(v) Document the actions taken to comply with the obligations of paragraphs (h)(1)(i) through (v) of this section, and retain these documents as employment records subject to the record keeping requirements of § 60-741.80.”

MYTH 10: CONTRACTORS ARE FAILING AT OUTREACH TO PROTECTED VETERANS

OFCCP believes the main problem preventing federal Kors from hiring Protected Veterans is that there is not enough Kor outreach and recruitment

• I think this is an erroneous conclusion
• Veterans can find you

But, massive retraining effort needed in America

− Corporate GI Bill of rights?
− What stops your company?
MYTH 10: IS OUTREACH TO PROTECTED VETERANS THE PROBLEM? (CON’T.)

Here’s the problem:

98% of Americans worked on the farm in 1900. 2% of Americans worked on the farm in 2000. (i.e. 98% of Americans now work off the farm)

So, in 100 years, America went from an agrarian to an industrial society.

MYTH 10: IS OUTREACH TO PROTECTED VETERANS THE PROBLEM? (CON’T.)

Only ~ 13% of U.S. Armed Forces personnel have a Bachelor’s Degree or Better.

But, 60% of all new jobs in America now require a BA or better

So, 60% of the new jobs we are creating require BA/BS or better, but only about 13% of PVs have a BA/BS, or better

Tilt!
MYTH 10: IS OUTREACH TO PROTECTED VETERANS THE PROBLEM? (CON’T.)

There are still currently ~ 10M people unemployed in America. There are currently over 7M people working part time who are interested/available to work full time.

There are still over 3M “discouraged workers” in America (meaning they no longer qualify for unemployment benefits and the Bureau of Labor Statistics has no way to accurately find or count them).

So, we are something in the neighborhood of 20M fulltime jobs short of demand... mostly blue collar jobseekers.

Only ~ 65% of those capable/desirous of working fulltime are currently working fulltime.

• Push for full-time employment is now an SEIU and workers advocates prime objective

Conclusion: A massive retraining effort is needed in America or else your successor will be facing the same Protected Veteran hiring challenge you are facing.

Question: What stops your company from deploying its own GI Bill of Rights (educational training/re-training/scholarships)?
MYTH 11: FEDERAL KORS WILL WANT TO CALCULATE THEIR OWN PROTECTED VETERANS BENCHMARK

The number of Kors who will likely calculate their own customized Protected Veterans “Benchmarks” is likely fewer than 50. Nationwide. Maybe 10.

- Why? What bad happens to a Federal Kor which does not achieve its Benchmark?
  a) Pat Shiu gives that Kor a public whipping to end all public whippings?

MYTH 11: CUSTOM BENCHMARK? (CON’T.)

b) The contractor has to undertake more outreach efforts which were previously only suggested, but not required.

c) No. Nothing bad happens

Review: Alternative outreach efforts attach ONLY if you deem your 4212 outreach efforts “not effective.” See 41.C.F.R. § 60-300.44(f)
MYTH 12: BAD THINGS WILL HAPPEN TO KORS WHICH MISS THEIR BENCHMARK

Answer: Nope

- Kors which fail to meet their OFCCP Benchmark must:
  - Pay monetary fines
  - No
  - Demonstrate “Good Faith Efforts” to achieve the Benchmark
    - No, no, no
  - Be debarred?
    - No, never

MYTH 13: D. COPUS’ BLOOD PRESSURE DOESN’T RISE WHEN LAW FIRMS/HR VENDORS START THE “CHICKEN LITTLE” SPEECH SELLING FEAR OF OFCCP DEBARMENTS

- OFCCP has never debarred a Kor over the Kor’s opposition
- Fewer than 70 OFCCP-related debarments since 1965 (49 years)
- How many OFCCP debarments in The Obama Administration?
There are Four Fast Ways to Internalize All the New OFCCP 503/4212 Regs? T/F

Answer = True!

1) Read only the regulations (not Preamble or Economic Justifications)

2) Listen to the National Employment Law Institute (NELI) Webinars I taught on January 23, 2014 (Segment A) and especially January 30, 2014 (Segment B = a transactional approach to the regulations) still available through NELI.

I WANT TO USE MY LIFELINE: AVAILABLE RESOURCES (CON’T.)

3) Listen to the Direct Employers “Transactional Approach” Webinar Candee Chambers and I taught February 12, 2014. Beg Candee if you are not a Direct Employers member.

4) Read my 40+ Model Forms, Analyses, Clauses, Evaluations, and Notices, etc. in the Fox, Wang & Morgan Contractor Conversion Kit.
Fox, Wang & Morgan is making its Compliance Conversion Kit available to the public, in digital form, including all documents you need to comply, including approximately 120 pages of material, all revised AAPs, almost 40 forms, notices, clauses, evaluations, audits, and surveys, etc. The price for the Compliance Conversion Kit is $3,000 for the general public. Fox, Wang & Morgan clients, National Employment Law Institute seminar/webinar attendees, and Direct Employers members are eligible for substantial discounts. Please contact us for discount pricing information.

Contact: Thuy Vu: (408)844-2352; Tvu@foxwangmorgan.com to order now.

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THANK YOU