Legal Opinion Letter

Vol. 24 No. 8 April 24, 2015

Washington Legal Foundation
Advocate for Freedom and Justice®
2009 Massachusetts Avenue, NW
Washington, DC 20036
202.588.0302 wlf.org

Federal Contract Office's Latest Regulatory Overreach Deserves Supreme Court Review

by Lawrence S. Ebner, Mark J. Meagher and Joel M. Pratt

New Office of Federal Contract Compliance Programs (OFCCP) regulations force government contractors to collect voluminous data on job applicants with disabilities and to enforce arbitrary employment goals. This effort is emblematic of OFCCP's overly aggressive approach to its mandate. The U.S. Supreme Court should put an end to this overreach by granting certiorari and reversing *Associated Builders and Contractors, Inc. v. Shiu*, No. 14-1111 (pet. for cert. filed Mar. 12, 2015).

Section 503 of the Rehabilitation Act of 1973 (the Act), 29 U.S.C. § 793 (2014), requires covered government contractors to "take affirmative action to employ and advance in employment qualified individuals with disabilities" and authorizes OFCCP to implement this requirement through regulation.

Previous OFCCP regulations required contractors to recruit qualified individuals with disabilities, publicize their affirmative action plans, and regularly audit the effectiveness of the programs.[1] Once a contractor offered employment to an applicant, the contractor had to invite the applicant to disclose his or her disability status.[2]

New regulations, proposed in 2011 and issued in 2013, reach further. Under the new rule, 78 Fed. Reg. 58682-01 (Sept. 24, 2013), contractors must invite applicants to disclose disability status *pre-offer*.[3] Moreover, OFCCP instituted a 7% "utilization goal" for qualified individuals with disabilities.[4] OFCCP requires a contractor that does not meet this threshold to reassess its recruitment processes and its affirmative action program audits.[5]

In November 2013, Associated Builders and Contractors, Inc. (ABC) sued to challenge the new rule.[6] A Washington, D.C. federal district court denied ABC's challenge, holding that OFCCP has broad authority under the statute to issue such regulations, and that promulgation of OFCCP's new regulations was a reasonable exercise of such authority.[7] The trial court ran the regulation through the two-step *Chevron* analysis, concluding both that "Congress has directly spoken to the precise question at issue," and that OFCCP's regulations represent "a permissible construction of the statute."[8] In addition, the district court held that the utilization goal is not arbitrary or capricious because the connection between overall labor data and OFCCP's conclusions was "rational."[9]

ABC appealed the decision to the U.S. Court of Appeals for the D.C. Circuit, which affirmed the district court's order.[10] Deferring to OFCCP, the appellate court ruled that the word "qualified" in the Act does not modify "affirmative action" and thus implied that affirmative action programs under the OFCCP regulations need not target only "qualified" individuals. The court of appeals held both that the Act expressly allowed OFCCP to promulgate this regulation, and that the regulation is a permissible interpretation of the Act.[11] In addition, the court ruled that the 7% utilization goal is not arbitrary or capricious on the theory that OFCCP used the best data it

---

Lawrence S. Ebner is a Partner and appellate attorney in the Washington, D.C. office of McKenna Long & Aldridge LLP. **Mark J. Meagher** is a Partner and **Joel M. Pratt** is a law clerk in the same firm's Denver office, where they focus on government contracts law. Mr. Pratt's admission to the Colorado Bar is pending results from the state bar examination, and he is working under the supervision of Mr. Meagher.

had available, and even so, the goal is merely a "yardstick," not an absolute mandate.[12] ABC then filed its petition for a writ of certiorari, seeking Supreme Court review of the regulation.[13]

The D.C. Circuit erred for two significant reasons. First, the pre-offer data collection and analysis requirement effectively *deletes* the word "qualified" from the Act. Not every applicant is qualified to do the work. Moreover, contractors have no responsibility to hire individuals if their disability interferes with a legitimate qualification that is "job-related . . . and . . . consistent with business necessity."[14] Thus, the new collection and analysis of data fails to tell a coherent story about the relevant category of people. The appellate court's decision is contrary to the express direction of Congress, which did not seek to force contractors to hire *unqualified* workers or spend resources tracking them. The regulations simply sweep too broadly.

This problem is particularly acute for construction contractors, whose work is marked by significant physical demands and high turnover.[15] These contractors do not need to track data from numerous applicants who, for whatever reason, lack the skills or experience to be successful. Contractors' collecting unnecessary information will prevent discovering meaningful data about contractors' application and hiring patterns.

The court of appeals' second error is permitting the 7% utilization rate. OFCCP derived this number by comparing the current employment rate of individuals with disabilities to the percentage of disabled individuals who "identify as having an occupation" but are not currently seeking work.[16] OFCCP assumed that individuals in the latter group had stopped looking for work because they face disability-related discrimination.[17] Given the wide variety of reasons that people may choose to stop looking for work, this assumption stretches credulity. In addition, the utilization goal is inflexible by industry, so it fails to take into account individual contractors' unique circumstances. The argument that the utilization rate is not a "quota" gives contractors little comfort: failure to reach the 7% rate triggers a host of costly obligations (mentioned *supra* at footnote 5).

Ultimately, OFCCP conservatively estimates that these new regulations will cost industry in the neighborhood of $300 million.[18] That amount would be better spent creating jobs for qualified individuals with disabilities; instead, it will be wasted on meaningless data collection and analysis. Contractors should take seriously their obligations to employ individuals with disabilities, but they should not be forced to waste time and resources collecting unnecessary data in an effort to reach an arbitrary goal.

Endnotes

[1] *Associated Builders & Contractors, Inc. v. Shiu*, 773 F.3d 257, 261 (D.C. Cir. 2014).
[2] *Id.*
[3] 41 C.F.R. § 60-741.42 (2014).
[4] 41 C.F.R. § 60-741.45 (2014).
[5] *Id.*
[6] *Associated Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 33 (D.D.C. 2014)
[7] *Id.* at 36–37, 40.
[8] *Id.* at 40 (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984)).
[9] *Id.* at 42.
[10] *Shiu*, 773 F.3d at 260.
[11] *Id.*
[12] *Id.* at 265–66.
[13] Petition for Writ of Certiorari, *Associated Builders & Contractors, Inc. v. Shiu*, No. 14-1111 (Mar. 12, 2015).
[14] 41 C.F.R. § 60-741.44 (2014).
[15] Office of Federal Contract Compliance Programs, *Technical Assistance Guide for Federal Construction Contractors* at 7, 37 (2009), *available at* http://www.civilrightsusa.gov/pdf/TAG%20-%20Constuction.pdf .
[16] *Shiu*, 30 F. Supp. 3d at 44–45.
[17] *Id.*
[18] Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities, 78 Fed. Reg. 58,682, 58,716 (Sept. 24, 2013) (codified at 41 C.F.R. § 60–741 (2014)).

 ISBN 1056 3059