CENTER FOR WORKPLACE COMPLIANCE

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September 18, 2017

Mr. Randall Smith
Veterans' Employment and Training Service
U.S. Department of Labor
Room S-1325
200 Constitution Avenue, NW
Washington, DC 20210

Re: HIRE Vets Medallion Program, RIN 1293—AA21; Notice of Proposed Rulemaking

Dear Mr. Smith:

I am pleased to submit these comments on behalf of the Center for Workplace Compliance in response to the notice of proposed rulemaking implementing the HIRE Vets Medallion Program published by the Department of Labor's Veterans Employment and Training Service (DOL-VETS) in the *Federal Register* on August 18, 2017.[1]

Founded in 1976, the Center for Workplace Compliance (CWC) (formerly the Equal Employment Advisory Council (EEAC)) is the nation's leading nonprofit association of employers dedicated exclusively to helping its members develop practical and effective workplace compliance programs. Its membership includes over 250 major U.S. corporations, collectively providing employment to millions of workers. CWC's directors and officers include many of industry's leading experts in the field of workplace compliance and their combined experience gives CWC a unique depth of understanding of the practical and legal considerations relevant to interpreting and applying workplace compliance policies and requirements. Nearly all of CWC's members are employers subject to the requirements of the Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

CWC supports programs to recognize employers that have implemented successful policies and practices that may serve as examples to other employers. The Department of Labor has implemented several such programs in the past. For example, in 2008, DOL's Office of

[1] 82 Fed. Reg. 39,371.

Federal Contract Compliance Programs (OFCCP) created the Good Faith Initiative for Veterans Employment (G-FIVE) award for contractors that demonstrate best practices related to the employment of veterans.[2] Unfortunately, these efforts have largely been discontinued.[3]

Recognition of employers who have implemented best practices or who have developed innovative practices and strategies to achieve important goals, such as the hiring and retention of veterans, can be an effective way to educate other employers about creative ways to address common challenges. We hope that the HIRE Vets Medallion program will be just one of several such efforts.

The proposed regulation largely tracks the provisions of the Honoring Investments in Recruiting and Employing American Military Veterans Act (HIRE Vets Act).[4] However, CWC has some concerns with proposed section 1011.120, which discusses employer ineligibility due to a "violation of labor law." There is no corresponding section in the HIRE Vets Act.

Section 1011.120 states that an employer will not be eligible to receive an award under the HIRE Vets Medallion Program if the employer has had an adverse labor law decision, stipulated agreement, contract debarment, or contract termination pursuant to USERRA or VEVRAA. We concur with the premise that an employer that does not take seriously its obligations under USERRA and VEVRAA is undeserving of an award under the program. However, as detailed below, we question whether the proposal has struck the right balance.

Before responding to the specific questions asked in the notice of proposed rulemaking, it is important to recognize that section 1011.120 is similar in design to Executive Order (E.O.) 13673, formerly entitled Fair Pay and Safe Workplaces and commonly referred to as the "Blacklisting" E.O. Under the E.O., which was repealed earlier this year,[5] prospective contractors would have been required to certify whether they had committed any "violations" of numerous labor and employment laws. If so, those "violations" would have been considered by contracting officers in making a responsibility determination before contract award.

One of the criticisms of the E.O. was that it could have led to denial of federal contracts for "violations" that have little to no bearing on contractor responsibility. The same principle could apply in the context of the current rulemaking unless DOL-VETS is careful to ensure that

[2] The G-Five award was created by OFCCP Directive 282 (July 17, 2008).
[3] Directive 282 was formally rescinded by Directive 314 (September 2013).
[4] The HIRE Vets Act was enacted as Division O of the Consolidated Appropriations Act, 2017, Pub. L. No. 115-31, 131 Stat. 135 (May 5, 2017).
[5] The regulations implementing the E.O. were repealed by Congress. Pub. L. No. 115-11, 131 Stat. 75 (Mar. 27, 2017). E.O. 13673 was repealed by E.O. 13782 (Mar. 27, 2017).

employers are not excluded based on violations that have no bearing on employer efforts to recruit, employ, and retain veterans.

Should DOL-VETS expand the list of covered laws beyond USERRA and VEVRAA, such as by including the Fair Labor Standards Act, the Occupational Safety and Health Act, or the Mine Safety and Health Act?

No. If DOL-VETS is to disqualify an employer from receiving an award based on a violation of an employment law, the list of laws should be limited to those that have a bearing on the employer's effort to recruit, employ, and retain veterans consistent with the HIRE Vets Act.

Is the scope of the definitions for disqualifying events appropriate?

The proposed rule would disqualify employers based on an "adverse labor law decision," a "stipulated agreement," a "contract debarment," or a "contract termination."

An "adverse labor law decision" as defined in the proposal would include civil or criminal judgments, final administrative merits determinations of an administrative adjudicative board or commission, or a decision of an administrative law judge or other administrative judge that is not appealed and that becomes final agency action. The scope of these definitions is narrower than that utilized in implementing the regulations under E.O. 13673 and therefore arguably less problematic. DOL-VETS should bear in mind, however, that an employer could be found in violation for technical or minor transgressions that say nothing about the employer's commitment to compliance or its efforts to recruit, employ, and retain veterans.

For example, both VEVRAA and the Labor Department's implementing regulations require that covered federal contractors list most of their employment openings with an "appropriate employment service delivery system." In practice, listing with the "appropriate employment service delivery system" usually means simply providing information about current job vacancies to a state or local employment service. While the contractor is responsible for providing the technical information necessary to list the vacancy, it has no control over whether the employment service will actually post the vacancies on its job boards after receiving them. Unfortunately, in practice, there are numerous instances in which the employment service will not actually post the jobs after receiving them. When this happens, the Labor Department's Office of Federal Contract Compliance Programs often takes the position that the contractor—not the employment service—is responsible for this lapse, and will allege a violation of VEVRAA.

While a bright line rule denying eligibility based on violations may be simpler to administer, it could have the effect of broadly excluding employers who may otherwise be deserving of recognition for their efforts to recruit, employ and retain veterans.

As to the definition of "stipulated agreements," we question whether it is ever appropriate to exclude an employer based on a settlement, which is often reached for cost and/or other reasons having nothing to do with the merits of the underlying dispute. However, if DOL-VETS decides to do so, the definition contained in the NPRM should not be further expanded as doing so could create a significant disincentive to settling allegations of technical and minor violations.

We do not object to the DOL-VETS proposal to disqualify employers based on a contract debarment or termination as defined in the proposed rule.

Should additional disqualifying events be added or should timeframes be adjusted?

No, additional disqualifying events should not be added as doing so would likely exclude more employers committed to recruiting, employing, and retaining veterans based on allegations that have not been fully litigated.

The proposed timeframes seem appropriate. As the award is annual, the timeframes should not be expanded.

Should DOL-VETS consider the nature of the violation as a factor in whether a violation is disqualifying?

If DOL-VETS retains a provision that would disqualify employers based on adverse labor law violations, then it should consider the magnitude or severity of the violation or violations. As described above, technical and minor violations are not likely to be indicative of an employer's commitment to employ, recruit, and retain veterans and should not be disqualifying.

Should DOL-VETS exclude employers from eligibility based on debarment under other laws?

No. If the final rule is to make contactors ineligible for an award based on debarment, then the provision should be limited to debarment under laws that have a bearing on an employer's commitment to employ, recruit, and retain veterans.

Is it advisable for DOL-VETS to delay awards in those circumstances where it has information suggesting a significant violation may have occurred?

If the final rule is to retain a provision denying eligibility based on violations of USERRA and VEVRAA, then we believe that DOL-VETS should retain the discretion to delay an award if it has credible information suggesting that a significant violation may have occurred. While we do not believe that DOL-VETS should delay or deny an award based on mere allegations, we recognize that there may be circumstances that warrant further investigation before an award is issued.

Thank you for your consideration of these comments. Please do not hesitate to contact me if CWC can be of further assistance as DOL-VETS moves forward to implement the HIRE Vets Act.

Sincerely,

Michael J. Eastman
Vice President, Policy and
Assistant General Counsel