



OFCCP ISSUES FINAL RULES UPDATING THE REHABILITATION ACT AND VIETNAM-ERA VETERANS' READJUSTMENT ASSISTANCE ACT (VEVRAA)



Mary Moffat Helms

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In a bid to boost the workforce participation of individuals with disabilities and veterans, the Office of Federal Contract Compliance Programs (OFCCP) has issued new rules that became effective on March 24, 2014. These new rules apply to all Federal contractors subject to Executive Order 11246.

The new disability-related rules:

- Establish a "utilization goal" of 7% for individuals with disabilities at the job group level in every covered workforce. This means that in a job group with 100 employees, 7 should be individuals with disabilities. OFCCP stresses that this is not a quota but only a "goal," and that failure to reach that percentage mark, alone, will not lead to penalties or sanctions;
- Require employers to invite job applicants to self-identify voluntarily on specially designated OFCCP forms as individuals with disabilities at the pre-offer stage (in contrast to the Americans with Disabilities Act (ADA), which forbids employers from inquiring about disabilities until a job offer has been made);
- Require employers to invite existing employees to self-identify as individuals with disabilities; this disability survey must be completed within the first year after becoming subject to the new rule and employers must use the self-identification form created by OFCCP to conduct this survey; for contractors already subject to these provisions, this one year period begins to run starting on March 24, 2014, the effective date of these new regulations (thus a current contractor would need to conduct this disability survey of their workforce before March 24, 2015);
- Once this initial disability survey is completed, the contractor must conduct a new updated survey at least once every five years; in addition, at least once between each five-year re-survey period, the contractor must remind its employees that they may voluntarily update their disability status;
- Require contractors to collect statistics regarding the number of disabled job applicants and employees, ostensibly to promote greater accountability for employment decisions and practices;
- Require contractors to advise sub-contractors in specific terms to promote compliance; and
- Make changes to the definition of "disability" required by changes to the ADA.

The new rules pertaining to veterans:

- Require covered employers to collect data reflecting their efforts in recruiting and hiring veterans and compare it to the currently set "benchmark" of 8% for veterans in the entire workforce (OFCCP will update this hiring benchmark annually, or the contractor can calculate its own benchmark taking into account various factors);
- Gather statistics showing the number of veterans who apply for jobs and are hired by inviting applicants to self-identify voluntarily as a veteran on forms created by the contractor;
- Require posting job opportunities with appropriate state employment services;
- Require contractors to advise sub-contractors in specific terms to promote compliance, noting applicable preferences for veterans; and
- Repeal certain portions of outdated and superseded regulations.

The final rule also requires covered contractors to record annually the number of job openings, number of jobs filled, number of applicants for all jobs, number of applicants who self-identify as being a protected veteran or having a disability, the number of applicants hired, number of applicants with disabilities hired and number of applicants hired who are protected veterans. While this

data can be compiled for a contractor’s entire workforce, since OFCCP audits will continue to be based on a single establishment, contractors may want to maintain this data separately for each establishment.

Contractors that are required to complete affirmative action plans annually do not need to make any revisions if their plan was in place by March 24, 2014, until the plan is updated for the new plan year. Only affirmative action plans that are drafted or renewed after March 24, 2014 must comply with the new regulations. The new rules also extend the record retention period to three years for all relevant records related to protected veterans and individuals with disabilities. The new Rules contain detailed requirements and covered employers should consult with counsel to ensure they are in compliance.

Editor’s Note: Although they are variously presented as “utilization goals” or “benchmarks,” experience with OFCCP suggests that the agency will, in fact, treat these desired percentages as quotas. Inviting individuals with disabilities to “self-identify” as disabled may well produce unintended consequences and fuel failure-to-hire discrimination charges. On the other hand, the Supreme Court has so expanded the definition of “disability” that many employers may find, to their surprise, that covered individuals make up far more than the desired 7%. The data collection and reporting requirements for both rules represent a significant expansion of OFCCP’s already onerous compliance burden.

SUMMARY OF TENNESSEE WORKERS’ COMPENSATION REFORM



Fredrick R. Baker

“The law will apply to injuries on or after July 1, 2014.”
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In 2013, the Tennessee General Assembly enacted the Tennessee Workers’ Compensation Reform Act (“Act”). The Act aims to bring about shorter periods to resolve conflicts, quicker return-to-work for injured workers, more assistance for injured workers, more consistency in results, and fewer obstacles to medical care. The law will apply to injuries on or after July 1, 2014.

The statute provides that the WC law shall not be remedially or liberally construed but shall instead be construed fairly, impartially, and in accordance with basic principles of statutory construction. The statute shall not be construed in a manner favoring either party.

Definition of Injury

The WC Law has long defined a compensable injury by accident as one arising out of and in the course of employment. In 2011, the General Assembly added additional requirements that have to be satisfied. An “injury by accident” had to be caused by incident(s) arising out of and in the course of employment identifiable by time and place of occurrence. Cumulative trauma conditions must arise “primarily” out of and in the course and scope of employment.

While the “primarily” standard only applied to repetitive motion conditions under the 2011 statutory changes, the 2013 statutory changes will apply that standard to all injuries occurring on or after July 1, 2014. The statute defines the term “primarily” as a preponderance of the evidence.

Impairment Rating and Permanent Partial Disability

The Act will bring about changes in how impairment ratings are calculated. Impairment ratings will be expressed as a percentage of the body as a whole. There will be no more scheduled member impairment ratings. Further, impairment ratings shall no longer consider complaints of pain in calculating degree of impairment.

The written opinion of the treating physician or chiropractor on the issue of permanent impairment rating shall be presumed to be the accurate impairment, rebuttable by the presentation of contrary evidence that satisfies a preponderance of the evidence standard.

The Act adopts a new calculation of PPD. The old framework of caps and reconsideration will be eliminated.

All PPD benefits will be based on a percentage of the body as a whole. The maximum value of the body as a whole will be increased to 450 weeks. Assuming compensability, the initial award of PPD benefits to the injured worker will be calculated as the product of the impairment rating times 450 weeks times compensation rate, regardless of whether the employee has returned to work or not. The initial award of benefits will also determine the “period of compensation.” The period of compensation is essentially the impairment rating times 450 weeks. It is at the end of this period that a determination must be made as to whether the employee will be entitled to additional benefits beyond the initial award. If at the time the period of compensation ends the employee has not returned to work with any employer or has returned to work and is receiving wages that are less than 100% of the pre-injury wages, the injured employee may file a claim for increased benefits, by multiplying the initial award by 1.35 times. The injured employee’s award shall be further increased by multiplying the award by the product of the following:

- Education – 1.45-times if the employee lacks a high school diploma or GED;
- Age – 1.2-times if the employee was over 40 years old at the time the period of compensation ends; and



CONGRATULATIONS, KAREN!

KAREN G. CRUTCHFIELD

At the East Tennessee Lawyers Association for Women's Supreme Court Luncheon on May 6, 2014, Karen was honored as the recipient of ETLAW's Spirit of Justice Award. The award is given to a member of ETLAW for her contribution to the organization and for her inspiration to young women attorneys. Among those nominated for this prestigious award were the Honorable Deborah Stevens, the Honorable Pamela Reeves, former Tennessee Supreme Court Justice Penny White and Attorney Millie Cunningham, who is an original member of ETLAW. We're so very proud of you, Karen!

Karen is a Member in the Knoxville, Tennessee office of the Firm, joining in October 2013. Her law practice focuses on general civil litigation involving premises liability, products liability, workers' compensation defense, contractual and construction defect issues, food liability and toxic exposures, professional liability defense and general liability. Karen received her B.S. degree from the University of Tennessee. She obtained a Masters in Social Work from Washington University and a Doctor of Jurisprudence degree from the University of Tennessee College of Law. She was selected to participate in the OECD-NEA Nuclear Law Program in October 2013. Karen is a member of the Tennessee Bar Association, the Knoxville Bar Association, the American Bar Association, the Anderson County Bar Association, and the East Tennessee Lawyers Association for Women (President in 2011). She is also a member of the Tennessee Defense Lawyers Association and the Defense Research Institute.

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- Unemployment rate – 1.3-times if the unemployment rate in the county where employee was employed on the date of the injury was at least two percentage points greater than the yearly average unemployment rate in Tennessee.

These factors are multiplied by one another.

An employee shall not be entitled to additional benefits when (1) loss of employment is due to voluntary resignation or retirement, unless the resignation or retirement resulted from the work-related disability; (2) loss of employment is due to the employee's misconduct connected with employment; or (3) employee remains employed but received a reduction in salary, wages, or hours that is concurrent with a reduction in salary, wages, or reduction in hours that affected at least 50% of all hourly employees operating at or out of the same location. No additional benefits will be available for injuries sustained by an employee not eligible or authorized to work in the United States.

It seems certain to result in an overall reduction in the amount of PPD benefits. This could also have a negative effect on the frequency that employees are brought back to work.

Administrative System and Personnel

The new system will be a separate division within the Department of Labor ("DOL"). Personnel under the Workers' Compensation Division ("Division") will include an Administrator, Judges (including a Chief Judge), a Clerk of the Court, an Appeals Board, Mediators and an Ombudsman.

The Division will be headed by the Administrator, who will be appointed directly by the Governor. The Administrator has the duties of developing and maintaining the organizational structure to ensure fair, equitable, expeditious, and efficient administration of compensation law.

The new system will carry over some aspects of the prior system, but adjudication of claims will be much different. The Division will have original and exclusive jurisdiction over all contested claims for compensation benefits for injuries occurring on or after July 1, 2014.

The Administrator will appoint individuals who are Tennessee licensed attorneys in good standing with five years' experience in compensation matters and who are at least thirty years of age to be Division Judges. Those Judges shall be executive service employees of the State and serve six-year terms (to a maximum of three terms). Those Judges will conduct hearings according to the Rules of Civil Procedure, the Rules of Evidence, and the rules adopted by the Division and shall have authority to issue subpoenas and to compel obedience to their judgments, orders, and process through the assessment of a penalty.

The Administrator shall also appoint someone to serve as Chief Judge. The Governor shall appoint three qualified individuals to serve as Judges on the Division Appeals Board.

Any party to the proceedings in the Court of compensation claims may, if dissatisfied or aggrieved by the judgment of that Court, appeal to the Tennessee Supreme Court, where cases shall be heard in accordance with the Rules of Appellate Procedure. Reviews of the Court's findings of fact shall be de novo upon the record of the Court, accompanied by a presumption of correctness of the finding, unless a preponderance of the evidence is otherwise. The Supreme Court may appoint a panel of three Judges (much as the Workers' Compensation Panel functions currently). That panel shall be appointed by the Chief Justice and shall include one Supreme Court Justice and two other Judges.

Before a case can enter this new Court system, a Dispute Certification Notice must be issued by a Division Mediator, certifying the issues in dispute. Those Mediators will attempt to mediate all disputes, thoroughly inform the parties as to their rights and responsibilities, and accept all documents and information presented to the Division. If a settlement can be reached, the Mediator will reduce the agreement to writing to be approved by a Judge.

Hearings of disputes shall be conducted within the timeframes adopted by the Administrator. Following the hearing, the Judge shall issue an order that sets forth findings of fact and conclusions of law, and, if appropriate, an order for the payment of benefits under the law.

The decision of the Judge shall become final thirty days after the Judge enters an order, unless a party in interest seeks an appeal of the decision from the Division Appeals Board. If a timely appeal of the decision is requested from the Appeals Board, the parties shall have fifteen calendar days after the appeal is filed to file briefs with the Appeals Board. Within forty-five days of receiving the appeal, the Appeals Board shall issue a decision either affirming the Judge’s order or remanding the case. If the judgment is affirmed, the final order of the Judge shall be certified as final. It is then immediately appealable to the State Supreme Court. After a compensation order entered by a Judge becomes final, the parties subject to the order have five days after all appeals are exhausted to comply with the order or be subject to penalization.

Claims for catastrophic injury or issues of temporary or medical benefits can be heard on an expedited basis.

All discovery disputes shall be adjudicated upon the review of motions and affidavits. A Judge may, in his or her discretion, convene a hearing on a discovery dispute only upon finding that good cause exists.

The Administrator will also establish a Division Ombudsman program to assist injured employees, persons claiming death benefits, employers, and other persons in protecting their rights, resolving disputes, and obtaining information available under the WC laws. The Ombudsman program shall be available only to those individuals or organizations that are not represented by an attorney in the claim for benefits.

Physician Panels

The Act also makes adjustments to the physician panel process. The employer will have the right to offer the injured employee a group of three or more independent reputable physicians, surgeons, chiropractors, or specialty practice groups in the injured employee’s community. Unfortunately, “community” is not defined. If three or more physicians are not available in the community, then the range for the panel can be up to 100 miles from the employee’s community. There is no mandate for the inclusion of one medical practice area over another.

Medical Advisory Committee

The Administrator will appoint a medical advisory committee comprised of medical practitioners having experience in the treatment of compensation injuries, representatives of the insurance industry, employer representatives, and employee representatives. One of the tasks of this new Committee will be to develop guidelines for the diagnosis and treatment of common compensation injuries. Those guidelines are to become effective January 1, 2016. Treatment under those guidelines shall have a presumption of medical necessity for utilization review purposes.

Conclusion

With the Act, the General Assembly intends to benefit Tennessee by changing the business landscape, making existing compensation law more employer-friendly. It will require a fair and impartial statutory construction which will no longer lean automatically in the injured worker’s favor. The administration of compensation claims will be handled by a separate division within the DOL, calling for the appointment of an Administrator to cultivate the State’s business environment and to create rules in order to administer compensation claims. With additional benefit calculation changes, such as the new impairment ratings being measured solely on the body as a whole and without reference to pain, the new law promises to alter the way benefits are determined, the actual effects of which will not be seen until after July 1, 2014.



Fredrick R. Baker

The Tennessee Workers’ Compensation Handbook, 5th Edition, by Wimberly Lawson attorney Fred Baker, is the comprehensive resource for anyone who interacts with the Tennessee Workers’ Compensation system. It is designed for HR personnel, attorneys, paralegals, risk managers, claims adjusters, mediators, benefits managers, claims analysts, and judges. Now fully updated and edited to include the 2014 legislative changes, the Tennessee Workers’ Compensation Handbook, 5th Edition, gives clear, authoritative guidance that will help you navigate the challenges of the new Tennessee Workers’ Compensation landscape. Please call or email Brenda Copeland at (931) 372-9123 or bcopeland@wimberlylawson.com to order your copy.