Legislative and Regulatory Update
New Apprenticeship EEO Regulations and Implications 29 CFR 30

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Overview

• Today we will discuss the new United States Department of Labor ("DOL") EEO regulations—29 CFR 30—And their impact on:
  – Recruitment
  – The maintenance of updated Affirmative Action Plan requirements
  – Mandatory record retention
  – Overview of sanctions for non-compliance
  – Best Practices to stay in compliance

• Additional key DOL Issues in Apprenticeship
  – New affirmative duties under the EEO regulations
Introduction—
Why Does 29 CFR 30 Matter?

• Federal Equal Employment Opportunity ("EEO") Regulations apply to all apprenticeship programs
  – Regardless if administered directly by the DOL Office of Apprenticeship ("OA") or a State Apprenticeship Agency ("SAA")
  – EEO regulations set standards for all programs
    • With five (5) or more registered apprentices

• In states with SAAs, you must check local regulations as they may have additional program or EEO requirements
  – After federal regulations are adopted, SAA’s must adopt new regulations within 180 days, so be mindful of SAA regulations
History of 29 CFR 30 and Upcoming Updates

- 29 CFR 30 has not been updated since 1978
- 1978 regulations requiring EEO plans came as a result of litigation against the DOL charging discrimination against women in construction trades and apprenticeship programs
- DOL proposed the updates because of:
  - Changes in the workforce (i.e. national demographics)
  - Changed nature of EEO laws in general (i.e. additional protected classes)
  - A desire to modernize and streamline the EEO regulations
  - Increase participation rates of women and other under-represented populations in apprenticeship
  - Address historic barriers to under-represented populations in apprenticeship
  - Increase the quality of the applicant pool for programs
DOL’s Basis for Concern
A History of Underrepresentation

• The current administration seeks to DOUBLE the number of apprentices in the United States

• A goal is to have a more diverse pool of applicants who reap the benefits of apprenticeship career-paths where participants generally earn higher wages and benefits throughout their careers
  – This rule change seeks to expand the opportunities for under-represented/underutilized groups while the administration also supports efforts to increase apprenticeships
    • A possible Win-Win scenario
    • But with that comes new rules that programs must follow to ensure compliance
DOL’s Basis for Concern
A History of Underrepresentation  (continued)

• Areas of concern:
  – Women make up nearly 50% of the US population but only 6% apprenticeship participation
    • Construction trade participation cited as even lower—Near 3% in various studies
  – Hispanic apprenticeship participation is 50% lower than their employment rates in manufacturing and transportation sectors
  – Low completion rates, especially by under-represented populations
    • Female completion rates in FY 2013 – 39.3% – 42.7% male
    • African American completion rates 30.3% versus 46.7% for Whites
  – Disparity in employment opportunities
    • Minorities concentrated in lower paying apprenticeship programs
Highlights of New 29 CFR 30

• The Impact of the new rule:
  1. Clarify affirmative action requirements
     • Outreach obligations
     • Development and distribution of EEO plan
     • Removing barriers that lead to discrimination
  2. Expand protections of, and affirmative action requirements for, individuals with disabilities and updated protected groups
     • New affirmative duty
  3. Revises the mandate and process for analyzing the composition of the apprenticeship workforce
Clarifying Affirmative Action Requirements

• 29 CFR 30 applies to registered apprenticeship sponsors with five (5) or more registered apprentices
• New EEO requirements will expand anti-discrimination rules
• 30.3(b)(a): Discrimination in the recruitment, selection employment and training of apprentices is prohibited based on any of the following criteria:
  – Old regulation: Race, Color, Religion, National Origin, Sex
  – New regulation: Race, Color, Religion, National Origin, Disability, Age (40 or older), sexual orientation, and genetic information
Sex Discrimination—More Broadly Defined

- The rule will update and broaden the protections against sex discrimination
  - Sex Discrimination now includes:
    - Pregnancy, childbirth and related conditions
    - Gender identification and transgender status
- These mirror the prohibitions in the Pregnancy Discrimination Act of 1978, recent EEOC and court decisions.
- What accommodations does your program offer to avoid sex discrimination claims?
  - Restrooms? Child care? Classroom hours?
What Is a Disability Under 29 CFR 30.2

• 29 CFR 30.2 defines Disability as “a physical or mental impairment that substantially limits one or more major life activities”, “a record of such an impairment”, or “being regarded as having such an impairment.”

• Generally, the new anti-discrimination provisions will follow ADA rules and definitions

• DOL statistics:
  – 16.6% of working population has a disability, yet only 17.8% of people with disabilities are in the workforce
What Is a Disability Under 
29 CFR 30.2 (Continued)

• DOL seeks to have a uniform, nationwide utilization goal of seven percent (7%) for individuals with disabilities

• How to identify and ask for the “unaskable”?  
  – DOL will **NOT** require applicants or registered apprentices to identify if they have a disability
  – But DOL will require sponsors to **invite** individuals to self-identify disabilities

• Sponsors must ask at two stages of apprenticeship (29 CFR 30.11):
  – “Pre-offer”: To all applicants before apprenticeship offers are made; and,
  – “Post-offer”: To all applicants who accept apprenticeship offers
Sponsors will have to develop a method to ask applicants and apprentices for disability information

- **PRACTICE NOTE:** Do not create your own form to ask for disability information! OA or SAA will provide language to use for inquiry.
- The goal is not to inquire into the general nature of the disability or limitations the disability may create
  - Apparent goal is a limited to of identifying data for reporting purposes

**Protecting the Data**

- Once obtained, the sponsor must ensure the data is protected from disclosure
- A process to distribute and store invitations and responses should be instituted to ensure confidential data is stored properly to avoid liability
What is Genetic Information?

• 29 CFR 30.2 defines Genetic Information as:
  – Genetic tests of individuals or their family members
  – Any diseases identified as a result of family medical history
  – A request for, or receipt of, genetic services
  – Genetic information of a fetus

• Mirrors definitions in EEOC regulations (29 CFR Part 1635) and the Genetic Information Non-Discrimination Act of 2008
  – Sponsors must ensure genetic information, if obtained (properly), is not used for an improper purpose
  – Genetic information, if obtained (properly), must be maintained securely
Affirmative Action Duty—30.3(b)

What Was Recommended Is Now Mandatory!

• General affirmative action duty is now set forth in the regulation
  – See 29 CFR 30.3(b)

• Each sponsor must “take affirmative steps to provide equal opportunity in apprenticeship”

• To comply with the duty the Sponsor must implement the mandates of 29 CFR 30.3(b)
  – Download and print the regulation; a must in your program master binder
1. Program must assign an individual “with appropriate authority” to be responsible and accountable for overseeing the program’s commitment to, including the development and implementation of, the affirmative action plan (30.3(b)(1))

- Designated person must monitor the program to ensure non-discrimination and that affirmative action plan obligations are met;
- Maintain necessary records, and
- Submit necessary reports
Affirmation Action Duty (Continued)

Internal Distribution

2. Internally distribute the EEO policy (30.3(b)2))
   - Inform all applicants, apprentices, and those who operate or administer the program of the program’s EEO and affirmative action
     
     • **Posting EEO Pledge**: Equal opportunity pledge must be posted on handbooks, manuals, and appropriate publications and available on bulletin boards (including electronically – website, Facebook, etc.)
       
       - Pledge should be vetted and approved by OA or SAA.
       
       **See 29 CFR 30.3(c) for model.**

     • **Training**: Conduct orientation and information sessions for apprentices, journeypersons who directly supervise apprentices, and others who administer or operate the program

     • **Records**: Maintain all records proving such distribution has occurred
3. Program must implement measures to broaden outreach (30.3(b)(3))

- Develop, and update annually, the list of current recruitment sources that will generate referrals from all demographic groups within the recruitment area
- Identify a contact source from each recruitment source
- Provide recruitment sources advanced notice, preferably 30 days, of recruitments.
  - Recruitment notice must contain the EEO pledge
4. Program must develop and implement procedures to ensure no discrimination occurs against apprentices (30.3(b)(4))

   - This is an **affirmative duty** that requires **affirmative steps** to ensure the affirmative action duty is met, including:
     
     • Advising all personnel (preferably in writing) that the program does not tolerate harassing conduct;
     
     • Providing anti-harassment training;
     
     • Facilities must not discriminate or lead to harassment;
       
       » Restrooms or changing areas must be separate or single use facilities
     
     • Implement a procedure for the receipt, handling, and processing/resolution of complaints

   - An annual review of program’s personnel policies to ensure program is operating free from discrimination. 29 CFR 30.9
     
     • Review must be “careful, thorough, and systematic”
     
     • Check all aspects of program (selection process, wages, outreach, requests for accommodation)

     • Concern: “Work assignments”, “promotions” also to be reviewed
Reasonable Accommodations—
29 CFR 30.2

- Sponsor must explore and provide reasonable accommodation to modify the application, work environment, or sponsor’s program itself
  - Application: Can the process be modified to ensure a qualified applicant with a disability can be considered for the position?
  - Work Environment: Can the work environment be modified or adjusted to enable a qualified applicant with a disability to perform the essential functions of that position?
  - Program: Can the program be modified to enable an apprentice with a disability to enjoy equal benefits and privileges enjoyed by similarly situated apprentices without disabilities?
Reasonable Accommodations—
29 CFR 30.2 (Continued)

• Types of accommodations
  – Facility modification
  – Job restructuring
    • Part-time or modified work schedules
    • Reassignment to vacant positions
  – Modifications to training materials and exams
  – Interpreters or readers

• How to ask to determine the appropriate accommodation?
  – 29 CFR 30.2(3): “[i]t may be necessary for the sponsor to initiate an informal, interactive process with the qualified individual in need of the accommodation.”
  – During this stage, the regulation allows for identifying the “precise limitations” and “potential reasonable accommodations”
Utilization Analysis and Goals
29 CFR 30.5—30.7

• Purpose is to develop a method “to assess possible barriers to apprenticeship for underrepresented/underutilized groups”
  – Analysis of race, sex, ethnicity and disability
• If there is a “significant disparity” between availability and representation, a “utilization goal” must be set
Utilization Analysis and Goals
29 CFR 30.5—30.7

Step 1: Analysis of the Program Workforce

• Two Step Process
• First, list all occupational titles in program and identify race, sex, and ethnicity of apprentices in each title
  – Most programs will have one occupational title
• Second, compare step one results with local labor pool
  – The “Availability Analysis”
    • A benchmark for demographic analysis based on recruitment area
    • Recruitment area is set in AAP
    • Regulations set sources for demographic data—American Community Survey, Census Bureau’s EEO Data, etc.
      – Consult with ETA or SAA for data sources to conform accuracy
Step 2: Set Utilization Goal

- If “significant disparity” exists between availability and representation in program, a “utilization goal” must be set
  - Triggered when utilization is less than what is “reasonably expected” based on availability of individuals as determined by analysis
- Utilization goal is a % goal at least equal to availability calculation
  - A utilization goal is not a finding or admission of discrimination
  - Meant to be a measure of effectiveness of sponsor outreach, recruitment and retention efforts and identify “barriers to equal opportunity”
  - Utilization goals are not to be quotas or set asides and cannot be used to justify preference to certain individuals or detriment to others
    - Not meant to require choice of less qualified candidates over more qualified ones
Utilization Analysis and Goals
29 CFR 30.5—30.7

Utilization Goals for Disabilities

• Utilization goal of 7% set by regulation
• Same utilization analysis as for under-utilized groups must be conducted
• If below 7%, “action-oriented programs” to be undertaken
  – Targeted outreach, recruitment and retention activities
  – Again, falling below utilization goal is not a finding or admission of discrimination
Targeted Outreach and Retention
29 CFR 30.8

• New minimum activities for outreach where a program has “underutilization” as defined in the regulations
  – Program must undertake targeted outreach, recruitment, and retention
    • In areas likely to generate an increase in applications for apprenticeship and improve retention of apprentices from targeted (i.e. under-represented) group
  – Program must include targeted outreach, recruitment, and retention in the program’s written AAP for the upcoming year which must include:
    • Outreach to community-based organizations, local high schools, local community colleges, local vocational, career and technical schools
    • Publishing in newspapers
    • Develop relationships with pre-apprenticeship programs
    • Create “linkage” agreements with pre-apprenticeship and other groups
• Program must evaluate the effectiveness of outreach efforts after every selection cycle.

• Refine targeted outreach, recruitment, and retention efforts as needed (presumably after each selection cycle).

• Maintain records of targeted outreach, recruitment, and retention efforts (presumably after each selection cycle).
In addition to the above outreach requirements, programs must “as a matter of best practice” consider other efforts and activities to improve outreach, recruitment and retention.

Not mandatory and other options available.

Regulations “recommend” the following ideas:

- Use journey workers from underutilized group(s) to assist in recruitment and retention.
- Conduct exit interviews for each apprentice that leaves the program.

Selection procedures must also be written, meet federal ADA standards and Uniform Guidelines on Employee Selection Procedures, be uniformly applied to all.

Tip: Whatever is done to assist the program meet goals, document it!
Document Retention
29 CFR 20.12

- Keep everything for at least three (3) years
  - Requests for accommodation, all EEO postings, annual recruitment notices and applications, etc.
- Records must be able to identify the race, sex, ethnicity, and, if known, disability status, of each apprentice
- Records must be able to identify the race, sex, ethnicity, and, if known, disability status, of each applicant
- Remember, all medical information must be protected (especially information obtained concerning disabilities)
  - Make sure the program retains records on how and why all such information was obtained
Violations and Enforcement
29 CFR30.13 & 30.15

- We can anticipate heightened attention to these regulations as OA or SAA “will regularly conduct EEO compliance reviews”
- This matters because non-compliance with EEO regulations may now result in:
  - Compliance assistance
  - Suspension of right to register new apprentices
  - Deregistration
  - Referral to other enforcement agencies
    - Most likely to EEOC
Concerns

- JATC is not an EEO enforcement agency
- Regulations seem to place job-site activities on the non-employer program
  - If shop steward and member training provided, any liability for violations
  - Program is not an employer (and does not want to be)
- New duty may create program liability
- When is a utilization goal necessary?
How to Comply With the Updated Affirmative Action Requirements

• Review all program materials for improper language and notices
  – Use their regulation as a road-map
    • They provide mandated notice language (See 29 CFR 30.3(c))
• Utilize DOL OA or SAA provided model forms for recruitment, selection, and training
• Develop necessary training curriculum
  – For all sponsor staff, instructors, union representatives
  – Plus, all shop stewards and supervisors who regularly oversee apprentices in the workplace
• Develop a complaint process—And publish it
• Review your training facility to ensure no bias to protected classes
• Review accommodation policies and implement necessary modifications
• Develop a disability review process, using DOL model forms, and methods to protect that data
Legislative and Regulatory Update

New Apprenticeship EEO Regulations and Implications
29 CFR 30

- Prepare to comply with new mandatory duties and procedures set forth in 29 CFR 30—And then SAA regulations (if applicable)
- Review existing EEO statement and revise as necessary
- Review program operations for potentially discriminatory problem areas (materials, facility, accommodations)
- Prepare to analyze EEO compliance and start developing new policies and procedures for outreach, recruitment and retention (pre-apprenticeship and new community outreach)
- Develop training protocols for staff, trustees, instructors and apprentice supervisors (shop stewards and key apprentice supervisors)

Website Resources
https://www.ifebp.org/Resources/apprenticeships/Pages/default.aspx
2017 Educational Programs
Apprenticeship, Training and Education

63rd Annual Employee Benefits Conference
October 22-25, 2017
Las Vegas, Nevada
www.ifebp.org/usannual

Institute for Apprenticeship, Training and Education Programs
January 16-18, 2017
Coronado (San Diego), California
www.ifebp.org/apprenticeshipinstitute

Related Reading
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Top Trends in Jointly Managed Apprenticeship Programs—2016 Survey Results (E-Book)
Item #7679E
www.ifebp.org/books.asp?7679E