
The OFCCP's New Veterans' Regulations Fail to Address What Veterans Really Need

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In this article, the author describes four fundamental defects with the new regulations promulgated by the OFCCP that he believes are likely to make them ineffective at providing greater employment opportunities and assistance to veterans most in need. The author then offers suggestions for what the government, veterans, and employers should be doing to increase employment opportunities for veterans most in need.

The Obama Administration's Office of Federal Contract Compliance Programs (OFCCP) promulgated new regulations,¹ effective on March 24, 2014, that implement the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA).² VEVRAA was enacted to help prevent discrimination against veterans returning from the Vietnam War and to promote their hiring into the civilian workforce.

The OFCCP asserts that veterans are being subjected to employment discrimination and need additional protections. To combat this alleged discrimination, the new regulations require employers to collect data about veterans' status of applicants and hires, analyze the efficacy of outreach efforts and compare that data to a benchmark.

The general premise that veterans need civilian employment opportunities as they transition from military service is valid. Further, there is a need for resources to assist with their transition. Unfortunately, the regulations suffer four fundamental defects that are likely to make them ineffective at providing greater employment opportunities and assistance to veterans most in need.

First, the OFCCP's presumption of discrimination appears based on a 1970s mindset that is inconsistent with current attitudes toward veterans. Veterans today are held in much higher regard. Data suggests that people want to help veterans, and that employers prefer to hire female veterans over female non-veterans.

Second, the OFCCP relied primarily upon data relating to Gulf War II-era male veterans that it claims shows some statistical disparities

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in rates of pay and unemployment between veterans and non-veterans. A fair reading of all relevant data shows that veterans are better paid, better educated and have higher rates of employment than non-veterans (as even the OFCCP concedes). Further, the data also shows that veterans under age 25 and primarily male, recently separated from service (and thus who are most likely to be Gulf War II-era veterans), tend to have the lowest wages and highest unemployment rates, and thus need the most assistance.

Third, a national benchmark that treats all veterans the same regardless of age, skills, and qualifications will not improve employment opportunities for veterans who need them most. Hiring a 50 year old veteran who has been in the civilian workforce for 20 years may let an employer meet the hiring benchmark, but it does little to assist transitioning veterans. By treating older veterans who are no longer in need of transitional assistance the same as a recently discharged and largely younger veterans, the regulations skew the data employers must use to determine if their outreach efforts are having an impact.

Fourth, more posting and outreach will not help increase veteran employment opportunities because the underlying data used for this purpose is not accurate.

However well intentioned, the regulations' focus on a national benchmark will not increase the employment opportunities and pay for veterans most in need. Further, placing all blame, and responsibility, on employers is both disingenuous and counterproductive. If veterans' pay and employment opportunities increase over time, it will largely be in spite of, rather than because of, the new regulations.

What is needed is more education about how military jobs and skills translate into civilian employment, coupled with better transitional services for recently discharged veterans. While OFCCP has a role to play, it simply is not the best federal agency to effectuate the kind of change needed to increase the employment opportunities of veterans most in need.

THE FIRST DEFECT: CURRENT ATTITUDES TOWARD VETERANS DO NOT SUPPORT THAT THERE IS WIDESPREAD DISCRIMINATION AGAINST VETERANS THAT REQUIRE NEW REGULATIONS

Under VEVRAA, covered federal government contractors and subcontractors must take affirmative action to employ, and to advance in employment, specific categories of veterans.³ VEVRAA also prohibits discrimination against such veterans.

In addition, VEVRAA requires covered federal government contractors and subcontractors to (1) list their employment openings with

the appropriate employment service delivery systems; (2) ensure that covered veterans receive priority in referral to such openings; and (3) compile and submit an annual report on the number of new hires and current employees who are covered veterans. The affirmative action and mandatory job-listing provisions of VEVRAA are enforced by the OFCCP, while the U.S. Department of Labor's Veterans' Employment and Training Service administers the veterans' employment reporting requirement.

VEVRAA arose near the end of an unpopular war as large numbers of young men (and some women) returned home. There may have been a legitimate need to protect Vietnam veterans against discrimination and promote hiring opportunities for them at that time. While the country may not have been very welcoming of returning veterans in the 1970s, Americans today are generally more accepting of veterans, including veterans from both the Vietnam era and the more recent Gulf War eras.⁴ For example, Professors MacLean's and Kleykamp's research demonstrates that while people may attach certain stigmas to veterans based on perceived stereotypes, such as that young returning combat veterans suffer mental health problems (for example, post-traumatic stress disorder (PTSD)), there is nonetheless a high affinity for such groups that outweighs those perceptions, concluding

People want to be socially closer to and support more help for these veterans compared to other veterans and nonveterans. We speculate this paradox stems not from casual attributions, but from cultural values about wartime veterans.... Our analyses reach similar conclusions regarding attitudes toward men returning from Iraq as some prior research about attitudes toward men returning from Vietnam. Vietnam veterans were assumed to have more problems than veterans who did not go to Vietnam. Yet survey respondents thought that government programs should target such veterans to help them reintegrate into civilian society. Our findings suggest that these attitudes apply not just to veterans, but to all men returning from war zones. People appear to believe that all war zone survivors behave according to negative stereotypes, but discriminate in favor of such survivors.⁵

Other data suggest that employers prefer hiring female veterans to female non-veterans.⁶

This more recent research suggests a shift in public sentiment toward veterans from the time when VEVRAA was enacted, but finds little reflection in the new VEVRAA regulations. The OFCCP's 1970s era mind-set led it to fail to realize that the problems of veterans' employment opportunities are far more complicated and nuanced than merely asserting that employer discrimination is solely to blame.

THE SECOND DEFECT: OFCCP USED SKEWED DATA THAT MISIDENTIFIES THE REAL PROBLEMS WITH VETERAN EMPLOYMENT

The OFCCP's Justification for the New Regulations

1. The OFCCP's Reasons the Old Regulations Were Failing

According to the OFCCP, the old VEVRAA regulations failed to address "the alarming rates of veterans' unemployment," particularly given that "increasing numbers of veterans are returning from duty in Iraq, Afghanistan, and other places around the world, and many face substantial obstacles in finding employment once they leave the military."⁷ While the OFCCP did not explain why its old VEVRAA regulations, which had been in place since 1976, were now insufficient, its FAQs address why the new regulations were needed:

Several factors contribute to limiting the ability of veterans to seek, find, keep, and thrive in jobs. The existence of an outdated framework that does not reflect the realities of today's workplace is one factor. Other factors include, bias or discrimination, the inability of employers to translate military skills and abilities, process and institutional barriers, and data collection issues. These all contribute to veterans being underutilized in the federal contractor workforce.⁸

2. The OFCCP's Data Used to Justify the New Regulations

The OFCCP found that, on average, wages of veterans (defined as anyone who is employed and reported serving in the military in the past) are higher than non-veterans. However, OFCCP also noted, controlling for age and race, based on data from the America Community Survey (ACS), that:

- Male veterans earn 2.7 percent less than non-veterans.
- Female veterans earn 6.3 percent more than non-veterans.⁹

Moreover, when controlling for the era of service,¹⁰ rather than just whether or not the person served, the OFCCP found:

- Male Gulf War-era II veterans earn 1.4 percent less than non-veterans.
- Male Vietnam era veterans earn 6.9 percent less than non-veterans.¹¹

The OFCCP further contends, based on data from the Bureau of Labor Statistics (BLS), that in 2012 the unemployment rate for Gulf War-era II

veterans was 9.9 percent while the rate for non-veterans was only 7.9 percent, and that the unemployment rate for male Gulf War-era II veterans age 18 to 24 was 20.0 percent, while the rate for non-veterans of the same age group was only 16.4 percent.¹²

3. What the OFCCP Does Not Explain About its Justifications or Data

The OFCCP's Executive Summary to the new regulations acknowledges that "[t]hrough it is unclear what portion of these disparities is caused by discrimination, employment discrimination and underutilization of qualified workers, such as veterans and individuals with disabilities, contribute to broader societal problems such as income inequality and poverty."¹³

The OFCCP does not explain what it means by an outdated framework, what realities exist now compared to when the prior regulations were issued, or what "process and institutional barriers" and data collection issues are limiting veteran hiring. The OFCCP does not cite any authority or support for its claims, other than a few general statistics. The nebulous reasons devoid of context or explanation, coupled with the OFCCP's frank admission that it really does not know what fraction, if any, of the disparities in the data are caused by discrimination, undermine its rationale for the new regulations.

For example, the OFCCP asserts that data collection is a problem necessitating the new regulations, yet the lack of data undercuts the OFCCP's rationale about discrimination. That is, how can an employer be discriminating against veterans if it does not have any data telling it who is and who is not a veteran? What the OFCCP likely means is data *retention* rather than data *collection* is the problem. Data retention is important because it affords the opportunity to analyze whether an employer is really reaching veterans, and if so, hiring them.

At present the OFCCP will not penalize an employer for failing to meet hiring benchmarks; however, the regulations' new data collection obligations and longer retention periods portend that the OFCCP may take more punitive action against employers in the future. Otherwise, the need to collect and retain these data for three years would be unnecessary.

More telling is OFCCP's references in the regulations' Executive Summary to persons with disabilities and income inequality. Those references suggest that the real purpose of the new VEVRAA regulations is to act as a surrogate for eliminating discrimination against persons with disabilities, which includes a subset of veterans, and the Obama Administration's general desire to eliminate income inequality. The new regulations will not solve those problems either, nor are these problems unique to veterans, because the hiring benchmark and outreach efforts are not designed to address the real causes of income inequality or hiring rates of persons with disabilities.

Complete Data Shows Veterans are Better Paid, Better Educated, and Have Higher Employment Rates than Non-Veterans

1. Veterans Have Lower Unemployment Rates than Non-Veterans

The Department of Veterans Affairs' National Center for Veterans Analysis and Statistics (NCVAS) Report "Unemployment Rates of Veterans: 2000 to 2009" found that, between 2000 and 2009, veterans had lower unemployment rates than non-veterans in every year.¹⁴ Over the same period, male veterans, which accounted for 93 percent of the total veteran population for this time period, had lower overall unemployment rates in each year from 2000 to 2009, while the unemployment rate for female veterans was statistically the same as non-veterans.¹⁵ NCVAS also found that, with the exception of 2004, veterans aged 18 to 24 had the same statistical unemployment rate as non-veterans.¹⁶ Even for Vietnam veterans, the NCVAS data demonstrates that their unemployment rates, based on age, are statistically even with non-veterans.¹⁷

Other data also supports the NCVAS's conclusions rather than the OFCCP's conclusions. For example, a recent report by the Illinois Department of Employment Security,¹⁸ which looked at data from 2001 to 2010 relating to discharged veterans in Illinois, similarly found that veterans had lower unemployment rates than non-veterans between 2007 and 2010.¹⁹ A 2008 study conducted by Abt Associates, Inc. for the U.S. Department of Veterans Affairs, "Employment Histories Report," reviewed the employment data relating to recently separated service-members (RSS) and comparing them to a control group of persons with similar demographics such as age, education, and race. It found, for example, unemployment was highest two years after separation, but dropped off after that.²⁰

What this data shows is that the OFCCP's focus on Gulf War II-era males (who are the only veterans who could be under the age of 25) does not take into consideration that this is likely a result of transitioning from the military to civilian employment, nor that, after the transition period, the disparity in the level of unemployment between veterans and non-veterans dissipates and, statistically speaking, disappears. While recently separated male veterans under age 25 do need assistance in obtaining post-discharge civilian employment, there are a number of factors that influence the employment opportunities of this group that have little to do with their status as veterans. Thus, the OFCCP's conclusions' about veterans' unemployment rates misstates the real problem.²¹

2. Veterans have Higher Overall Wages than Non-Veterans

According to the BLS, in 2010 male veterans earned approximately 15 percent more than male non-veterans (\$35,725 versus \$30,822), while female veterans earned \$30,540 compared to only \$20,634 for female non-veterans.²² A report from the U.S. Census Bureau, "A Snapshot of Our Nation's Veterans," based on 2010 ACS data, found

that median income for veterans was \$35,367 while median income for non-veterans was only \$24,521.²³ A study published in *Monthly Labor Review* similarly found that recent veterans had no statistical difference in wages or household income from comparable non-veterans.²⁴ Even the OFCCP appears to concede that overall veterans are earning more than non-veterans.

While the new regulations do not distinguish between male and female veterans, the OFCCP acknowledges that female veterans earn 6.9 percent more than female non-veterans. This conclusion is supported by other data from the Department of Labor.²⁵ A report by the California Commission on the Status of Women and Girls similarly found that female veterans in California earned more on average than non-veterans in 2010.²⁶

The "Employment Histories Report" explains that while earned wages were lower, total income (which includes various assistance and transfer payments) was similar between RSS and the control group.²⁷ It also found that various factors accounted for differences. For example, higher wages were associated with being an officer, while "[t]wo strong predictors of not receiving a high wage were living in a rural or remote community and having received the GI Bill."²⁸ When looking at senior management positions obtained by RSS, the "Employment Histories Report" found that they were "5 times more likely to have been senior officers and 3.5 times more likely to have completed a graduate degree before separation."²⁹

What the data on veterans' wages demonstrates is that, on the whole, veterans out earn non-veterans, although various factors play a role, such as whether a person lives in a rural area, their level of education, or their military rank upon discharge. The new regulations fail to take these differences into account, even while acknowledging that veterans are generally doing better than non-veterans.

The OFCCP's Data and Statistical Analysis is Flawed

The "Profile of Veterans: 2011" summarizes its data's conclusions about veteran employment:

Male Veterans were older, more likely to be White non-Hispanic, more likely to be married, less likely to be uninsured, less likely to live below poverty, and had higher personal incomes than male non-Veterans. Employed male Veterans were more likely to work in management and professional occupations or production and transportation occupations, and more likely to work for local, state or federal governments than their non-Veteran counterparts. Male Veterans who worked year-round and full-time earned about \$5,300 more than similar non-Veterans.... Female Veterans were ... less likely to live below poverty, and had higher personal incomes than female non-Veterans.... Female Veterans who worked year-around and full time earned about \$7,000 more than similar non-Veterans.³⁰

The "Employment Histories Report" concluded that "[c]hallenges appear to be greater for RSS receiving the GI Bill, living in more rural areas, being a lower rank, and having less education."³¹

Statistics is a way to summarize data (information), from which conclusions may be drawn. "Even in the best of circumstances, statistical analysis rarely unveils 'the truth.' ... You *can* lie with statistics. Or you can make inadvertent errors."³² Similarly, the United States Supreme Court explained: "We caution only that statistics are not irrefutable; they come in infinite variety and, like any other kind of evidence, they may be rebutted. In short, their usefulness depends on all of the surrounding facts and circumstances."³³

While the OFCCP's statistical analysis is being used to justify new regulations rather than to establish discrimination in a specific disparate impact case, the OFCCP should have relied upon something more substantial than a few data points about a limited subset of veterans.³⁴ For example, it appears that the OFCCP relied upon a limited number of years in determining the wage disparities and unemployment rates. It did not account for gender, geography, education or skills.³⁵ In doing so, the OFCCP likely makes "inadvertent errors" that misidentify the real problems with veteran employment. As discussed in the next section, this misidentification of the problem led the OFCCP to craft a solution—a hiring benchmark—that is not tailored to help veterans most in need, nor provide employers with the right kind of data to assist them in hiring veterans most in need.

The data also suggests that over time, and assuming no new significant engagements of military personnel in another war era (which is a big assumption), veterans overall will become better educated, better paid and better employed than their non-veteran peers, including the current Gulf War-era II veterans. In other words, the current crop of young veterans returning from Iraq, Afghanistan, and elsewhere will go to school, get degrees, get jobs and flourish over time. As a result, the OFCCP may be forced to adjust its benchmark down over time, which in turn will likely make the benchmark even less useful. This further undermines the new regulations' purpose, because it is, at best, a long-term solution to a short-term problem.

THE THIRD DEFECT: A NATIONAL HIRING BENCHMARK IS NOT TARGETED TO INCREASE EMPLOYMENT OPPORTUNITIES FOR VETERANS MOST IN NEED

The New Regulations' Benchmarking Requirement

Under the new VEVRAA regulations, federal contractors are required on a periodic basis to

- Calculate the percentage of all new hires who are veterans;
- Compare that percentage to a benchmark set by the OFCCP;

- Assess the effectiveness of their efforts to hire veterans; and
- Take any needed affirmative action to attract and hire veterans effectively.

The regulations require contractors to gather the following rudimentary data:

- Number of job openings;
- Number of jobs filled;
- Number of applicants for all jobs;
- Number of applicants who self-identified as protected veterans;
- Number of applicants hired; and
- Number of protected veteran applicants hired.³⁶

The data gathered are then compared to a benchmark. There are two possible methods for establishing a benchmark. Under the first method, the OFCCP will annually publish a benchmark derived from the national percentage of veterans in the civilian labor force. The current benchmark is 8 percent. Under the second method, contractors are permitted to establish their own benchmarks in accordance with OFCCP guidelines, which allow contractors to consider the following factors:

- The average percentage of veterans in the civilian labor force over the preceding three years in the state where the contractor is located, as calculated by the Bureau of Labor Statistics and published on the OFCCP Web site.
- The number of veterans over the previous four quarters who were participants in the employment service delivery system in the state where the contractor is located, as tabulated by the Veterans' Employment and Training Service and published on the OFCCP Web site.
- The applicant ratio and hiring ratio for the previous year based on the data collected by the contractor for its affirmative action plan data analyses.
- The contractor's recent assessment of the effectiveness of its external outreach and recruitment efforts.
- Any other factors, including, but not limited to, the nature of the contractor's job openings and/or its location, which would tend to affect the availability of qualified protected veterans.³⁷

Covered federal government contractors must then use the benchmark to review annually their protected veteran hiring for the current year and the two prior plan years. Contractors are expected to use this review as an assessment of their external outreach and recruitment efforts and make adjustments based on the review of what was, and was not, working to promote the recruitment and hiring of veterans.

In performing this assessment, contractors will be looking at their entire workforce rather than performing the analysis on a job-group-by-job-group basis. However, the OFCCP expects this assessment to be performed on an establishment-by-establishment basis.³⁸

Given the complexity involved in attempting to calculate individualized benchmarks and the relatively small benefit of doing so, it seems likely that most contractors will elect to use the benchmark published by the OFCCP. The 8 percent hiring benchmark (as adjusted from time to time in the future) will likely end up like the 1970s era women in the trades benchmark—nice in theory but ignored in practice due to disconnects between reality and the underlying assumptions of the benchmark.

Why the National Benchmark is Not Properly Designed to Address the Employment Problems of Veterans Most in Need

The new regulations are predicated upon the incorrect assumptions that veterans are not being hired because (a) civilian employers discriminate against veterans' status; and (b) civilian employers do not let veterans know about job openings or otherwise track their outreach efforts.³⁹ The OFCCP's solution was to create a benchmark for hiring—currently 8 percent—that employers will match against their own hiring of veterans.

The hiring benchmark will fail because it treats veteran status as a single homogenous group. However, veteran status is not a singular immutable characteristic similar to gender or race. As a result of OFCCP's treatment of veteran status as a homogenous characteristic, the regulations fail to account for the numerous differences among veterans that impact their employment opportunities. These differences include education and skills at the time of discharge, geography and gender. The data shows that these differences have significant impacts.

1. Veterans' Age, Educational Attainment, and Skills upon Discharge

The biggest impact upon veterans' employment opportunities appears to be their age, educational attainment and skills upon discharge. These factors similarly impact all job applicants.

The age of veterans at the time of discharge has implications for both their hiring opportunities and unemployment rate. For example, the IDES Report found that the "probability of unemployment for a veteran is at its highest immediately after discharge (separation from the military)

and then declines as the time since discharge increases. Veterans under the age of 25 have a much higher concentration of individuals who have a higher probability of unemployment than older veterans."⁴⁰

The IDES Report further explains that substantial numbers of veterans under age 25 are in the lowest military ranks and have the highest proportion of individuals in the Department of Defense Occupational Group "Infantry, Gun Crews and Seamanship Specialists," but also have the highest proportion of veterans enrolled in higher education programs. This led the IDES to conclude "that in most cases it would take a few years after veterans were discharged from the military before they could complete a degree."⁴¹ The "Employment Histories Report" similarly found that, in recent years, a high proportion of RSS used the GI Bill, suggesting that many younger veterans are returning to school after leaving military service.⁴²

The data also shows that non-veterans had a higher proportion of employment than Gulf War-era II veterans in the fields of management, business, and financial operations, even though veterans had a higher proportion of employment in such fields overall and among Gulf War-era I veterans. "It is likely that many of these occupations have a tendency to require a college degree and it will take a few years for the Gulf War Era II veterans to complete their education and increase their proportional share of these jobs."⁴³

Taking these factors into consideration, two 24 year old candidates, one veteran and one non-veteran, may have very different educational attainment and skills sets. An employer looking to hire the best available candidate may reasonably conclude that the veteran lacks the educational requirements for the position. While this could be seen as a veteran "penalty," it is not discrimination based on veteran status. Rather, it reflects the reality of later completion of educational requirements and development of certain skill sets.

The data also shows, however, that this veteran penalty disappears both with age and the passage of time since discharge. According to the Department of Labor's own statistics, veterans are better educated and higher paid and have lower unemployment rates than the general population.⁴⁴ This result derives from the fact that veterans tend to be older than non-veterans. For example, in 2011 the median age of male veterans was 64, while the median age of male non-veterans was 41.⁴⁵ In 2011 female veterans median age was 49, while non-veterans' median age was 47.⁴⁶ The age difference accounts for some of the difference between veterans and non-veterans in education and employment attainment, and thus wages, particularly for male veterans.

This data suggests that, overall, veterans are doing quite well relative to non-veterans, but that recently discharged, and primarily male, veterans under age 25 with lower military ranks and less education are driving veterans' unemployment rates up and their pay rates down. The new regulations make no distinction between those who have been recently discharged, their age, rank, or education, and thus fail to address veterans most in need.

2. Geographic Dispersion of Veterans

The VEVRAA regulations benchmark is a national benchmark, and thus does not account for any regional differences, notwithstanding that the benchmark is applied on an establishment-by-establishment basis. For example, what is the veterans' unemployment rate in North Dakota versus Nevada? Are the unemployment rates in such jurisdictions consistent with the general (or even non-veteran) unemployment rates in those jurisdictions, or do they differ widely? In other words, are veterans' unemployment rates significantly different than regional unemployment rates for all persons? The OFCCP's 8 percent benchmark does not say.⁴⁷

In the report "Characteristics of Rural Veterans: 2010," the NVCAS noted that more veterans under age 25 lived in urban areas than rural areas, while more older veterans live in rural areas than urban areas (and in fact, over 90 percent of veterans living in rural areas were over age 35).⁴⁸ The IDES Report found that a far greater proportion of Illinois veterans come from rural areas of the state, while a disproportionate amount of the population is clustered around Chicago. These demographics have implications for veteran hiring, which the "Employment Histories Report" noted was an important factor.⁴⁹

For example, a Chicago area employer may have fewer available veterans than an employer in a rural part of the state. Further, suppose veterans in Chicago are younger, with less experience and more limited skills. Unless the Chicago area employer uses the alternative methodology to determine a target hiring rate that differs from the generic 8 percent benchmark—and it seems unlikely that many employers will do so because the requisite data may be unavailable—the 8 percent benchmark is unlikely to provide the employer useful data about veteran hiring. In turn, even if its hiring is reviewed in light of the benchmark, there may be very little the employer can do to impact its outreach efforts, applicant flow, or hiring numbers. While the benchmark may be across the entire establishment rather than by job group, that generalization will not necessarily eliminate the geographic differences based on where the employers' establishments are located relative to where veterans live, and the general profile of both urban and rural veterans.

The alternative benchmark does allow employers to factor in geographic differences. But it may be complicated to do so, and places the burden entirely upon employers. For an employer seeking to hire a few workers in a single establishment, the burden of calculating the alternative benchmark merely to potentially hire one or two veterans seems outweighed by any possible benefit.

3. Female Veterans are Doing Well

The hiring benchmark does not distinguish between male and female veterans. The data shows that female veterans have higher wages and no worse unemployment rates than female non-veterans. The data also shows that male veterans under age 25 are those most in need of

employment assistance. Perhaps ironically, if employers were to hire veterans at higher rates, it could do so to the detriment of women, who, while a growing percentage of veterans, still account for less than 10 percent of the total veteran population. Thus, employers could be faced with the Hobson's choice of discriminating against women or discriminating against veterans.

Perhaps the upside to the regulations' new data collection requirements is that, when the OFCCP asserts a gender based discrimination claim, the employer will be able to demonstrate that the adverse impact against women results from its hiring of more veterans, which in turn resulted in more males being hired. However, it seems unlikely that the OFCCP will readily sanction adverse impacts against women because male hires also happen to be veterans, and employers are equally unlikely to take comfort in being whipsawed by the government's competing regulatory requirements.⁵⁰

Irrespective, it may be difficult to tell from the data required under the new regulations whether an employer is discriminating against a female applicant because she is female, because she is a veteran, both, or for some other reason. Again, the use of a generic hiring benchmark simply does not provide the necessarily information to assist employers in targeting veterans in need.

4. Disabilities or Other Factors

There may be other factors that account for employers' decisions to hire veterans. One such factor may be disabilities. There is no doubt that some veterans have service related injuries, whether mental, such as PTSD, physical, such as missing limbs, or both. Such disabilities may impact veterans' hiring opportunities.

The Employment Histories Report noted PTSD is a concern for hiring managers, whether real or not. This could be a form of discrimination. However, hiring managers also noted numerous other negative factors, such as being inflexible, rigidity, only taking order and not being creative, lacking specific business knowledge and financial skills. "The consistent concerns with RSS as candidates are that (1) they cannot demonstrate business aptitude based on past experiences and (2) they are not ready to quickly contribute to the profit-making environment. As a result, RSS are not perceived as having the ability to contribute swiftly nor significantly to corporate profitability."⁵¹ Some of these concerns could be ameliorated with continued education about military occupations and skills. The Employment Histories Report goes on to suggest rebranding of RSS and their skill sets for greater success in gaining entry into the civilian workforce.⁵²

However, it seems unlikely that veterans' disabilities impede hiring in ways that are significantly different than similar disabilities suffered by non-veterans.⁵³ In other words, the existence of a disability, rather than veteran status, may impede certain veterans in obtaining employment opportunities.

THE FOURTH DEFECT: THE OUTREACH REQUIREMENTS ARE BASED ON FLAWED DATA AND WILL NOT LEAD TO MORE EMPLOYMENT OPPORTUNITIES FOR VETERANS MOST IN NEED

The New Solicitation, Notice, and Posting Requirements

Coupled with the benchmarking requirement are new requirements focused on solicitation and analysis of data and better notice to veterans and others. Thus, employers must solicit from applicants self-identification of their veteran status, if any. Such self-identification is voluntary and must be kept confidential.⁵⁴ In addition, new language must be added to solicitations and advertisements stating that the contractors are an equal employment opportunity employer of protected veterans. Other similar language must be added to purchase orders and subcontracts.⁵⁵ There are also additional requirements for veterans Affirmative Action Plans.⁵⁶

The regulations add language specifying that contractors posting with state workforce agencies "must provide information about the job vacancy in any manner and format permitted by the [workforce agency] which will allow [the workforce agency's system] to provide priority referral of veterans protected by [the Vietnam Era Veterans Readjustment Assistance Act (VEVRAA)] for that job vacancy." The regulations make clear that responsibility for posting rests with the contractor, who cannot assert that any failures were the result of outsourcing this function to a third party.⁵⁷

Outreach and Matching Skills to Market Needs

1. Data Shows Veterans Tend to Concentrate in Certain Jobs

Data shows that veterans hold a higher percentage of jobs in certain professions and industries than non-veterans. This is not surprising, because veterans learn specific skills in the military that translate well into particular professions. For example, data show that veterans have higher levels of employment in professional and managerial jobs, such as engineers, educators, and doctors.⁵⁸ The higher levels of managerial employment likely stems, at least in part, from officers' training in managing both personnel and logistics, as well as higher educational attainment (such as for medical doctors).

In a recent op-ed piece in *The Wall Street Journal* announcing that over 100 construction companies were planning to hire 100,000 veterans over the next five years, First Lady Michele Obama told the following story about one veteran and the challenges employers face in trying to determine whether veterans are the most qualified person for the position:

Yet their qualifications aren't always obvious from their résumés. Take the example of Glenn Tussing, who currently works at Disney. Glenn is an Air Force veteran who served as chief of future joint

manpower requirements. In that role, he was responsible for figuring out the exact numbers and types of troops—from the pilots, to the engineers, to the medical personnel—needed for a mission to succeed. He would then locate those troops and help send them where they needed to go.

When Disney was looking for someone to oversee the menus at Disney properties around the world, it would have been easy for them to overlook Glenn since the link between manpower planning and menu management isn't exactly intuitive. But Disney has trained its HR specialists to translate military experience into civilian qualifications. So when they were looking for someone who could determine the exact quantities and types of ingredients for every meal they served—and get that information anywhere in the world it needed to go—they knew Glenn was their guy. In fact, today at Disney, Glenn uses the same types of databases and programs he used in the military.⁵⁹

Anecdotal stories such as the one about Glenn Tussing demonstrate both that military service tends to train veterans in certain skill sets that translate well into certain civilian jobs, and that veterans tend to concentrate in specific industries more than others that might better utilize those skills. Again, this is hardly surprising, and the same could be said of non-veterans that obtain particular skills in one kind of employment when switching to another kind of employment.⁶⁰

2. The New Regulations Do Not Ensure Better Matching of Military Skills to Civilian Hiring Needs Because the Data is Not Useful

The new regulations do not consider whether civilian labor markets match veterans' skills. Take, for example, an Army JAG whose skills of practicing law are highly specific, thus make it is easy to identify the kind of employment opportunities that would best utilize those skills. However, the JAG's employment opportunities will depend upon where the veteran lives after discharge and the overall market for attorneys in that area. If the geographic area is highly saturated with attorneys, the veteran's employment prospects may be poor.⁶¹ Thus, a recently discharged veteran who is an Army JAG may have a hard time finding civilian employment based on market forces that have nothing whatsoever to do with his military service.⁶²

In addition, some government contractors, such as construction contractors, may have much higher percentages of veterans, while others will have considerably less. These differences are likely to reflect what skills are needed in the labor market rather than discrimination by employers. Thus, a contractor's failure to meet hiring benchmarks could be the result of a lack of qualified veterans for particular positions or a lack of veterans in the geographic area of the establishment, both reasons, or others that have nothing to do with discrimination.

Further, the regulations do not require employers to keep data on a job group basis, and the government does not offer sufficient granular data

to allow for analysis at that level. While employers are free to create their own benchmarks, employers are unlikely to create benchmarks that are targeted to job groups by establishment because such data would be difficult and time consuming to assemble, and the benefits afforded from doing so may only reach a few if any new potential veteran applicants or hires. But without such data, employers will not truly know whether they are doing better at reaching and hiring veterans that actually need assistance, rather than just veterans in general, or truly finding the right person for the job.

Another problem is that the OFCCP's benchmark only applies to covered federal government contractors and subcontractors, and thus misses a substantial portion of the overall employer population. Non-covered federal contractors are competing for the same labor pool as covered federal government contractors, but veterans may end up working in higher proportions for non-covered employers than covered federal government contractors. For example, data show that veterans work for government agencies at twice the rate of non-veterans.⁶³ Veteran applicants' decisions about where to apply for jobs, or what offers to accept, represent another example of self-selection bias in the data, and do not necessarily establish that employers are not effectively reaching veterans or trying to hire them.

It will take a few years of data to know how many veterans are willing to self-identify as part of the pre-hiring process, but unless significant numbers do so, the collection of what would be incomplete data is unlikely to yield employers much useful data. This is a typical problem when data suffer from self-selection or other biases, such as veterans' decisions to self-identify their veterans' status.⁶⁴ There is no reason to impose data collection and analysis burdens on employers if the data collected is biased and incomplete, as any analysis thereof does not provide valuable insight. Further, if veterans are self-identifying through other means (such as explaining their veteran status through job histories or skills on their resumes or job applications), it does not appear that a second method of collecting the same data (albeit in a different form) adds anything substantive.

The regulations also do not address education for employers or veterans, and thus fail in any way to address the problem of converting military jobs and skills into civilian jobs and skills. The regulations also do not address transitional assistance. Other efforts by the federal government, such as the Work Opportunity Tax Credit, are also directed at increasing veteran hiring, but it does not appear that any attempt was made to coordinate those efforts with the new regulations.

Increased Employment Opportunities for Those in Need Will Not be Influenced by the Data Collected

Data shows that male veterans are significantly older than the general population, and include a significant portion of World War II, Korean War and Vietnam War veterans. As these veterans retire and eventually

begin to pass away, they will less skew the overall data on veterans' employment rates and pay. At the same time, as Gulf War I-era and Gulf War II-era veterans leave military service, return to school and obtain degrees, their employment prospects will improve. This is the natural tendency of anyone who acquires more education and skills over time that are useful in the labor market.

The regulations are a blunt instrument because they set benchmarks for hiring that fail to consider many of the relevant factors that impact veteran hiring. Applying a general benchmark is simply the wrong tool to solve the problem, and is akin to slicing a loaf of bread with a sledgehammer.

Additionally, because covered veterans includes more than just recently discharged veterans (veterans within three years of discharge), the benchmark fails to benefit young returning veterans who are most in need. Data does not exist, nor likely will, to discern which veterans need help and which do not.

Finally, while the purpose of the regulations is to address veterans, there is failure to consider that there are other potentially needy groups, such as at-risk youths who did not or could not enter the military, single parents and those seeking to break their dependency upon welfare. Consequently, there is a hidden cost to veteran preferences which must be weighed against the benefits of the preference. Because the benchmark does not target the most-needy group of veterans, the likely outcome of the regulations will be that numerous non-needy veterans will be hired for every truly needy veteran. The regulations also raise the barriers to employing needy non-veterans in order to benefit just one needy (or potentially non-needy) veteran. A more targeted program could drastically reduce these disparities and better serve those in need.

WHAT THE GOVERNMENT, VETERANS, AND EMPLOYERS SHOULD BE DOING TO INCREASE THE EMPLOYMENT OPPORTUNITIES OF VETERANS MOST IN NEED

Recognize that Veterans are Not a One-Size-Fits-All Group Underemployed Solely Because of Discrimination Based on Veteran Status

In his State of the Union speech on January 28, 2014, President Obama declared: "As this time of war draws to a close, a new generation of heroes returns to civilian life.... We'll keep working to help all our veterans translate their skills and leadership into jobs here at home." While a laudable goal, it will not be accomplished by the new VEVRAA regulations. Rather, OFCCP's mentality as reflected in the new VEVRAA regulations appears stuck in the 1970s Vietnam era devoted to preventing discrimination against veterans, even though such discrimination—based solely on military service—does not appear to be what is driving

veterans' wages and employment rates. To the contrary, data suggests that veterans in fact are favored, have higher employment rates, and earn more than their non-veteran peers.

Better Education about How Military Skills Translate to Civilian Jobs

As Ms. Obama pointed out, construction companies plan to hire more veterans because it is good business. But it is good business because many veterans have developed skills during their military service that are useful in the construction industry. Data from the IDES Report notes that veterans have a higher proportion of construction jobs than non-veterans.⁶⁵

Better education is needed to make the goal of more veteran hiring a reality. Fortunately, resources already exist. For example, VA has tools for veterans, such as the "VA for Vets Military Skills Translator," which helps veterans translate their military skills, experience, and training, such as military occupation code (MOS), area of concentration (AOC), Air Force specialty code (AFSC), or Navy enlisted classification (NEC), into civilian occupations and skills sets.⁶⁶ Similarly, there are federal and state resources that help employers translate those MOS, AOC, AFSC, and NEC classifications, pay grades, and other military information into civilian jobs through crosswalks and translations.⁶⁷

If these resources are to be effective, there needs to be a partnership between veterans, the federal government (Departments of Defense, Veterans' Affairs, and Labor), and employers. Each must improve their understanding of what is needed to advance the employment opportunities of veterans in need. The federal government needs to better understand what civilian employers need. Veterans need to better understand how their skills translate to civilian jobs. Employers need to better understand the language of military employment and how military skills translate into civilian skills. Ms. Obama's anecdote about Glenn Tussing demonstrates the importance of better understanding.

Merely posting employment opportunities in more locations, adding equal opportunity employer language to advertising and other similar window dressing will not resolve the gaps in understanding that currently exist. Moreover, the regulations create a kind of cause-and-effect relationship based on the data; that is, that hires will tell us about recruitment in ways that are truly unique just to veterans. This may or may not be the case. For example, if an employer has 100 applicants for an establishment, 10 of whom self-identify as protected veterans, that tells us that 10 percent of the applicants self-identified as protected veterans (and not that 10 percent are actually protected veterans, or that more applicants were protected veterans than self-identified). If we ask each about the reference source they used to learn about the job, and they each give us a different reference source, what information has the

employer obtained about whether its outreach was effective or which reference sources were the best? Further, even if eight of the 10 came from the same reference source, that does not necessarily mean that in the future that particular reference source will provide more protected veteran applicants, particularly if it was a generic resource (posting on the company's Web site or a site like Monster.com), or if the requirements for the position are narrowly tailored. In short, just knowing the number of applicants, hires, and where they found the job listing is not a guarantee that employers can use that data to improve hiring in the future.

Thus, rather than put all the onus and blame on employers, OFCCP and other federal agencies should do more to educate employers, who cannot be expected to understand all aspects of military employment without assistance. Placing all responsibility on employers, as the VEVRAA regulations do, undermines the importance of "shared responsibility" and the need of all sides to work together to increase veterans' employment opportunities.

Better Transitional Services for Younger Veterans Recently Discharged from Military Service

As noted, what the data shows is that veterans, and in particular male veterans under age 25 who are recently discharged, are, as a group, most in need of help in seeking civilian employment opportunities. As the IDES Report concludes, unemployment is "highest immediately after discharge and decreases asymptotically as the time since discharge increases."⁶⁸ No cognizable attempt has been made by the new regulations to discern differences between veterans upon release from military service, and otherwise previously employed veterans who may have lost a civilian job to a RIF (or misconduct), and have otherwise been unable to find other suitable employment.

What this data really demonstrates is that male veterans under age 25, with only high school education or some college but no degree, who were likely "Infantry, Gun Crews and Seamanship Specialists," with lower ranks, suffer the highest levels of unemployment and need the most help transitioning to civilian life. This cohort's failure to attain employment quickly can be attributed to fewer skills, younger age, and less education. According to the IDES Report, a much larger percentage of veterans in this age cohort are enrolled in school, and it takes a few years after military service to complete their degrees, delaying their entry into the civilian workforce, and thus their rates of pay.⁶⁹ However, the data shows that these disparities disappear over time, contrary to what the OFCCP claims.

Hiring benchmarks, more posting and additional language in notices will not make this group of veterans any better educated, skilled, or experienced, and thus more employable. The new regulations do little to assist this group of veterans most in need. Rather, better transitional

services are needed, including job training services.⁷⁰ Nothing in the new VEVRAA regulations provides those services.

Recognize that the OFCCP Is Not the Best Agency to Accomplish What Needs to be Done

While the OFCCP has recently sought to push the extent of its jurisdiction as far as possible, the new regulations only apply to covered federal government contractors, and significant numbers of employers are not subject to the OFCCP's benchmarking and outreach obligations. While data does not appear to be currently available, comparing the efforts of non-covered employers to covered government contractors is likely to show that veterans' hiring trends are not significantly enhanced by the OFCCP's added regulatory burdens. Again, while laudable, OFCCP's regulations create more work for covered federal government contractors while failing to truly address veterans' most pressing needs.

It is probably too difficult to draft effective regulations that parse veterans in ways that better reflect the realities of which veterans are in need of the greatest help. The option to use an alternative benchmark is at least an implicit acknowledgement that the 8 percent benchmark is likely to be of limited, if any, use. However, the OFCCP places all responsibility upon employers to create micro-benchmarks that could actually provide useful data. But the time and expense, borne solely by employers, to develop these benchmarks, coupled with their limited value if applied to same data sets, makes their creation unlikely.⁷¹

There is no question that veterans need and deserve a variety of resources to help transition from military to civilian employment. Some of those resources are provided by the federal government, while others need to be driven by private employers, veteran's organizations, and state agencies. Whatever is done, however, it must be a joint effort between all constituencies, including employers, the federal government, and veterans themselves. Focusing on the real problems veterans face, such as the need for better education about how military skills translate into civilian employment, coupled with more transitional assistance, while also recognizing that "veterans" are not a homogenous group, will likely have a far greater impact upon veterans' success than tracking a generic, national hiring benchmark.

NOTES

1. 41 C.F.R. §§ 60-300 *et seq.*

2. 38 U.S.C. §§ 4212 *et seq.*

3. Under the new regulations these categories are: (1) disabled veteran; (2) recently separated veteran; (3) active duty wartime or campaign badge veteran; and

(4) Armed Forces service medal veteran. *See* 41 C.F.R. § 60-300.2 for definitions of each category.

4. Alair MacLean & Meredith Kleykamp, Coming Home: Attitudes toward U.S. Veterans Returning from Iraq, *Social Problems*, vol. 61, no. 1, pp. 131-154 (Feb. 2014); *see also* Rochelle B. Birkelo, Vietnam veterans accepted, respected decades after their war ended, *Gazetteextra*, Feb. 11, 2011, available at <<http://gazetteextra.com/news/2011/feb/16/vietnam-veterans-accepted-respected-decades-after->>; Alan Cutter, Learning to come home from war: no one said "thank you" to Vietnam vets, *Guardian*, Apr. 13, 2013, available at <<http://www.theguardian.com/commentisfree/2013/apr/13/vietnam-veterans-not-thanked-for-military-service>>.

5. MacLean & Kleykamp, *supra* note 4, at pp. 145-146 (citations omitted).

6. *See* Meredith Kleykamp, *Women Veterans: Who are they and how are they doing?*, Presentation at the U.S. Department of Labor's "Symposium on Women Veterans: Skills Matter," Aug. 29, 2013.

7. OFCCP Fact Sheet, Final Rule on Vietnam Era Veterans' Readjustment Assistance Act (VEVRAA), p.1, available at <http://www.dol.gov/ofccp/regs/compliance/vevraa.htm> (last visited February 28, 2014).

8. OFCCP, "Frequently Asked Questions: Vietnam Era Veterans Readjustment Assistance Act (VEVRAA) Final Rule" (FAQs), General Information FAQ 1, available at <http://www.dol.gov/ofccp/regs/compliance/faqs/VEVRAA_faq.htm> (last visited February 28, 2014).

9. OFCCP Fact Sheet, *supra* note 7, at p. 2.

10. Military service is divided into several eras: World War II era, Korean War era, Vietnam War era, Gulf War-era I (August 1990-September 2001), Gulf War-era II (September 2001 to present), and Peacetime only.

11. OFCCP Fact Sheet, *supra* note 7, at p. 2.

12. *Id.*

13. OFCCP Final Rule, Executive Summary, sec. I, *Purpose of the Regulatory Action*.

14. U.S. Department of Veterans Affairs, National Center for Veterans Analysis and Statistics (NCVAS), "Unemployment Rates of Veterans: 2000 to 2009," Oct. 2010, p. 4.

15. *Id.* at pp. 5-6.

16. *Id.* at p. 8. The NCVAS did note that due to the small sample size, the error rate may have been larger and could account for the lack of a statistical difference. It also noted that this age group had the highest unemployment rate for both veteran and non-veterans.

17. *Id.* at pp. 11-13 (data for age groups 45 to 54, 55 to 64 and 65 and older); *see also* U.S. Department of Labor, "Veteran Labor Force in Recovery," Nov. 3, 2011, pp. 2-3 (showing that veterans from the Vietnam War era had lower overall unemployment rates than non-veterans).

18. Illinois Department of Employment Security (IDES), "The Transition of Illinois Veterans from Military Discharge to Stale Civilian Employment," (2011) (IDES Report).

19. IDES Report, *supra* note 18, at p. 11.

20. Abt Associates, Inc., "Employment Histories Report," Mar. 24, 2008, p. 8.

21. The OFCCP only mentions a single year as its data point, which stands in sharp contrast to the decade-long trends analyzed in the NCVAS study.
22. Veteran Labor Force in the Recovery, *supra* note 17, at p. 2.
23. U.S. Census Bureau, "A Snapshot of Our Nation's Veterans," available at <<http://www.census.gov/hou/infographics/veterans.html>>.
24. Jennifer Tennant, *Disability, employment, and income: are Iraq/Afghanistan-era U.S. veterans unique?*, MONTHLY LAB. REV., Aug. 2012 ("Recent veterans were also similar in terms of annual income from wages and salary (on average, \$43,370 versus \$42,972) and family income adjusted for number of people in the household (on average, \$52,038 versus \$47,530, but there was no statistically significant difference between these two amounts).").
25. See Jennifer Hunt, *Female Veterans' Unemployment and Wages*, U.S. Department of Labor, Presentation at the U.S. Department of Labor's "Symposium on Women Veterans: Skills Matter," Aug. 29, 2013. Chief Economist Hunt found that that female veterans of each era earn at least 10 percent more than non-veterans, veterans earn 14.1 percent more than non-veterans of same age, and veterans of each era earn at least 12 percent more than non-veterans of same era, although they generally tend to be slightly older and better educated than non-veterans. The exception is Gulf War-era II veterans, which show contrary results.
26. California Commission on the Status of Women and Girls, "California's Women Veterans and Employment: A 2012 Overview," Sept. 2012, pp. 1-2 (\$54,900 for veterans versus \$47,683 for non-veterans).
27. Employment Histories Report, *supra* note 20, at pp. 9-13. The control group was intended to match veterans on various demographics including age, race, and education, but was not a straight comparison of veterans to non-veterans.
28. *Id.* at p. 11.
29. *Id.* at p. 26.
30. NCVAS, "Profile of Veterans: 2011, Data from the American Community Survey," Mar. 2013, p. 19 (Profile of Veterans: 2011).
31. Employment Histories Report, *supra* note 20, at p. 37.
32. CHARLES WHEELAN, *NAKED STATISTICS*, (W.W. Norton & Co, 2013), pp. 13-14 (emphasis in the original).
33. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 (1977); *see also* *McNamara v. City of Chicago*, 138 F.3d 1219, 1223 (7th Cir. 1998) ("Raw statistical disparities prove little").
34. In *Bazemore v. Friday*, 478 U.S. 385, 400 (1986), the U.S. Supreme Court ruled that a valid statistical model need not contain all variables, and some arguably relevant variables could be omitted in certain cases. *But see* *EEOC v. Chicago Miniature Lamp Works*, 947 F.2d 292, 301-303 (7th Cir. 1991) (Title VII case in which the court held that the variables of commuting distance and language fluency were too important to be ignored in statistical model addressing lower wage entry level jobs). The OFCCP's failure to use a more balanced statistical model that considered relevant variables such as age, gender, education, geography, skill sets, and the passage of time since discharge, makes its claim of employment discrimination against veterans questionable, and therefore, the basis for the regulations questionable.

35. According to the OFCCP, it only accounted for age and race. See OFCCP Fact Sheet, *supra* note 7, at p. 2. Even in accounting for age, it is hard to tell from a single statistic whether the OFCCP accounted for the qualitative implications of age, such as that younger veterans have the least experience, and that a disproportionate amount of veterans are older than the general population.

36. 41 C.F.R. § 60-300.44(k).

37. 41 C.F.R. § 60-300.45.

38. See FAQs, *supra* note 8, Hiring Benchmarks FAQ 1-2.

39. These assumptions appear inconsistent. If the reason the rate of veteran hiring is not higher is merely a failure to reach more veterans, then that is not based on discrimination by the employer. The OFCCP might argue that the failure to reach out to more veterans is because of discrimination, and there is no desire to reach veterans that employers do not want to hire. But if that is the case, then greater outreach would still fail because it would not result in more veterans being hired even if more veterans are reached.

40. IDES Report, *supra* note 18, at p. 4.

41. *Id.* at p. 20.

42. Employment Histories Report, *supra* note 20, at p. 16.

43. IDES Report, *supra* note 18, at p. 13.

44. Veteran Labor Force in the Recovery, *supra* note 17, at p. 2; Profile of Veterans: 2011, *supra* note 30, at p. 13.

45. Profile of Veterans: 2011, *supra* note 30, at p. 5.

46. *Id.* at p. 6.

47. Veteran Labor Force in Recovery, *supra* note 17, at p. 8 (showing veterans' unemployment rates by region).

48. NCVAS, "Characteristics of Rural Veterans: 2010," July 2012, pp. 9, 16.

49. For example, the NCVAS explains that educational attainment differed between urban and rural veterans, as well as their employment. "The geographic distribution of education and employment among Veterans in urban and rural areas may be one way to identify patterns of need within service areas." *Id.* at p. 25.

50. The same problem might exist for employers seeking to hire racially diverse workforces, to the extent that, for example, substantially more veterans are non-Hispanic whites than minorities. Profile of Veterans: 2011, *supra* note 30, at p. 7. That the hiring of veterans based on veterans status could work at cross purposes with attempts to hire women or minorities underscores the problem of treating veterans as a homogeneous category for discrimination purposes.

51. Employment Histories Report, *supra* note 20, at p. 30.

52. *Id.* at pp. 30-31; see also Margaret C. Harrell & Nancy Berglass, *Employing America's Veterans: Perspectives From Business*, CENTER FOR A NEW AMERICAN SECURITY, June 2012 (discussing reasons private employers do and do not hire veterans and proposing changes to increase veteran hiring).

53. It is unlikely that an employer would discriminate against an applicant that lost a leg to a roadside IED but not discriminate against a person that lost a leg due to gout or in

a car accident. If an employer has a reason, discriminatory or otherwise, for not wanting to hire an applicant with a missing leg, it is unlikely to discriminate on the basis of why the leg is missing. However, this is not to suggest that bias based on concerns about potential mental disabilities such as PTSD or more readily observable disabilities such as lost limbs do not exist.

54. 41 C.F.R. § 60-300.42.

55. 41 C.F.R. § 60-300.5.

56. 41 C.F.R. § 60-300.44.

57. 41 C.F.R. § 60-300.5.

58. Profile of Veterans: 2011, *supra* note 30, at pp. 9-10 (noting 34.6 percent of male veterans were in management and professional occupations compared to only 32.5 percent for male non-veterans, and 48.7 percent of female veterans were in management and professional occupations compared to only 39.6 percent for female non-veterans).

59. Michelle Obama, Construction Companies Step Up to Hire Veterans: It's not just the patriotic thing to do. It's also a smart move for businesses, WALL ST. J., Feb. 10, 2014, A13.

60. Military service is both employment and a profession, and many veterans make a career out of military service, advancing in rank and responsibility similar to civilian employees of other large organizations, whether local, state or federal governments or large corporations. People do change careers and industries in the private sector with frequency, and a career military veteran who leaves in his 40s with a high rank and skill likely has a very different employment profile than a 22-year-old enlisted soldier. While there is no real data on career changes, because there is no real consensus on what constitutes a career change, the general notion that people change jobs does have different implications for someone who serves one or two tours in the military versus a career military veteran. See <<http://www.bls.gov/nls/nlsfaqs.htm#anch41>> (National Longitudinal Study FAQs discussing tracking of job changes).

61. U.S. Department of Labor, Bureau of Labor Statistics, "Occupational Outlook Handbook," (Lawyers), 2014-15 ed., available at <<http://www.bls.gov/ooh/legal/lawyers.htm>> (finding that "[c]ompetition should continue to be strong, because more students are graduating from law school each year than there are jobs available. Some recent law school graduates who have been unable to find permanent positions are turning to the growing number of temporary staffing firms that place attorneys in short-term jobs. This service allows companies to hire lawyers 'as-needed' and permits beginning lawyers to develop practical skills. Because of the strong competition, a law graduate's willingness to relocate and his or her work experience are becoming more important.").

62. Employment Histories Report, *supra* note 20, at pp. 30-34 (discussing challenges for RSS hiring).

63. Profile of Veterans: 2011, *supra* note 30, at p. 9.

64. See Wheelan, *supra* note 32, at pp. 110-126 (discussing various forms of data bias); see also *Mister v. Illinois C. G. R. Co.*, 832 F.2d 1427, 1435-37 (7th Cir. 1987) (discussing selection bias in disparate impact case).

65. IDES Report, *supra* note 18, at p. 13 (noting veterans employment rate in construction was 6.5 percent, compared to 5.1 percent for non-veterans).

66. See VA To Vets Military Skills Translator, available at <https://www.vetsuccess.va.gov/public/military_skills_translators.html>; see also O*NET Military Skills Translator, available at <<http://www.onetonline.org/crosswalk/>>.

67. See, e.g., Mil2FedJobs Federal Jobs Crosswalk, available at <<http://www.dllr.state.md.us/mil2fedjobs/>> (State of Maryland resource); Department of Labor (DOL) Military to Civilian Occupation Translator, available at <<http://www.careerinfonet.org/moc/default.aspx?nodeid=213>>. Harrell and Berglass criticize these efforts in general as being insufficient. See *supra* note 52, at p. 23 (Both civilians and members of the military have a hard time translating military skills into civilian job qualifications—a challenge this report identifies as the most prominent obstacle to hiring veterans.”).

68. IDES Report, *supra* note 18, at p. 11.

69. *Id.* at p. 20.

70. One such program is the Entrepreneurial Bootcamp for Veterans, or EBV, run by the University of Connecticut. EBV is a nationally recognized educational program to support business initiatives for veterans through experiential and small business management training. For a short article on EBV, see Michael Melia, *Returning veterans swell ranks of US entrepreneurs*, YAHOO NEWS, Oct. 13, 2012, available at <<http://news.yahoo.com/returning-veterans-swell-ranks-us-entrepreneurs-161134428.html>>. For more information about EBV, see <<http://ebv.business.uconn.edu/>>.

71. The OFCCP may argue that some data is better than no data, and thus the regulations are better than nothing. For example, in the Final Rule's analysis of the data collection requirements under Section 60-300.44(k), the OFCCP stated that several comments expressed concern about “data integrity issues and questions about the purpose of conducting the calculations or comparisons. One of the primary issues identified by commenters is that applicant data appears to be dependent upon self-identification which is not reliable. These issues were addressed in the discussion of the invitation to self-identify proposals in § 60-300.42(a). In short, demographic data based on self-identification will never be perfect, but it is the best data that is available.” Such a view fails to take into account the burdens of such regulations relative to the benefits of inaccurate data, and the focus it takes away from more effective efforts, such as education and training.