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SBA RULES ON SDVOSB OWNERSHIP AND CONTROL

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The Department of Veterans Affairs (VA) and the United States Small Business Administration (SBA) each has its own service-disabled veteran-owned small business (SDVOSB) contracting program. Until recently, the VA and SBA programs were subject to different sets of eligibility rules. Effective October 1, 2018, SBA revised its eligibility requirements for the SBA service-disabled veteran-owned small business concern (SDVO SBC) program. Due to the VA's recent elimination of its own eligibility requirements and corresponding adoption of SBA's rules on eligibility, the recent changes to the SBA rules impact eligibility determinations under both programs.

In a few respects, the recent rule change eased SDVOSB eligibility requirements. For example:

- Non-service-disabled veteran minority owners now have more rights to decide certain extraordinary company actions (this was discussed in a prior article).
- In states with community property laws (note: Virginia is *not* a community property state), ownership is now determined without regard to community property;
- In limited circumstances, upon the death of a service-disabled veteran owner, his or her surviving spouse can own the SDVOSB for a period of up to ten (10) years;
- Company stock owned by an employee stock ownership plan (ESOP) is exempt from the ownership calculation.

However, in many other ways, SBA now more tightly restricts SDVOSB eligibility than it did previously. For example, there is a bright line rule that service-disabled veteran owners must receive at least 51% of annual distribution of the company's profits and retained earnings, and 100% of the value of each share upon sale of stock or dissolution of the company. Additionally, in the following circumstances, there is a presumption that non-service disabled veterans control the company (but the presumption is rebuttable):

- A non-service disabled veteran who is involved in the management or ownership of the SDVOSB is a current or

former employer (or principal of a current or former employer) of the service-disabled veteran;

- A non-service disabled veteran receives compensation that exceeds compensation paid to the SDVOSB's highest-ranking officer (usually CEO or President);
- The SDVOSB shares an office, employees, equipment, resources, or services with another company in the same line of work and the other company or any of its owners, officers, directors, or their direct relatives owns an equity interest in the SDVOSB;
- A non-service disabled veteran holds an equity interest in the SDVOSB and provides critical financial or bonding support;
- A non-service disabled veteran holds a critical license required in the SDVOSB's line of work;
- The SDVOSB is dependent upon non-service disabled veteran individuals or entities such that the service-disabled veteran owner's independent business judgment is compromised;
- The service-disabled veteran owner is not able to work for the firm during "normal working hours"; and
- The service-disabled veteran owner "is not located within a reasonable commute" to the SDVOSB's "headquarters and/or job-sites locations, regardless of the firm's industry." Evidence that the service-disabled veteran owner is able to telecommute is insufficient to rebut the presumption.

Although they represent a departure from SBA's old regime, the new rules are closely aligned with the eligibility criteria historically used by the VA. Importantly, the new regulations provide much-needed clarity on the eligibility requirements for SDVOSBs under both the SBA and VA programs, and hopefully will eliminate some of the inconsistencies previously experienced between the two programs. For more information, please contact the authoring attorney.

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