

**APPENDIX A TO PART 61-300 - FEDERAL CONTRACTOR VETERANS' EMPLOYMENT  
REPORT VETS-100A  
FEDERAL CONTRACTOR VETERANS' EMPLOYMENT REPORT VETS-100A  
(For covered contracts entered into or modified on or after December 1, 2003.)**

OMB NO: 1293-0005

Expires: 04/30/2014

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RETURN COMPLETED REPORT TO:  
VETS-100 Submission  
VETERANS' EMPLOYMENT AND TRAINING SERVICE (VETS)  
Service Center  
In care of: Department of Labor National Contact Center (DOL-NCC) (Suite 200)  
14120 Newbrook Drive  
Chantilly, VA 20151

**ATTN: Human Resource/EEO Department**

<b>TYPE OF REPORTING ORGANIZATION</b> (Check one or both, as applicable)	<b>TYPE OF FORM</b> (Check only one)
<input type="checkbox"/> Prime Contractor	<input type="checkbox"/> Single Establishment
<input type="checkbox"/> Subcontractor	<input type="checkbox"/> Multiple Establishment-Headquarters
	<input type="checkbox"/> Multiple Establishment-Hiring Location
	<input type="checkbox"/> Multiple Establishment-State Consolidated (specify number of locations) _____ (MSC)

**COMPANY IDENTIFICATION INFORMATION (Omit items preprinted above-ADD Company Contact Information Below)**

<b>COMPANY No:</b>	<b>TWELVE MONTH PERIOD ENDING</b>	2 0 1 1			
		M M D D Y Y Y Y			
<b>NAME OF PARENT COMPANY:</b>	<b>ADDRESS (NUMBER AND STREET):</b>				
<b>CITY:</b>	<b>COUNTY:</b>	<b>STATE:</b>	<b>ZIP CODE:</b>		
<b>NAME OF COMPANY CONTACT:</b>	<b>TELEPHONE FOR CONTACT:</b>	<b>EMAIL:</b>			

<b>NAME OF HIRING LOCATION:</b>	<b>ADDRESS (NUMBER AND STREET):</b>				
<b>CITY:</b>	<b>COUNTY:</b>	<b>STATE:</b>	<b>ZIP CODE:</b>		

<b>NAICS:</b>																				<b>DUNS:</b>											<b>EMPLOYER ID (IRS TAX No.)</b>													
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**INFORMATION ON EMPLOYEES**

JOB CATEGORIES	NUMBER OF EMPLOYEES					NEW HIRES (PREVIOUS 12 MONTHS)				
	DISABLED VETERANS (L)	OTHER PROTECTED VETERANS (M)	ARMED FORCES SERVICE MEDAL VETERANS (N)	RECENTLY SEPARATED VETERANS (O)	TOTAL EMPLOYEES, BOTH VETERANS AND NON-VETERANS (P)	DISABLED VETERANS (Q)	OTHER PROTECTED VETERANS (R)	ARMED FORCES SERVICE MEDAL VETERANS (S)	RECENTLY SEPARATED VETERANS (T)	TOTAL NEW HIRES, BOTH VETERANS AND NON-VETERANS (U)
EXECUTIVE/SENIOR LEVEL OFFICIALS AND MANAGERS 1										
FIRST/MID LEVEL OFFICIALS AND MANAGERS 2										
PROFESSIONALS 3										
TECHNICIANS 4										
SALES WORKERS 5										
ADMINISTRATIVE SUPPORT WORKERS 6										
CRAFT WORKERS 7										
OPERATIVES 8										
LABORERS/HELPERS 9										
SERVICE WORKERS 10										
TOTAL 11										

Report the total maximum and minimum number of permanent employees during the period covered by this report.

Maximum Number	Minimum Number

# Federal Contractor Veterans' Employment Report (VETS-100-A)

## WHO MUST FILE

This VETS-100A Report is to be completed by all nonexempt federal contractors and subcontractors with a contract or subcontract entered into or modified on or after December 1, 2003, in the amount of \$100,000 or more with any department or agency of the United States for the procurement of personal property and non-personal services. Services include but are not limited to the following services: utility, construction, transportation, research, insurance, and fund depository, irrespective of whether the government is the purchaser or seller. Entering into a covered federal contract or subcontract during a given calendar year establishes the requirement to file a VETS-100A Report during the following calendar year. The VETS-100A Report is to be completed by all nonexempt federal contractors and subcontractors whose only contract or subcontract with any department or agency of the United States for the procurement of personal property and non-personal services (including construction) was entered into after December 1, 2003 (and did not become subject to 41 CFR part 61-300 through contract modification).

## WHEN/WHERE TO FILE

This annual report must be filed no later than September 30. Mail to the address pre-printed on the front of the form.

## LEGAL BASIS FOR REPORTING REQUIREMENTS

Title 38, United States Code, Section 4212(d) requires that federal contractors report at least annually the numbers of employees in the workforce by job category and hiring location, and the number of such employees, by job category and hiring location, who are qualified covered veterans. Federal contractors must report the total number of new hires during the period covered by the report and the number of such employees who are qualified covered veterans. Additionally, federal contractors must report on the maximum and minimum number of employees during the period covered by the report.

## HOW TO SUBMIT THE VETS-100A REPORT

Single-establishment employers must file one completed VETS-100A Report. All multi-establishment employers, i.e., those doing business at more than one hiring location, must file (A) one VETS-100A Report covering the principal or headquarters office; (B) a separate VETS-100A Report for each hiring location employing 50 or more persons; and (C) EITHER, (i) a separate VETS-100A Report for each hiring location employing fewer than 50 persons, OR (ii) consolidated reports that cover hiring locations within one State that have fewer than 50 employees. Each state consolidated report must also list the name and address of the hiring locations covered by the report. Company consolidated reports such as those required by EEO-1 reporting procedures are NOT required for the VETS-100A Report. Completed reports for the headquarters location and all other hiring locations for each company should be mailed in one package to the address indicated on the front of the form. Employers may submit their reports via the internet at <http://www.dol.gov/eisloans/forms/cfr/main.htm>. A company number is not required in order to use this method of submission. Employers that submit computer-generated output for more than 10 hiring locations to satisfy their VETS-100A reporting obligations must submit the output in the form of an electronic file. This file must comply with current DOL specifications for the layout of these records, along with any other specifications established by the Department for the applicable reporting year. Employers that submit VETS-100A Reports for ten locations or less are exempt from this requirement, but are strongly encouraged to submit an electronic file. In these cases, state consolidated reports count as one location each.

## RECORD KEEPING

Employers must keep copies of the completed annual VETS-100A Report submitted to DOL for a period of one year.

## HOW TO PREPARE THE FORMS

Answers to questions in all areas of the form are mandatory.

Multi-establishment employers submitting hard copy reports should produce facsimile copies of the headquarters form for reporting data on each location.

Type of Reporting Organization Indicate the type of contractual relationship (prime contractor or subcontractor) that the organization has with the Federal Government. If the organization serves as both a prime contractor and a subcontractor on various federal contracts, check both boxes.

Type of Form If a reporting organization only has a covered contract that was entered into or modified on or after December 1, 2003, it then must use a VETS-100A Report. If a reporting organization only has a covered contract that was entered before December 1, 2003, (and did not become subject to 41 CFR part 61-300 through contract modification) it must use a VETS-100 Report. If a reporting organization has a covered contract entered both before and on or after December 1, 2003, it then must use both a VETS-100 and a VETS-100A Report.

If a reporting organization submits only one VETS-100A Report for a single location, check the Single Establishment box. If the reporting organization submits more than one form, only one form should be checked as Multiple Establishment-Headquarters. The remaining forms should be checked as either Multiple Establishment-Hiring Location or Multiple Establishment-State Consolidated. For state consolidated forms, the number of hiring locations included in that report should be entered in the space provided. For each form, only one box should be checked within this block.

## COMPANY IDENTIFICATION INFORMATION:

**Company Number** Leave Blank. If there are any questions regarding a Company Number, please call the VETS-100 staff at (866) 237-0275 or e-mail [VETS100-customersupport@dol.gov](mailto:VETS100-customersupport@dol.gov).

**Twelve Month Period Ending** Enter the end date for the twelve month reporting period used as the basis for filing the VETS-100A Report. To determine this period, select a date in the current year between August 1 and September 30 that represents the end of a payroll period. The selected date will be the basis for reporting Number of Employees, as described below. The twelve-month period preceding that date will be your twelve-month period covered. This period is the basis for reporting New Hires, as described below. Any federal contractor or subcontractor who has written approval from the Equal Employment Opportunity Commission to use December 31 as the ending date for the EEO-1 Report may also use that date as the ending date for the payroll period selected for the VETS-100A Report.

**Name and Address for Single Establishment Employers** COMPLETE the identifying information under the Parent Company name and address section. LEAVE BLANK all of the identifying information for the Hiring Location.

**Name and Address for Multi Establishment Employers** For parent company headquarters location, COMPLETE the name and address for the parent company headquarters, LEAVE BLANK the name and address of the Hiring Location. For hiring locations of a parent company, COMPLETE the name and address for the Parent Company location, COMPLETE the name and address for the Hiring Location.

**NAICS Code, DUNS Number, and Employer ID Number** Single Establishment and Multi Establishment Employers must COMPLETE the Employer ID Number, NAICS Code, DUNS Number, as described below.

**NAICS Code** Enter the six (6) digit NAICS Code applicable to the hiring location for which the report is filed. If there is not a separate NAICS Code for the hiring location, enter the NAICS Code for the parent company.

**Dun and Bradstreet I.D. Number (DUNS)** If the company or any of its establishments has a Dun and Bradstreet Identification Number, please enter the nine (9) digit number in the space provided. If there is a specific DUNS Number applicable to the hiring location for which the report is filed, enter that DUNS Number. Otherwise, enter the DUNS number for the parent company.

**Employer I.D. Number (EIN)** Enter the nine (9) digit number assigned by the I.R.S. to the contractor. If there is a specific EIN applicable to the hiring location for which the report is filed, enter that EIN. Otherwise, enter the EIN for the parent company.

## INFORMATION ON EMPLOYEES

**Counting Veterans.** Some veterans will fall into more than one of the qualified covered veteran categories. For example, a veteran may be both a disabled veteran and another protected veteran. In such cases the veteran must be counted in each category.

**Number of Employees.** Provide all data for regular full-time and part-time employees who were disabled veterans, other protected veterans, Armed Forces service medal veterans, or recently separated veterans employed as of the ending date of the selected payroll period. Do not include employees specifically excluded as indicated in 41 CFR 61-300.2(b)(2). Employees must be counted by qualified covered veteran status for each of the 10 occupational categories (Lines 1-10) in columns L, M, N, and O. Column P must count all employees, including qualified covered veterans, in each of the 10 occupational categories (Lines 1-10) Blank spaces will be considered zeros.

**New Hires.** Report the number of regular full-time and part-time employees who were hired, both veterans and non-veterans, as well as those who were hired by veteran category, and who were included in the payroll for the first time during the 12-month period preceding the ending date of the selected payroll period. The total line in columns Q, R, S, T, and U (Line 11) is required. Enter all applicable numbers, including zeros.

**Maximum/Minimum Employees.** Report the maximum and minimum number of regular employees on board during the twelve-month period covered by this report, as indicated by 41 CFR 61-300.10(a)(3).

## DEFINITIONS:

**'Hiring location'** means an establishment as defined at 41 CFR 61-300.2(b)(1).

**'Job Categories'** means any of the following: Officials and Managers (Executive/Senior Level Officials and Managers and First/Mid Level Officials and Managers), Professionals, Technicians, Sales Workers, Administrative Support Workers, Craft Workers, Operatives, Laborers and Helpers, and Service Workers and are defined in 41 CFR 61-300.2(b)(3).

**'Disabled Veteran'** means (i) a veteran of the U.S. military, ground, naval or air service who is entitled to compensation for who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or (ii) a person who was discharged or released from active duty because of a service-connected disability.

**'Other Protected Veteran'** means a veteran who served on active duty in the U.S. military, ground, naval, or air service during a war or in a campaign or expedition for which a campaign badge has been authorized. For those with Internet access, the information required to make this determination is available at <http://www.opm.gov/staffingportal/vamedal2.asp>. A replica of that list is enclosed with the annual VETS-100A mailing.

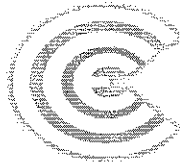
**'Armed Forces Service Medal Veteran'** means a veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985 (61 Fed. Reg. 1209) at <http://www.opm.gov/staffingportal/vamedal2.asp>

**'Recently Separated Veteran'** means a veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service.

**'Covered Veteran'** means a veteran as defined in the four veteran categories above.

A copy of 41 CFR part 61-300 can be found at [http://www.dol.gov/dol/cfr/Title\\_41/Chapter\\_61.htm](http://www.dol.gov/dol/cfr/Title_41/Chapter_61.htm)

Public reporting burden for this collection of information is estimated to average 45 minutes per response, including the time for reviewing instructions, searching existing data source, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden to the Department of Labor, Office of Information Management, Room N-1516, 200 Constitution Avenue, NW, Washington, D.C. 20210 or electronically transmitted to [VETS100-customersupport@dol.gov](mailto:VETS100-customersupport@dol.gov). All completed VETS-100A Reports should be sent to the address indicated on the front of the form.



CENTER FOR  
CORPORATE  
EQUALITY

February 21, 2012

VIA ELECTRONIC UPLOAD

Debra A. Carr  
Director, Division of Policy, Planning and Program Development  
Office of Federal Contract Compliance Programs  
U.S. Department of Labor  
Room C-3325  
200 Constitution Avenue, NW  
Washington, DC 20210

**Re: Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities (RIN 1250-AA02)**

Dear Ms. Carr:

The Center for Corporate Equality (CCE) submits this comment in response to the Notice of Proposed Rulemaking (NPRM) on Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities (RIN 1250-AA02). This notice was published in the Federal Register on December 9, 2011.

CCE is a nonprofit equal employment opportunity member, research and think tank organization established in 2007 to help companies proactively respond to a new generation of complex and technology-based affirmative action and non-discrimination compliance issues. CCE is designed to carry out the mission of creating workplaces free from bias and unlawful discrimination by harnessing the synergies between human resource functions and by promoting affirmative action and equal employment regulatory compliance. Individuals with disabilities are a socially important group and CCE commends the agency's effort to strengthen regulatory requirements related to enhancing affirmative action and nondiscrimination.

As you know, CCE submitted a comment in response to section 503 proposed regulatory changes described in a 2010 ANPRM. Although many of our comments were considered by the agency in the NPRM, others were not. We attach those comments as an Appendix to this submission. We applaud the agency for seriously considering some of those comments; yet feel that other comments were not seriously considered.

As the agency also knows, CCE requested a 60-day extension on the NPRM comment due date. The NPRM proposes a number of significant changes to the data collection, analysis, recordkeeping and knowledge dissemination as it relates to individuals with disabilities. In addition, the NPRM contained over 50,000 words, and as such it will take federal contractors substantial time and effort to read and contemplate the regulatory changes. We appreciate that the agency granted a two week extension, yet feel obligated to reiterate that, given the scope of the NPRM and potential implications, this comment period is rushed. This is particularly the case if the goal is to produce data-based comments that can be utilized by OFCCP and the contractor community in evaluating the ultimate effectiveness of the proposed rule. This would require independent research on available disability data and a comprehensive survey of stakeholders to understand current best practices and accurate burden estimates.

This response is organized into five sections. In Section I, we consider justification for regulatory change. Section II focuses on new personnel processes and documentation. Section III focuses on data, goals, and groupings relevant to workforce analyses. Section IV reviews outreach and outreach effectiveness considerations. Section V describes some of the challenges with new self-identification requirements. The comment ends with a section of concluding thoughts.

Improving employment opportunities and affirmative action for disabled applicants and employees is of critical social importance in this country, and CCE encourages OFCCP, EEOC, DOJ, and the federal government as a whole to continue to meet this objective. However, it is absolutely critical that these requirements on federal contractors are attainable, do not produce negative or unintended consequences for disabled applicants and employees, and are grounded in science. We urge OFCCP to consider the challenges described in this response, and hope that this response encourages positive dialogue on a variety of important topics. We hope that the new section 503 regulations improve EEO/AA for disabled applicants and employees. We also hope that these new regulations do not require contractors to spend an enormous amount of time, effort, and human capital on tasks that do not improve employment opportunities and affirmative action for individuals with disabilities.

### **Section I. Justification for a Regulatory Change**

In evaluating the content of an NPRM, it is often useful to start by considering the agency's justification for a rule change. CCE has two general observations addressing OFCCP's justifications as presented in the NPRM. First, the overarching theme appears to be that OFCCP has had difficulty reviewing contractors' affirmative action programs for individuals with disabilities. This comports with contractors' feedback to CCE regarding OFCCP compliance reviews during the last few years. The NPRM appears to address this difficulty by purporting to establish a uniform, standard reporting format and content for all contractors, with the goal of eliminating "subjective interpretations" and allowing the agency to conduct its reviews with more consistency and fewer complications.

This approach, however, belies the argument made by OFCCP elsewhere that flexibility in reviewing contractors' practices is essential to the mission of the agency to enforce the regulations, and that an overly narrow, "one-size-fits-all" approach that is followed regardless of the facts of a particular case significantly limits and undermines OFCCP's ability to vigorously

investigate and identify discrimination.<sup>1</sup> Where OFCCP states that the current regulatory language requiring contractors to review their processes “periodically” is “vague and subject to confusion” and “complicated by contractors’ various subjective interpretations of what constitutes ‘periodic’ review,” CCE argues that the current language was well-written to allow flexibility in determining the appropriate frequency for such reviews at contractor establishments that encompass a broad spectrum of size and personnel activity volume. For example, an establishment with few employees and infrequent hiring activity may be unnecessarily burdened by the proposed requirement of an “annual” review. This flexibility contributes to the effectiveness of both OFCCP and the contractor community to monitor compliance with the requirements of 60-741.

Relatedly, OFCCP also appears concerned about contractors’ documentation in the event of employee/applicant complaints under section 503. In addition to the statement cited above, OFCCP justifies the proposed changes as follows: *Requiring that contractors record the specific reasons for their personnel actions and make them available to an employee or applicant upon request would also aid them in clearly explaining their personnel actions to applicants and employees, which could subsequently reduce the number of complaints filed against contractors.*

The second justification issue relates to claims of discrimination, which would be an intuitive data source for considering whether regulatory change is necessary. According to the U.S. Department of Labor’s enforcement data web site<sup>2</sup>, OFCCP has received only 183 complaints filed by employees/applicants under the authority of section 503 during the last **four** full fiscal years, an average of about 46 complaints per year, or one complaint for every 3,723 contractor establishments. While CCE does not dismiss the seriousness of those complaints filed, this paucity of complaints clearly does not support the agency’s justifications for the increased burden associated with the proposed changes, nor the argument that the changes would be helpful for reducing the already miniscule number of complaints filed against contractors.

## **Section II. Personnel Processes and Documentation**

CCE also believes that the burden-hour estimates for .44(b) included in the NPRM are not realistic, and in fact grossly underestimate the amount of time that would be required by contractors to comply with the proposed requirements.

One obvious and contentious burden issue relates to documenting reasons for rejection for all rejected disabled candidates. CCE surveyed members, and received strong feedback from contractors that the estimate of 30 minutes per year per contractor establishment to prepare written statements of reasons for rejection and descriptions of accommodations considered for every individual with a disability who applied for a vacancy but was not selected was an underestimate. In fact, the contractors we surveyed suggested that the burden is closer to 30 minutes per vacancy, for a variety of reasons. These include the following:

- This is a “statement” available to the rejected individual upon request, so it necessarily entails something more than a disposition code or terse description.

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<sup>1</sup> Cf. “Interpretive Standards for Systemic Compensation Discrimination and Voluntary Guidelines for Self-Evaluation of Compensation Practices Under Executive Order 11246; Notice of Proposed Rescission,” 76 FR 62-63 (January 3, 2011).

<sup>2</sup> [http://ogesdw.dol.gov/raw\\_data\\_catalog.php](http://ogesdw.dol.gov/raw_data_catalog.php)

- Moreover, given the legal implications of such a written statement by the employer (for example, as evidence in a later pretext claim), the employer will be compelled to provide an exhaustive list of reasons and not merely a summary description or listing of the primary reason.
- Due to the fact that the proposed regulations preclude the hiring manager from knowing which applicants have self-identified as having a disability (e.g. separate detachable tear off form), the hiring manager would have to report back with the reason for rejecting every applicant or the employer's diversity/compliance/HR representative will have to survey the hiring manager after the fact about specific individuals.
- With regard to existing employees who anonymously self-id in response to the internal employer survey, the employer presumably has no way of knowing when it has rejected (or selected, for that matter) an existing employee with a disability for a vacancy.

Using this more realistic estimate of 30 minutes per vacancy per year, CCE sampled employment and vacancy data for calendar-year 2011 from three multi-establishment contractors to estimate the number of hours required to comply with the proposed .44(b). The data sampled are summarized in the table below:<sup>3</sup>

	Establishments	Employees	Vacancies Filled	Total Hours	Hours/ Establishment	Increase over OFCCP Estimate
Company A	800	50,000	8,531	4,265.5	5.5	994%
Company B	125	15,000	1,623	811.5	6.6	1,220%
Company C	130	100,000	32,880	16,440	123.6	24,622%

Based on this small but representative sample of contractor personnel activity during 2011, OFCCP's burden-hour estimates based on 30 minutes per establishment per year are most likely *underestimated by orders of magnitude*. Further, it is worth noting that the hiring numbers for 2011 presented above were likely *smaller* than normal for these companies, due to unfavorable economic conditions that suppressed hiring activity<sup>4</sup>. It is reasonable to expect that the numbers of vacancies filled (and, thus, the number of burden hours) will increase as the U.S. economy improves.

Another concern held by CCE is that OFCCP failed to include an estimate or discussion of burden hours and costs associated with the requirement under the proposed .44(b) to review information and communication technology and make changes to ensure accessibility for applicants and employees with disabilities. This omission is difficult to understand, considering that estimates of the one-time costs of such technology changes would reach hundreds of thousands of dollars per company, and the time and costs associated with an annual review and potential updates at each contractor establishment would certainly exceed the 30 minutes per

<sup>3</sup> This table is based on actual federal contractor data. However, to ensure anonymity, all values have been rounded up. This rounding made little difference in burden estimates.

<sup>4</sup> In fact, two of the three companies operated under hiring freezes or limitations during at least a portion of 2011.

establishment estimate that OFCCP used for the candidate rejection and consideration of accommodations documentation requirements.

Lastly, CCE has strong reservations about burden estimates related to reviewing physical and mental qualifications. The new regulations would require an **annual** review of physical and mental job qualifications, as well as formal documentation of that review. More specifically, the NPRM states: *"The proposed paragraph (c) clarifies that all physical and mental job qualification standards must be reviewed and updated, as necessary, on an annual basis. As with paragraph (b), the current rule's requirement that the contractor review these standards 'periodically' is vague and subject to confusion. OFCCP has concluded that contractors inconsistently interpret what constitutes 'periodic' review. The proposed change provides a clear, measurable, and uniform standard."*

The agency assumes that since a periodic review of physical and mental job qualifications is required under the old regulations, this new requirement will not require any meaningful additional time or effort to complete the review. Yet the word "periodic" refers to something that appears or occurs at regular intervals, and, as the agency suggests, the length of those intervals may be very different for different contractors; as such, so would the potential additional burden. Intuitively, any activity done more frequently requires more time.

The regulations go on to say the following: *"The proposed paragraph (1) adds language requiring the contractor to document the results of its annual review of physical and mental job qualification standards. The regulation has long required this review to ensure that job qualification standards that tend to screen out individuals with disabilities are job-related and consistent with business necessity. The proposed change would merely require that the contractor document the review it has already been required to perform. It is anticipated that this documentation will list the physical and mental job qualifications for the job openings during a given AAP year- which should already be available from the contractor's job postings—and provide an explanation as to why each requirement is related to the job to which it corresponds. Documenting this review will ensure that the contractor critically analyzes its job requirements and proactively eliminates those that are not job-related (emphasis added by the authors). It will also allow OFCCP to conduct audits and investigations in a more thorough and efficient manner."*

We note some specific language from the above section, because that language informs on what the purpose of a review of physical and mental job qualifications is. The purpose of the review is to determine what is "job-related and consistent with business necessity", and to make this determination a "critical analysis" is necessary. These notions are not new: in 1978, they were codified in the Uniform Guidelines on Employee Selection Procedures, which OFCCP enforces. In that context, any selection tool that has substantial adverse impact on a protected group must be demonstrated to be job-related and consistent with business necessity. Yet the guidelines are clear that this demonstration must be made via research conducted in professionally competent ways, and not simply via cursory reviews or articulations.

Industrial-Organizational (I/O) Psychologists often specialize in job-relatedness considerations. I/O Psychologists are trained to evaluate employment decision-making, work performance, and organizational behavior using the rigor of the scientific method. As such, I/O Psychologists are equipped with unique research skills and specialized knowledge regarding the intersection of

work and human behavior. One example of this type of research is job analysis, which generally refers to methods for measuring important aspects of work through subject matter expert judgment via data collection methods such as job observation, supervisor interviews, incumbent focus groups, and employee surveys. The results of a job analysis can often be used as the foundation for developing employment decision processes (e.g., hiring, promotion, and performance measurement systems). A job analysis ensures that the organization clearly understands the work behaviors required on the job, and the knowledge, skills, abilities, and other characteristics necessary to perform those work behaviors. This information provides a solid basis for the development of policies and procedures that are job-related.

Given the above purpose of reviewing physical and mental qualifications, a job analysis would seem to be what the regulations require. Yet this type of job analysis requires substantial time and effort. For example, according to the Uniform Guidelines: *“There should be a job analysis which includes an analysis of the important work behavior(s) required for successful performance and their relative importance and, if the behavior results in work product(s), an analysis of the work product(s). Any job analysis should focus on the work behavior(s) and the tasks associated with them. If work behavior(s) are not observable, the job analysis should identify and analyze those aspects of the behavior(s) that can be observed and the observed work products. The work behavior(s) selected for measurement should be critical work behavior(s) and/or important work behavior(s) constituting most of the job”*.

As the Uniform Guidelines describe, research about the job is necessary to demonstrate job relatedness. We see no reason why this standard would be different when reviewing physical and mental job qualifications as they relate to section 503, even if the job analysis is confirmatory in nature. Obviously, such an analysis would take time and effort. To be clear, we do not suggest that a review of physical and mental job qualifications is a bad idea for ensuring equal employment opportunity for persons with disabilities. In fact, we think such a review would be useful in this context, albeit in situations where there is evidence to suggest that a job has changed. Regardless, the agency has grossly underestimated the time and effort needed to perform such a review in a meaningful way. This is particularly if it is required annually and in the absence of any evidence that a job has meaningfully changed.

A paperwork exercise that involves having one person (who may or may not be qualified) quickly read physical and mental job requirements would add no time and effort burdens to federal contractors. However, this exercise would not improve equal employment opportunities for persons with disabilities. A more structured confirmatory job analysis, where work tasks are analyzed, documented, and linked to physical and mental job qualifications, would require substantial time and effort, and would be more likely to improve equal employment opportunities for persons with disabilities by eliminating barrier qualifications that are not job-related. This analysis may also include an initial consideration of potential<sup>5</sup> accommodations. We ask that the agency provide a more accurate estimate of burden related to this new requirement or drop the requirement that this be done on an annual basis.

### **Section III. Data, Goals & Groupings**

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<sup>5</sup> Given the case by case nature of disability, it is impossible to consider all possible accommodations since the form of disability drives the appropriateness and reasonableness of accommodations. However, an initial consideration of some likely accommodations based on common physical and mental disabilities and may be reasonable.



A major change proposed in the NPRM was the establishment of a hiring goal for individuals with a disability. Based on available data from the American Community Survey (ACS), the OFCCP has proposed that all contractors would be required to establish a 7% hiring goal for individuals with a disability and to use that goal for each job group, rather than using the special EEO file that is used for race and gender availability. Although we applaud OFCCP for realizing there are limitations with the available data, and trying to work around those limitations by establishing an aggregate availability percentage goal, we feel that both the ACS data and the suggested 7% goal by job group have too many limitations to appropriately mirror reality. We take issue with the type of data that the ACS captures and doubt that it will be meaningful for its intended purpose of increasing opportunities for individuals with disabilities.

The ACS definition of a disability is based on six dichotomous questions, which would likely incorrectly capture a person as disabled (or not disabled), based upon the vague nature of the questions. The questions are:

- Deafness or other serious hearing difficulty;
- Blindness or other serious seeing difficulty (after correction);
- Physical, mental, or emotional condition that causes serious difficulty concentrating, remembering, or making decisions;
- Serious difficulty walking or climbing stairs;
- Difficulty dressing or bathing; and
- Physical, mental, or emotional condition that causes difficulty doing errands alone such as visiting a doctor's office or shopping.

Being disabled is not a dichotomous variable. Disability status is also very different from race and gender. With race, gender, or even veteran status, self-identification is much more intuitive and permanent. It may be inappropriate to establish goals based on the above questions. It is easy to find examples of individuals who meet the ADAAA definition of 'disability' but would not be counted as having a disability in the ACS: for example, a Type I (insulin-dependent) diabetic would meet the ADAAA definition, but unless the individual were experiencing severe and unusual complications, the individual would meet none of the criteria above, and thus would not be counted as having a disability in the ACS data. Conversely, an individual who answers "yes" to the category of "difficulty dressing or bathing" may or may not be covered as an individual with a disability under section 503 of the Rehabilitation Act. For example, an individual may have difficulty dressing or bathing on any given day because they participated in a recreation sport and injured his or her back. This challenge of defining 'disability' in accurate ways makes conducting meaningful quantitative analyses that mirror reality, and consequently, implementing goals based on quantitative results, very difficult. In essence, the availability statistics used by the contractor would usually be wrong.

Additionally, we are skeptical of the quality of the ACS data. Until recently, the disability data was deemed inappropriate for the Special EEO file for two reasons: (1) there was a 'break in series' (i.e., the same questions were not asked over the 2006 through 2010 timeframe); and (2) research on the six questions that might have been used to identify those who had a "disability" was not conducted. However, in November 2011 it was announced that the data would in fact be published, but as a separate file. Based on this info and the NPRM, it is clear that the disability data will be based on only one year of ACS data (as opposed to five years like the Special EEO

file), will be from the 2009 ACS data collection period, and will capture a much smaller sample than has historically been used. The ACS is administered monthly, reaching approximately three million households per year. Thus, the 7% proposed goal was calculated based on a sample of less than 3 million households. In comparison, the 2010 Special EEO file includes 5 years' worth of data, which would have been distributed to approximately 15 million households. The 2000 Census long form (which the ACS replaced) was sent to approximately 16.7 million households. Further, this is the first time that a disability goal is being established.

It seems premature to base a disability goal on one year of data, using a survey for the first time in that manner without pilot data, and holding contractors operationally accountable for achieving this goal. It is also of concern that an implemented goal would likely be in place for an extended period of time. Based on a reliable source for the Special EEO file, much of the reason that the Special File is a roll-up is based on the 5 year period being reasonable and affordable – both for those agencies funding the data and those contractors who must update systems accordingly. Further, given the state of the economy and federal budgets, the possibility of creating an EEO file every five years might be in jeopardy (i.e., the five year file would be used for 10 years). This leads us to believe that a new set of data for disability information would be affected by similar constraints, and it is likely that this 7% goal, which is based on a small population in a limited time period, would be in place for the next 10 years. If not, and if in fact it is changed by the Director as the NPRM states, it could be changed in an arbitrary manner, on a different schedule than other EEO information, potentially resulting in unwarranted burden and questionable transparency.

In addition to the points noted above, we do *not* think it is appropriate to apply the 7% goal to each job group, as the goal was obviously calculated by aggregating across EEO category totals. The EconSys<sup>6</sup> report previously stated that the 2008 ACS data showed that over 40% of the census occupation categories had no labor force members at all with disabilities. Thus, numbers are not consistent across EEO categories, and this is likely the reason why OFCCP averaged across EEO category totals. However, this does not fix this “limitation” of that data, as OFCCP suggests. Contractor job groups are based on the EEO categories, so it would be logical to assume that there would not be any availability, let alone 7%, for many job groups. In other words, the 7% goal does not in any way mirror reality of availability by job group.

Furthermore, the OFCCP does not factor an individual's profession or geographic recruitment area in its own benchmark. How can a federal contractor expect to be able to have a fair representation of individuals with a disability in their organization if there is no data source to reliably define the pool of qualified individuals for a given profession in the labor force? How can individuals with disabilities expect to have the barriers to equal employment opportunity meaningfully reduced by goals that do not consider the representation of individuals with disabilities within particular professions?

In order to make a section 503 AAP “more than a paperwork” exercise, OFCCP has taken the position that the best way to assist individuals with disabilities to overcome employment barriers is to use job group as the unit of analysis because it has worked for other protected groups. The

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<sup>6</sup> EconSys report to the Office of Disability Employment Policy US Department of Labor on July of 2010. Volume I Data Sources and Models and Volume II Modernizing the Affirmative Action Provisions of the Section 503 and VEVRAA Regulations.

federal contractor community recognizes the need for a stronger affirmative action initiative for individuals with disabilities. However, they also recognize that the remedy for employment discrimination and equitable representation in a given profession is not the same for people who are “individuals with a disability” as it is for those who are a part of a particular race or gender. Therefore, a 7% goal for each job group is inappropriate and may be setting organizations up for failure.

If a goal must be implemented, it is recommended that the goal be established for the entire corporation and cover all establishments. The corporate office would take the responsibility for the development and implementation of nationwide good faith efforts and partnership organizations. Certainly, each establishment can participate locally with relevant organizations, but the program would be developed on a national basis. This model allows the contractor to spend more time on the outreach, recruitment, and partnership programs, and less time on the analysis of data that likely will not yield meaningful results. In addition, requiring one aggregate contractor goal ensures consistency and accountability across all contractor establishments.

We also ask OFCCP to consider the grouping discrepancy between the goal setting and annual measurement of the outreach efforts. For example, the proposed regulation specifies a 7% goal by job group within each establishment; however, the data collection that occurs throughout the year to assess whether certain outreach efforts were successful is done as an aggregate. In other words, the data collection is a sum of the total referrals, applicants, and hiring decisions made during the year to come up with ratios for known individuals with a disability at each major action item in the contractor’s selection process. This is not done at the job group level. Why should the unit of analysis (aggregate vs. job group) change across analysis? This data exercise further exemplifies the need for a uniform approach for setting goals and assessing the efficacy of contractor efforts. Again, if a goal for individuals with a disability is required of federal contractors, it is recommended the goal be established for the entire corporation (e.g., covering all establishments and all job groups).

#### **Section IV. Outreach and Effectiveness**

Federal contractors have historically been required to make good faith efforts to initiate outreach and recruitment efforts to attract individuals with disabilities to the contractor workplace, so it comes as no surprise the proposed regulations have expanded this obligation by setting a minimum number of outreach engagements. Specifically, the proposed regulations require contractors to list job openings with the nearest Employment One-Stop Career Center and establish three linkage agreements. These linkage agreements include partnering with each of the following organizations:

- Local State Vocational Rehabilitation Service Agency or an organization in the Ticket to Work Employment Network Directory;
- An agreement with one of the following organizations: the Employer Assistance One-Stop Career Center; the nearest employment one-stop Career Center; the nearest Department of Veterans Affairs Regional Offices; any other local disability group; placement or career offices of educational institutions; private recruitment sources

- One or more of the disabled veterans' service organizations listed in the Employer Resources section of the NRD.

There is a critical difference between when an organization is required to establish good faith efforts under EO 11246 for job groups underutilized for females and/or minorities, and in this proposed regulation for individuals with a disability. There is no requirement to engage in a specified number of outreach efforts to recruit females and/or minorities; the only requirement is to engage in outreach efforts when underutilized in a specific job group(s). As described above, OFCCP has taken the stance that goals are necessary for persons with disabilities. Why has the agency then not proposed an underutilization trigger (i.e. 80%, whole person, statistical significance) to initiate outreach requirements for individuals with a disability similar to the trigger used for race/ethnicity and gender? Federal contractors could engage in outreach and recruitment targeted to attract individuals with a disability when *underrepresented*. It is unclear why the agency would not determine if a federal contractor is underrepresenting individuals with a disability *first* before mandating obligatory recruitment in all levels of the organization.

For example, the OFCCP could mandate the comparison of representation to the established goal and, when underrepresented, require federal contractors to prepare an action-oriented plan to address the underrepresentation. Per the Technical Assistance Guide for Federal Supply and Service Contractors, the following methodologies, when uniformly applied, have been accepted by the OFCCP when determining whether a federal contractor is underutilized for females and/or minorities in a given job group:

*"Some contractors declare underutilization when there is any difference between the availability percentage and the utilization percentage, while some conclude that underutilization exists when the number of minority or female incumbents is at least one whole person lower than the number predicted by the availability percentages. Other contractors use an "80 percent" rule of thumb and declare underutilization only when the actual representation is less than 80 percent of availability (which is the expected representation). Still others use a "two standard deviation" rule and test whether the difference between the actual and expected representation is statistically significant."*

There are two additional concerns that make the mandatory outreach and goal setting impractical for federal contractors: (1) The requisite recruitment area federal contractors utilize as part of their affirmative action processes may not contain individuals with a disability that are able to perform the functions required in the job(s); and (2) The proposed regulations do not take into account the fact that contractors may have already *reached or surpassed the 7% goal* for job group(s). These scenarios would require the contractor to attempt to recruit job seekers that may not actually be available with the requisite skill set needed or investing time and resources into outreach efforts when they have already surpassed the standard employment goal. Again, why would a federal contractor need to do additional outreach and recruitment when, for example, 50% of its workforce self-identified as an individual with a disability? Clearly in this situation the contractor is well over the 7% target.

This leads into our final issue with regard to the ambiguous assessment for evaluating the effectiveness of these efforts. OFCCP has stated that "the primary indicator of effectiveness is whether qualified individuals with disabilities have been hired". Why would the focus be on the onboarding of individuals with a disability and not on the efforts a federal contractor engages in?

To put it in another context, wouldn't the measurement of hires be closer to a quota than to a goal? More importantly, wouldn't this lead the contractor to engage in some sort of preferential treatment in order to meet the arbitrary 7% goal?

If the evaluation of outreach and recruitment efforts is based on referral and hiring data, there is concern among the contractor community about the consequences of not attaining these hiring goals. Federal contractors have a legal obligation and business need to hire the most qualified person for the job, regardless of race, color, religion, sex, or national origin or disability status. The idea that efforts made by federal contractors to attain a 7% employment goal for individuals with a disability would be measured by the amount of hires made could undermine the good faith affirmative action efforts and merit-based selection decisions. We strongly encourage OFCCP to review these concerns and develop more meaningful measures of the effectiveness of these outreach efforts. For example, having a contractor provide documentation for the efforts made *when underrepresented* for individuals with a disability may be an important measure of performance.

### **Section V. Challenges with Self-Identification of Disability Status**

OFCCP states in their Notice of Proposed Rule Making that some commenters incorrectly stated that section 503 of the Rehabilitation Act did not allow for the collection of disability status pre-offer. A cursory review of the current regulations would lead one to believe that statement is correct. The current regulations at 741.42 state that one of the exemptions to soliciting disability status at the pre-offer stage is "*when the contractor actually is undertaking affirmative action for individuals with disabilities at the pre-offer stage*".

However, OFCCP appears to be ignoring history and interpretive guidance that had been received by both EEOC and OFCCP<sup>7</sup>. First, most federal contractors correctly interpreted section 503 as an affirmative action program that required positive outreach and recruitment to organizations that specialize in the areas of disabilities. Perhaps until these new regulations are passed, section 503 does not require a quota nor does it require preferential treatment in the hiring process. Therefore, it was not necessary to know at the individual level which job seekers were disabled. In addition, the term "undertaken affirmative action for individuals with disabilities at the pre-offer stage" was vague, and the advice from the legal community was that soliciting disability status at this stage could cause a contractor to violate the ADA.

Second, both OFCCP and EEOC went on the record in 1996 to clarify this issue in response to a letter submitted by EEAC asking clarification from both agencies on what section 503 did and did not require/allow. Both OFCCP and EEOC stated that section 503 does not require, *nor* does it authorize, a federal contractor to solicit disability status pre-offer. More specifically, OFCCP stated:

*"Under the new section 503 regulations pre-offer invitations to self-identify are not permitted" and "The fact that a contractor is subject to, and complies with, the affirmative action requirements of section 503 does not in and of itself qualify as a basis for invoking either of the exemptions from the general prohibition."*

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<sup>7</sup> The OFCCP letter was sent and signed by then Deputy Director Joe N. Kennedy on September 24<sup>th</sup> 1996. The EEOC letter was sent and signed by Associate Legal Counsel Peggy R. Mastroianni on December 17, 1996.

EEOC stated:

*“Section 503 regulations do not require that federal contractors take any affirmative action at the pre-offer stage which would necessitate inviting applicant to self-identify at this stage, a contractor cannot cite section 503 as justification for making pre-offer inquiries regarding self-identification.”*

OFCCP appears to be ignoring recent and relevant history in deciding that federal contractor status trumps the ADA prohibition of collecting disability status pre-offer. There is clear EEOC and OFCCP documentation explaining why a majority of contractors consider the self-identification of disability status pre-offer as a violation of ADA and also not required nor allowed under section 503.

In fact, some of OFCCP's own compliance officers and managers have taken the position that it is illegal and a violation of section 503 to ask about disability status at the pre-offer stage. CCE is aware of several OFCCP conciliation agreements in FY2011 where OFCCP **cited** contractors for soliciting disability status at the pre-offer stage as a violation of section 503. Here is an example of an actual FY2011 conciliation agreement (with the name of the contractor redacted) with the stated alleged violation and remedy:

***ALLEGED VIOLATION:*** *During the selection process, XXX failed to invite all applicants to inform the company whether they believe they may be covered under Section 503 of the Rehabilitation Act of 1973, as amended, or the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, and wish to benefit under the affirmative action programs **after** (authors emphasis added) making an offer of employment to job applicants and before the applicants began their employment duties. Specifically, XXX asked applicants to check if applicant was disabled prior to the job offer. This is a violation of 41 CFR 60-250.42, CFR 60-300.42, and 41 CFR 60-741.42.*

***REMEDY:*** *XXX will modify its current EEO tear-off sheet that is presented to all applicants requesting them to self-identify by removing any request to check if the applicant is disabled. XXX will develop another form to solicit this information after the applicant has been extended a job offer and before the applicant begins his or her employment duties.*

How can OFCCP make the argument that this is a current requirement when its own staff cites contractors for engaging in this activity?

It is worth considering why the requirement to collect disability status pre-offer would be such a monumental shift in both the policy and position on the collection of disability information prior to making an offer of employment. Currently, the EEOC website states the following:

*The ADA prohibits employers from asking questions that are likely to reveal the existence of a disability before making a job offer (i.e., the pre-offer period). This prohibition covers written questionnaires and inquiries made during interviews, as well as medical examinations. However, such questions and medical examinations are permitted after extending a job offer but before the individual begins work (i.e., the post-offer period).*

The ADA was written in a way that precluded (with some very narrow exceptions) the solicitation of disability status pre-offer because the knowledge of this information at the application stage could in fact lead to discriminatory hiring decisions. Whether the job seeker could perform the job duties with or without an accommodation is the only information that is pertinent during the application and pre-offer stages. The issue of providing a reasonable accommodation would be evaluated after the individual was hired. The ADA was written in such a way to preclude the hiring official from knowing information about disability status pre-offer so the issue of reasonable accommodation could not and would not be a factor in the selection process.

However, the proposed regulations seem to turn this theory upside down and require not only that contractors collect this information, but also take disability status into account as part of their decision making process. CCE believes that this is problematic and may in fact lead to more discrimination against individuals with disabilities.

CCE addressed this issue in our comments to the section 503 ANPRM and feels just as strongly now that this requirement is problematic and against the spirit of the ADA. In those comments, Dr. Eden King, Assistant Professor of Industrial/Organizational Psychology at George Mason University, cited various research and scholarly literature to support these concerns. Therefore, we felt that it was critical to reiterate the comments made by Dr. King:

*Social scientists who study workplace discrimination would likely commend OFCCP's efforts to ensure that people with disabilities have equal employment opportunities as do those without disabilities. Nonetheless, empirical evidence from this science points to the need for caution in the implementation of these efforts. Of particular focus here is the component of the proposal that states, "amending the section 503 regulations to require contractors to invite all applicants to voluntarily and confidentially self-identify if they have a disability prior to an offer of employment." Three important themes can be derived from research on discrimination that have implications for the proposed procedures: (1) people will be reticent to disclose their disabilities, (2) upon disclosure of a disability, stereotyping will automatically occur, and (3) this reticence to disclose and emergence of stereotyping is particularly likely in the early stages of employment.*

*Research has clearly established that disadvantaged group members make careful decisions about whether, to whom, when, and how to discuss their identities.<sup>8</sup> Many ethnic minorities, for example, wonder whether or not to indicate their ethnicity on demographic forms—they may want to benefit from affirmative action programs but at the same time need to avoid potential prejudice. These "disclosure dilemmas" are particularly salient for individuals whose identities are not readily observable.<sup>9</sup> For people with concealable identities, like many people with disabilities, decisions about revealing or concealing a stigma can be complex and stressful as they weigh conflicting desires to access resources and avoid discrimination.<sup>10,11</sup> The implication*

<sup>8</sup> Goffman, E. (1963). *Stigma: Notes on the Management of Spoiled Identity*. New Jersey: Prentice-Hall.

<sup>9</sup> Clair, J. A., Beatty, J. E., & MacLean, T. L. (2005). Out of sight but not out of mind: Managing invisible social identities in the workplace. *Academy of Management Review*, 30, 78-95.

<sup>3</sup> King, E. B., Reilly, C., & Hebl, M. R. (2008). The best and worst of times: Dual perspectives of coming out in the workplace. *Group and Organization Management*, 33, 566-601.

<sup>11</sup> Hebl, M. R., & Skorinko, J. L. (2005). Acknowledging one's physical disability in the interview: Does "when" make a difference? *Journal of Applied Social Psychology*, 35, 2477-2492.

*of this reasoning is that, by directly asking potential or recently hired employees to disclose their disability, organizations may (a) create concern, anxiety, or psychological distress in people with disabilities, and (b) gather, analyze, and report underestimates of the prevalence and experiences of people with disabilities.*

*Research has also established that disadvantaged group members are well-justified in their concerns that disclosure may lead to discrimination. In the case of ethnic minorities, for example, job applicants who submit a resume with names that “sound Black” or “look Hispanic” (like Jamal Jenkins or Jose Rodriguez) are less likely to get hired than applicants with the identical resume and a typically-White name (e.g., James Sullivan).<sup>1213</sup> Discrimination emerges because these names automatically trigger negative stereotypes about the competence of African American and Hispanic people. Similar stereotypes are automatically associated with people with disabilities; research has shown that Americans hold stereotypes that people with disabilities are nice but incompetent.<sup>14</sup> Given the centrality of perceived competence to employment decisions such as selection, compensation, and promotion, marking individuals as “disabled” will likely have consequences that are similar to those experienced by workers with names that “sound Black” or “look Hispanic”.*

*A critical corollary of these findings is that, although stereotypes are automatically activated, they do not automatically manifest in discrimination. Many factors, such as being highly motivated to be fair or being free from time pressure in decision-making, can reduce the likelihood that a negative stereotype will translate into unfair treatment.<sup>15</sup> Of particular relevance to OFCCP’s proposal is a consistent finding that gaining additional information about targets of stereotypes can reduce the likelihood of discrimination. That is, when a “disabled” identity is one of only a few things known about a person, evaluators are likely to rely (unconsciously) on stereotypes.<sup>16</sup> However, when a great deal is known about a person beyond the fact that they have a disability, evaluators can use information other than stereotypes to make their decisions.<sup>17</sup> It can be argued, then, that requiring the disclosure of a disability before hiring or immediately thereafter would make workers with disabilities particularly vulnerable to stereotypes and discrimination.*

*Social science research also provides some guidance for how efforts to ensure equal employment opportunities for disabled workers might be structured. When people who have concealable stigmas have a choice about how, when, and to whom to disclose their identity, there can be positive outcomes.<sup>1819</sup> Positive outcomes are most likely when the supervisors and coworkers are*

<sup>12</sup> Bertrand, M., & Mullainathan, S. (2004). Are Emily and Brendan more employable than Lakisha and Jamal? A field experiment on labor market discrimination. *American Economic Review*, 94, 991-1013.

<sup>13</sup> King, E. B., Mendoza, S., Madera, J., Hebl, M. R., & Knight, J. L. (2006). What’s in a name? A multi-ethnic I investigation of access discrimination. *Journal of Applied Social Psychology*, 36, 1145-1159.

<sup>14</sup> Fiske, S. T., Cuddy, A. J., Glick, P., & Xu, J. (2002). A model of (often mixed) stereotype content: Competence and warmth respectively follow from perceived status and competition. *Journal of Personality and Social Psychology*, 82, 878-902.

<sup>15</sup> Crandall, C. S., & Eshleman, A. (2003). A justification-suppression model of the expression and experience of prejudice. *Psychological Bulletin*, 129, 414-446.

<sup>16</sup> Swim, J., Borgida, E., Mariyama, G., & Myers, D.G. (1989). John McKay versus Joan McKay: Do gender stereotypes bias evaluations? *Psychological Bulletin*, 105, 409-429.

<sup>17</sup> Fiske, S. T., & Neuberg, S. L. 1990. A continuum of impression formation, from category-based to individuating processes: Influences of information and motivation on attention and interpretation. In M. P. Zanna (Ed.), *Advances in experimental social psychology* (Vol. 23, pp. 1-74). New York: Academic Press.

<sup>18</sup> King, E. B., Reilly, C., & Hebl, M. R. (2008). The best and worst of times: Dual perspectives of coming out in the workplace. *Group and Organization Management*, 33, 566-601.



*genuinely supportive of people with disabilities.<sup>20</sup> Under these circumstances, people with disabilities can get access to the resources they need and can demonstrate their competence without feeling vulnerable to discrimination.*

*Together, these findings point to the need to develop supportive organizational cultures before instituting major structural changes, and to the importance of giving workers with disabilities control over their own disclosure decisions*

Dr. King's message based on scholarly research is clear. In addition, these proposed self-identification requirements may be in contrast to the agencies own internet applicant definition. For example, the proposed regulations require:

*“that the contractor invite all applicants to voluntarily self-identify as individuals with disabilities whenever the applicants applies for or is considered for employment”.*

It is unclear from this language as to whether job seekers, actual internet applicants, or both must be asked their disability status. Would the contractor be required to solicit disability status from anyone who expresses an interest in employment regardless of whether or not they met the Internet Applicant criteria? For example, would the contractor be required to solicit disability status from the following hypothetical examples?

- A contractor speaks to a job seeker about the company and position during a college career fair;
- A job seeker inquires via LinkedIn to a recruiter about a posted position on the contractor's website;
- A job seeker submits an unsolicited resume to a recruiter;
- A job seeker applies to a specific requisition and is either not considered or qualified.

It is unclear from the proposed language whether or not there is a self-identification requirement in each of the abovementioned scenarios. If the answer is yes to any of these questions, this requirement is clearly not in line with the Internet Applicant requirement to self-identify race/ethnicity and gender during the contractor's selection process. The current regulations at 60-1.12 require that the contractor, where possible, identify the gender, race, and ethnicity of each applicant or Internet Applicant.

If the proposed regulations are passed as specified, contractors would be required to program their applicant tracking systems (ATS) to collect disability status from all job seekers, and then solicit race/ethnicity and gender from just those that satisfy the Internet Applicant rule. In addition, based upon the language in the proposed rule, one would assume that contractors would be required to solicit disability status from all job seekers who express an interest via email, job fair, social media (e.g. LinkedIn, Facebook), etc. Clearly this creates an undue burden on contractors. At a minimum, OFCCP should adopt the same requirement to solicit disability status as those defined under 60-1.12.

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<sup>19</sup> Hebl, M. R., & Skorinko, J. L. (2005). Acknowledging one's physical disability in the interview: Does "when" make a difference? *Journal of Applied Social Psychology*, 35, 2477-2492.

<sup>20</sup> Huffman, A., Watrous, K., & King, E. B. (2008). Diversity in the workplace: Support for lesbian, gay, and bisexual workers. *Human Resource Management*, 47, 237-253.

OFCCP also incorrectly assumes that the current regulations require contractors to send out a self-identification form. On the contrary, the current requirement under 741.42 states the following:

*The contractor shall, after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, invite the applicant to inform the contractor whether the applicant believes that he or she may be covered by the act AND wishes to benefit under the affirmative action plan.*

Therefore, unlike the requirement under EO 11246 to collect and maintain race/ethnicity and gender data, the requirement to solicit disability status post-offer is much more passive. For example, a contractor may fulfill this requirement by merely placing a poster or sending out a corporate wide memo stating that any employee that believes that they are disabled AND wishes to benefit under the affirmative action plan may notify the human resource department. Note the “and” in the above statement; an individual who believes that he or she is disabled, but does NOT wish to benefit under the affirmative action program, would not self-identify. Finally, unlike race/ethnicity and gender data, there is no requirement to collect, maintain and conduct any analysis on disability information.

The proposed rule would require that contractors annually survey their employees, providing an opportunity for each employee who is, or subsequently becomes, an individual with a disability to voluntarily self-identify as such in an anonymous manner, thereby allowing those who have subsequently become disabled or who did not wish to self-identify during the hiring process to be counted.

Due to confidentiality issues, it makes sense that the annual survey be conducted in an anonymous manner. However, this clearly will not work if the proposed rule would require the contractor to collect the information for the purpose of conducting a utilization analysis by affirmative action job group. It is not possible to have an anonymous survey and, at the same time, match an employee to a specific job title which in return is mapped to an affirmative action job group.

Under 60-2 contractors are required to develop and maintain affirmative action job groups for the purpose of conducting affirmative action utilization analyses. A job group is an aggregation of job titles that are similar in content, wage and opportunity. Therefore, in order to conduct a disability utilization analysis by job group, the contractor must know how many individuals with disabilities are employed within each job title. This number will then be rolled up to the entire job group. How is it possible to determine the number of individuals with a disability **by job title** if the survey is required to be anonymous?

CCE has considered every possible alternative and has concluded that it is not possible to conduct an anonymous survey of the contractor’s workforce and, at the same time, have the ability to conduct analyses by affirmative action job group. This is absolutely critical, because if anonymity is promised but not provided, this would be an egregious violation of transparency and fairness.

One more point is worth considering. Even if it were possible for the contractor to conduct an anonymous survey and conduct the analysis by affirmative action job group, it would probably

not be anonymous. Contractors conduct affirmative action plans by establishment and the number of employees by establishment will greatly vary. Assume that at an establishment there is only one employee in the EEO-1 category Technicians. That employee has self-identified as disabled. Due to the fact that there is only one employee in the EEO-1 category, it would not be possible to break that group down further by affirmative action job group. Therefore, there will only be one employee in the job group. The results of the affirmative action plan would show one employee in the job group and that that individual self-identified as disabled. Clearly, everyone who has access to the affirmative action plan would know the individual and now know that he or she is disabled. Hence, the self-identification and affirmative action plan results are no longer anonymous.

CCE suggests keeping the requirement to annually survey the workforce in an anonymous manner, however remove the requirement to conduct the utilization analysis by affirmative action job group. This solution will allow employees to self-identify in an anonymous manner, and the results of the affirmative action plan will also remain anonymous.

The proposed regulations require that all information collected during the self-identification process be kept confidential and treated as medical information and inquiries in accordance with 60-741.23(d). 60-741.23(d) states the following:

*(d) Confidentiality and use of medical information. (1) Information obtained under this section regarding the medical condition or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:*

*(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or employee and necessary accommodations;*

*(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and*

*(iii) Government officials engaged in enforcing the laws administered by OFCCP, including this part, or enforcing the Americans with Disabilities Act, shall be provided relevant information on request.*

*(2) Information obtained under this section regarding the medical condition or history of any applicant or employee shall not be used for any purpose inconsistent with this part.*

It is unclear from the proposed regulations how it would be possible for a contractor to comply with 741.42 and, at the same time, conduct analyses of applicant and employee data. That requirement would appear to be a violation of this section. Note that this section requires that all data collected must be kept confidential and kept as a medical record with the three above mentioned exceptions. In addition, (2) does not allow the self-identification data to be used in any other way outside of the three exceptions. Clearly, it is not possible to be in compliance with the data analysis requirements of the regulations and simultaneously be in compliance with the confidentiality and use of medical information under 741.42. This is an apparent inconsistency in the regulations and absolutely must be addressed, because as it is currently written, compliance would be impossible.

In addition, the OFCCP makes an attempt to differentiate between a “data analysis” file versus a medical file of individual employees. It is unclear what the meaning of a “data analysis” refers to. It is important to understand the manner in which a contractor would collect disability information from applicants and employees.

For most contractors, race/ethnicity and gender data is collected and maintained in the contractor’s applicant tracking system (ATS). Job seekers express interest online and at some point during the process voluntarily solicit race/ethnicity and gender information. That information is maintained and stored in the ATS and can be queried out as needed to conduct applicant analysis. On the other hand, employees are surveyed and race/ethnicity and gender information is collected and maintained in the human resource information system (HRIS). Once again, this system allows the contractor to query personnel data on employees to conduct affirmative action analyses. However, the proposed regulations appear to disallow this practice of collecting and maintaining disability data in the ATS and HRIS. Therefore, this would require that contractors build a separate confidential medical “data analysis” system to store disability information. The cost of building and maintaining a new system would be enormous. In theory, a contractor would have to maintain an ATS, an HRIS, and now a disability tracking system. This new requirement is not accounted for in the burden estimates that have been submitted to OMB, yet must be. We estimate that this could be thousands of contractor hours and millions of dollars.

We suggest that the agency either eliminate the requirement to solicit disability status, or revise the language under 741.23(d).

### **Concluding Thoughts**

Improving employment opportunities and affirmative action for disabled applicants and employees is of critical social importance in this country, and CCE encourages OFCCP, EEOC, DOJ, and the federal government as a whole to continue to meet this objective. However, it is critical that requirements on federal contractors are attainable, do not produce negative unintended consequences for disabled applicants and employees, and are grounded in science. Some aspects of the proposed regulations may not accomplish the above goals and, in fact, may impede them. We urge OFCCP to consider the challenges described in this response, and hope that this response encourages positive dialogue on a variety of important topics. We also hope that the final regulations do not require contractors to spend an enormous amount of time, effort, and human capital on tasks that do not improve employment opportunities and affirmative action for disabled persons.

Respectfully submitted,



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