



Health & Disability Advocates

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February 16, 2012

Debra A. Carr
Director,
Division of Policy, Planning, and Program Development
Office of Federal Contract Compliance Programs
Room C-3325
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Comments on Proposed Regulations Implementing Section 503 of the Rehabilitation Act, RIN 1250-AA02

Dear Director Carr:

Health & Disability Advocates (HDA) respectfully submits these comments in response to the Notice of Proposed Rulemaking issued on December 9, 2011 by the Office of Federal Contract Compliance Programs to implement Section 503 of the Rehabilitation Act.

Since 2009, HDA has been spearheading a national marketing campaign known as Think Beyond the Label, targeting businesses to raise awareness on the benefits of employing workers with disabilities. While many businesses have expressed interest in hiring workers with disabilities, we believe the OFCCP's proposal to strengthen its regulations implementing Section 503 of the Rehabilitation Act will provide further incentives for businesses that for far too long have publicly stated interest in hiring, but for a variety of reasons have not acted on that interest. Bringing Section 503 regulations in line with regulations concerning federal contractors' obligations with respect to employment of women and minorities is long overdue, and, with proper guidance and enforcement, will facilitate increased employment of qualified workers with disabilities.

Requirements for contractors to collect data and keep records that would enable them -- as well as the OFCCP -- to determine the effectiveness of their affirmative action efforts will be critical to the success of the regulation. In addition, HDA believes that the OFCCP's guidance and enforcement of the regulations that encourage contractors to enter linkage agreements with organizations that serve individuals with disabilities and other demonstrable steps to improve the breadth of the recruitment pool of qualified job candidates with disabilities will be important measures to assess success. Finally, we are supportive of the OFCCP's objective to require employees to self-identify anonymously as individuals with disabilities, although we would like to see some more effort put into providing guidance on how contractors can achieve this objective.

Recommendations for improvement in the draft regulations:

Clarify that Contractors who Subcontract with Sheltered Workshops May Not Count Individuals in the Sheltered Workshops Toward the Contractors' Utilization Goals.

OFCCP should clarify its regulation concerning subcontracts with sheltered workshops. In one section the proposed regulations state "[c]ontracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified individuals with disabilities." Yet, in another section the regulations say that such contracts "may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the

contractor is obligated to hire trainees at full compensation when such trainees become ‘qualified individuals with disabilities.’ HDA recommends that the OFCCP should clarify that a contractor is permitted to count toward its *utilization goal* only those sheltered workshop employees who are actually hired by the contractor at full compensation in integrated employment. Individuals who are not employed by the contractor, for example employees of a *subcontractor* should not count toward the utilization goal for the *contractor's* workforce. Making such a distinction will go a long way to ensure that contractors are clear on what kind of employment counts toward utilization goals as well as ensures that operators of sheltered workshops are clear on what OFCCP will consider to qualify as affirmative action programs.

Specific Comments:

(1) Statement of Purpose (Section 60-741.40):

We think the proposed addition, in Section 60-741.40, of the Statement of Purpose articulating OFCCP's general expectations for affirmative action programs is helpful. The proposed statement is appropriate, except that it should make clear that (1) affirmative action tools such as measurable objectives, quantitative analyses, and internal auditing and reporting systems are important not only for *measuring the contractor's progress* in achieving equal employment opportunity, but also for *effectuating* that goal, and (2) an affirmative action program also includes priority consideration.

Accordingly, we propose modifying the Statement of Purpose to add the italicized text: "An affirmative action program must be 'more than a paperwork exercise.' Rather, an affirmative action program is a management tool that includes measurable objectives, quantitative analyses, *priority consideration*, and internal auditing and reporting systems designed to *effectuate and* measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities."

(2) Self-identification (Section 60-741.42):

While HDA is generally in support of the concept of requiring contractors to invite job applicants to self-identify as having a disability after receiving a job offer we recognize the reluctance that many job seekers with disabilities have in revealing disability status. It has been our experience that job seekers with disabilities are wary of highlighting anything that could be perceived as a barrier to ability to perform the job, and therefore simply requiring contractors to invite job applicants to self-identify will not achieve the objective OFCCP is working toward. We think there are more effective ways to demonstrate efficacy of affirmative action plans. HDA believes businesses should develop and implement internal communications strategies that foster a “disability-friendly” work place. Similar to affirmative action programs for women and other minorities, such strategies include workplace training and information sessions with management and non-management as well as employee resource groups focused on a range of topics related to disability in the workplace.

We are not in support of the OFCCP's requirement that contractors invite all job applicants to self-identify as having a disability *before* receiving a job offer, since we are concerned that individuals with “hidden” disabilities will be reluctant to self-identify at all. The OFCCP’s objective of having contractors evaluate how well affirmative action plans are working could be done through a variety of less obtrusive strategies that do not put the onus on job seekers with disabilities. For example, there are several national on-line job feeds that target job seekers with disabilities and contractors could post positions and track outcomes from these disability targeted national job feeds. Again, similar to other affirmative action programs, contractors can target disability services within higher education – Universities, Community Colleges as well as

vocational technology schools - and subsequently track referrals and how many of these referrals are ultimately hired from this recruitment pool.

We support the OFCCP's requirement that self-identification be done anonymously. Anonymous self-identification would permit contractors to collect the data necessary to evaluate the effectiveness of their affirmative action efforts while ensuring that applicants and employees with disabilities are protected from discrimination. We agree with the proposed regulations to limit the self-identification so that applicants and employees simply indicate that they have a disability, rather than indicating the type of disability. Many applicants and employees are likely to be wary about disclosing needlessly detailed information about their disabilities, even with anonymous self-identification, and will be more likely to self-identify if not asked to identify the nature of their disabilities. Moreover, it is not necessary for purposes of evaluating affirmative action efforts to collect information on the specific type of disability that each person has.

We appreciate the OFCCP's effort to develop standardized language for contractors to invite applicants to self-identify as having a disability. Having uniform language for all contractors will be helpful to contractors, applicants and employees.

We have some concern that the proposed language may be too complex and not easily understood. We propose the following simplified version:

This employer is a Government contractor or subcontractor required by law to take affirmative action to employ and advance in employment people with disabilities. Federal regulations require that Government contractors and subcontractors ask job applicants to indicate whether they have a disability. This information is only used for purposes of providing affirmative action for people with disabilities and measuring the effectiveness of affirmative action efforts.

A person has a disability if he or she has either (1) a physical or mental impairment that substantially limits a major life activity, (2) a history of such an impairment. For a list of major life activities, see the back of this page [include the major life activities listed in the NPRM].

If you have a disability, please check the box below:

YES, I HAVE A DISABILITY

Your submission of this information is voluntary. Choosing not to answer will have no negative effect on your job application or subject you to negative treatment of any kind. The law also requires Government contractors to provide people with disabilities with reasonable accommodations needed to ensure equal employment opportunity. If you need an assistive device, sign language interpreter, or other help (including a change in a policy that is applied to you) to participate fully in the application process, please let us know.

(3) Required Contents of Affirmative Action Programs (Section 60-741.44):

We believe OFCCP's efforts to set forth clearer lines of responsibility for implementing affirmative action plans, as well as more clearly defining what steps must be undertaken as part of an affirmative action plan (including linkage agreements and other recruitment strategies, as well as annual reviews of affirmative action programs with specific mandated components), are extremely important to ensure that affirmative action can be done in a meaningful way that brings more people

with disabilities into the contractor workforce. HDA hopes contractors, as well as OFCCP, will use the annual reviews to carefully scrutinize physical and mental job qualification standards.

We recommend eliminating the requirement in Section 60-741.44(f)(i) that contractors supply their job listings in formats and in a manner required by the appropriate Employment One-Stop Career Center (One-Stop). Rather than insisting that companies abide by a multiplicity of formats, OFCCP should make it as easy as possible for companies to post their job listings with any One-Stop.

Linkage agreements with vocational rehabilitation agencies, employment networks, EARN, Veterans Affairs regional offices, as well as centers for independent living and other disability organizations are an important component of effective affirmative action. However, HDA would like to point out that such linkages will only connect contractors with job seekers with disabilities who are engaged with the publicly funded disability services systems. In the last three years of the Think Beyond the Label campaign, HDA and our partners – the majority of which are state VR agencies – have heard from thousands of job seekers with disabilities who are not connected to the publicly funded system for a variety of reasons. Some job seekers were unaware of the availability of such services; others were worried about the stigma attached to publicly funded programs. Yet others were unable to avail themselves of vocational rehabilitation services because they did not have disabilities that met the agency’s “order of selection” criteria, meaning the agency was only able to serve the most “severely disabled” due to limited funding. For these reasons, we believe that the OFCCP must have a broader description of appropriate linkages in the final regulations that reflect the diversity in disability-type and skills of the disability population. Again, we urge the OFCCP to include strategies like posting jobs on disability related online job feeds, targeted outreach through social media to reach job seekers with disabilities and marketing their business directly to persons with disabilities to be an acceptable linkage strategy as a part of a well-rounded affirmative action plan.

The final rule should include Disabled Veterans Outreach Programs as one of the entities with which a contractor may choose to enter a linkage agreement under Section 60-741.44(f)(ii). These programs are funded through the Department of Labor’s Veterans’ Employment and Training Service and are specifically tasked with promoting employment opportunities for veterans with disabilities.

Technical assistance and training should be readily available from OFCCP and OFCCP approved sources – through online teaching tools, webinars and other easily achievable learning mechanisms.

We support the OFCCP’s requirement that contractors provide accommodations such as large print, Braille or other means that enable individuals with visual impairments to read notices of employee rights and contractor obligations rather than having such notices read to the individual. This change brings the regulations in line with current practice and with reasonable accommodation law under the ADA and the Rehabilitation Act.

(4) Reasonable Accommodation Procedures (Section 60-741.45):

We believe OFCCP’s effort to set forth specific requirements for reasonable accommodation procedures is useful. We believe that these requirements should be part of the non-discrimination portion of the Section 503 regulations, however, rather than part of the affirmative action requirements. While non-discrimination is essential in order for affirmative action efforts to be effective in expanding the number of individuals with disabilities in the workforce, placing

reasonable accommodation mandates in the affirmative action section suggests (incorrectly) that these requirements go beyond non-discrimination requirements.

(5) Utilization Goals (Section 60-741.46):

We strongly support OFCCP's proposal to impose a utilization goal for employees with disabilities. In contrast to the baseline goals that have long been imposed on contractors under OFCCP's regulations concerning affirmative action programs for women and minorities, the absence of any such goals for affirmative action programs for people with disabilities is striking. There is a clear need to have meaningful and measurable goals for employment of people with disabilities. As OFCCP has noted, people with disabilities had staggeringly low employment rates at the time that the ADA was passed and, more than 20 years later, continue to be employed at a fraction of the rate of employment of people without disabilities -- with a 2010 labor force participation rate of 21.8%, compared with 70.1% for people without disabilities.¹ This stagnation has occurred despite the protections of the ADA and the existing Section 503 regulations.

Moreover, people with disabilities have been disproportionately affected by the recession of the last several years. The employment rate of working age people with disabilities declined by 12.3% between October, 2008 and June 2010, compared with a 3.4% decline for working age adults without disabilities.²

The Appropriate Goal

In response to OFCCP's request for comment on whether 7% is an appropriate utilization goal and on the possible range of values between 4% and 10%, we believe that the 7% goal is too low, and that a 10% goal would be more appropriate. As OFCCP recognizes, the calculation of the 7% goal was based on a data set (the American Community Survey) that captures a considerably narrower set of people with disabilities than is covered by Section 503.

Among other things:

- While the individuals who would be the subject of the proposed 7% goal include anyone with a physical or mental impairment that substantially limits a major life activity *or* a record of such a limitation, the ACS data captures only people who are deaf or have serious difficulty hearing, people who are blind or have serious difficulty seeing even when wearing glasses, people who have serious difficulty concentrating, remembering, or making decisions due to a physical, mental or emotional condition, people who have serious difficulty walking or climbing stairs, people who have serious difficulty dressing or bathing, and people who have difficulty doing errands alone - such as visiting a doctor's office or shopping - due to a physical, mental or emotional condition.
- The individuals who would be the subject of the proposed 7% goal include people whose impairments substantially limit major bodily functions (such as kidney, liver,

¹ OFCCP cites Bureau of Labor Statistics data that is based on the Current Population Survey, which captures a narrower group of individuals with disabilities than the ADA and Section 503. As OFCCP also notes, 2009 American Community Survey data shows similar results, with 23% of people with disabilities participating in the labor force compared to 65.8% of people without disabilities.

² H. Stephen Kaye, *The Impact of the 2007-09 Recession on Workers with Disabilities*, Monthly Labor Review, at 2 (Oct. 2010), <http://www.bls.gov/opub/mlr/2010/10/art2full.pdf> (using Current Population Survey data).

endocrine, or immune function) even if they do not substantially limit activities such as hearing, seeing, walking, bathing, climbing stairs or other activities captured by the ACS data.

- The individuals who would be the subject of the proposed 7% goal include people whose limitations are partially or completely controlled by mitigating measures (such as medication, therapies, and other interventions) while the ACS does not ask people whether they would meet the definition of disability absent mitigating measures.

In its Final Regulatory Impact Analysis for regulations implementing the ADA Amendments Act, the EEOC estimated that somewhere between 20% and 64% of individuals covered by the ADA as amended participate in the labor force.³ The EEOC's estimate applies as well to Section 503, which has the identical definition of disability as that in the ADA. This estimate confirms that OFCCP should aim higher than a 7% utilization goal.

Within OFCCP's suggested range of between 4% and 10%, we believe that 10% is the most appropriate goal in light of the breadth of the targeted group.

We recognize that some applicants and employees may choose not to self-identify. Because the identification would not only be anonymous, but also would not specify what type of disability the person has, we believe the number of people who will decline to self-identify will be small. In our experience, most people with disabilities are interested in participating in voluntary affirmative action programs where the nature of their disability and its existence will remain unknown to the employer. Moreover, in the unlikely event that very few individuals with disabilities did self-identify, OFCCP would be able to take that into account in its enforcement efforts -- and as OFCCP has emphasized, a contractor will not be found in violation of Section 503 simply by virtue of not meeting the utilization goal. In addition, if a 10% goal were to prove unworkable, OFCCP would be able to change it pursuant to Section 60-741.46(c), which requires the Director to periodically review and update the utilization goal as appropriate.

OFCCP requested comment concerning its decision to include a portion of "discouraged workers" with disabilities in calculating the utilization goal. We believe this is appropriate for several reasons. First, discouraged workers are individuals who have not looked for work in four weeks, not because they lack the *desire* to work, but rather because they believe that *no work is available* for them. As OFCCP correctly describes, historical discrimination against people with disabilities has had the effect of suppressing the representation of people with disabilities in the workforce, and discouraged workers might seek employment in the absence of discrimination or other employment barriers. The utilization goal that OFCCP sets should not reflect an expectation that such discrimination and exclusion will continue.

³ 76 Fed. Reg. 16991 (March 25, 2011). The EEOC began with data from the Current Population Survey, which uses the same definition of disability as the ACS, and adjusted to account for the much greater scope of individuals covered under the ADA. The baseline percentage of people with disabilities participating in the labor force using the CPS data was 20%. This figure is significantly higher than the 5.7% derived by OFCCP by averaging ACS disability data averaged by EEO-1 job category and then averaged across EEO-1 job categories. We note that averaging across job categories will significantly depress the percentage of individuals with disabilities in the labor force by giving equal weight to the low percentage of individuals with disabilities in high level job categories (due in part to a history of discrimination and unwarranted assumptions about the capabilities of people with disabilities), even though those categories represent comparatively small numbers of individuals.

Second, one of the primary purposes of revising the Section 503 regulations is to ensure that there are far more aggressive outreach and recruiting efforts on the part of contractors and correct the perception that there are no jobs available for people with disabilities. The utilization goal should reflect the assumption that new outreach and recruiting efforts will have some effect in correcting this notion among discouraged workers.

Third, the percentage of discouraged workers counted by OFCCP is minimal and any possible over count is more than offset by the dramatic under count that results from using the vastly under inclusive ACS data to calculate the utilization goal. The agency included a mere 1.7% of discouraged workers to the goal, and further reduced that number to 1.3% when it rounded down the goal from 7.4% to 7%. Even if some portion of the 1.3% would not seek employment, this number pales in comparison to the undercount occasioned by using the ACS definition of disability rather than the definition in the ADA and Section 503.

(8) Sanctions and Penalties (Section 60-741.66):

OFCCP should make clear that it will use the full range of enforcement mechanisms available to effectively prevent violations of Section 503, and that it will use appropriate sanctions and penalties to prevent situations where a contractor calculates that continuing to incur penalties and violate the law is preferable to complying.

Sincerely,

A handwritten signature in black ink, appearing to read 'Barbara A. Otto', with a long horizontal flourish extending to the right.

Barbara A. Otto,
Chief Executive Officer