OFCCP’s Proposed Affirmative Action and Nondiscrimination Obligations For Federal Contractors and Subcontractors Regarding Individuals with Disabilities

On December 9, 2011, the Department of Labor’s Office of Federal Contract Compliance Programs (OFCCP) published a Notice of Proposed Rulemaking (NPRM) in the Federal Register that would fundamentally alter the affirmative action requirements established in Section 503 of the Rehabilitation Act for qualified individuals with disabilities. Among other things, the proposed regulatory changes would, for the first time, set a goal that seven percent of every job group in a contractors’ workforce be persons with disabilities. Moreover, the NPRM indicates that a sub-goal of two percent for persons with severe disabilities is also under consideration. In addition, the NPRM details significant new actions contractors must take in the areas of recruitment, training, record-keeping and policy dissemination.

FEDERAL CONTRACTOR AFFIRMATIVE ACTION AND NON-DISCRIMINATION REQUIREMENTS GENERALLY

Companies that enter into contracts and subcontracts with the federal government are subject to a number of special equal employment opportunity and affirmative action requirements. Federal contractors’ nondiscrimination and affirmative action obligations are established by two laws and an Executive Order:

- Executive Order 11246 (race, gender, religion, and national origin);
- Section 503 of the Rehabilitation Act of 1973, as amended (individuals with disabilities); and
- Section 4212 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (protected veterans), and the implementing regulations.

The federal contractors’ obligations are enforced by the Office of Federal Contract Compliance Programs (OFCCP) which is an agency in the U.S. Department of Labor. The failure to comply with OFCCP’s regulations may result in various remedies for the affected persons with disabilities and sanctions for the contractor from withholding progress payments up to and including the termination of current federal contracts and debarment from eligibility to enter future federal contracts.

CURRENT RULES GOVERNING COMPLIANCE WITH SECTION 503 GENERALLY

Coverage The nondiscrimination requirements and general affirmative action requirements of Section 503 apply to all employers with federal government contracts or subcontracts in excess of $10,000 for the purchase, sale, or use of personal property or nonpersonal services (including construction). However, the requirement to prepare and maintain an affirmative action program, and the specific affirmative action requirements apply to those service and supply contractors that have a contract or subcontract of $50,000 or more and 50 or more employees. Once an employer is covered, the requirements generally apply to all of its operations, not just those performing work on federal contracts.
**General Requirements** Federal contractors and subcontractors covered by Section 503 are currently required to:

- Employ nondiscriminatory employment practices (as is also required generally of all employers under the Americans with Disabilities Act, or ADA);
- Provide reasonable accommodations to the known physical and mental limitations of otherwise qualified job applicants and employees with disabilities (also an ADA requirement);
- After a job offer is extended but before employment begins, invite job applicants to voluntarily and confidentially self-identify as to whether or not they have a disability in order to benefit from any affirmative action programs covered contractors may have;
- Develop and maintain a written affirmative action program (AAP) that includes:
  - Developing an equal employment opportunity policy statement;
  - Reviewing personnel processes;
  - Conducting periodic reviews of physical and mental job qualifications;
  - Developing and implementing procedures to prevent harassment;
  - Disseminating the contractor’s EEO policy externally and performing outreach and positive recruitment;
  - Disseminating the EEO policy internally;
  - Designing and implementing an audit and reporting system;
  - Designating a management official to direct and assume responsibility for ensuring the implementation of the affirmative action program; and
  - Training personnel to ensure that EEO and affirmative action program commitments are implemented.
- Maintain certain personnel and employment records pertaining to compliance with Section 503.

**Numerical Goals** The current regulations do not require numerical goals for persons with disabilities. Instead, the focus is on taking good-faith affirmative action to establish a workplace free from barriers to equal employment opportunities, and to recruit, train, and promote qualified individuals with disabilities. There is no apparent legal authority under Section 503 of the Rehabilitation Act that permits the federal government to set numerical employment requirements. Moreover, affirmative action requirements which operate as a quota are generally unlawful and subject to the highest level of judicial scrutiny.

**Overview of Proposed Regulations Governing Section 503**

On December 9, 2011, OFCCP published a Notice of Proposed Rulemaking (NPRM) in the Federal Register that would fundamentally alter the affirmative action requirements established in Section 503 of the Rehabilitation Act for qualified individuals with disabilities. Without providing any evidence of discrimination, the proposed regulatory changes would, for the first time, set a goal that seven percent of every job group in a contractors’ workforce be persons with disabilities. Moreover, the NPRM indicates that a sub-goal of two percent for persons with severe disabilities is
also under consideration. In addition, the NPRM details significant new actions contractors must take in the areas of recruitment, training, record-keeping and policy dissemination. The NPRM also implements the new definition of disability under the ADA Amendments Act of 2008 (ADAAA) and the Equal Employment Opportunity Commission’s (EEOC) recent regulations under the ADAAA.

Rationale for the Proposal  The U.S. Department of Labor describes the NPRM as “one of the most significant advances in protecting the civil rights of workers with disabilities since the passage of the Americans with Disabilities Act.” According to OFCCP Director Patricia A. Shiu, "for nearly 40 years, the rules have said that contractors simply need to make a 'good faith' effort to recruit and hire people with disabilities. Clearly, that's not working." Although the current regulations have been in place since the 1970’s, this is the first time in 15 years that they have been comprehensively revised.

Percentage of Workforce and Hiring Utilization Goals

As noted above, the current regulations do not have numerical goals for individuals with disabilities. The proposed rule would establish a federally mandated “utilization goal” of seven percent for individuals with disabilities for each job group in the contractor’s workplace. According to OFCCP, the seven percent goal “should be attainable by complying with all aspects of the [proposed] affirmative action requirements.”

Under the NPRM, contractors must use the same job groups that they use for race and gender under the Executive Order 11246 affirmative action requirements. They are required to conduct an annual utilization analysis to evaluate the representation of individuals with disabilities in each job group relative to the seven percent goal. If the utilization goal is not met in one or more job groups, the contractor must develop and execute action-oriented programs to attain the goal including alternative or additional affirmative action efforts listed in the proposed rule.

Because OFCCP recognizes there is no reliable statistical data on the number of individuals with disabilities as defined by the ADA, it is also seeking comments on whether or not it would be better to have a goal that ranges from four percent to ten percent to account for geographic variation in availability and a discouraged worker effect, instead of a single seven percent goal.

Subgoal of Two Percent for Individuals with Severe Disabilities  In addition, OFCCP is considering a sub-goal of two percent for individuals with certain particularly severe disabilities including:

- total deafness;
- blindness;
- missing extremities (hand, foot, arm or leg);
- partial paralysis;
- complete paralysis;
- epilepsy;
- severe intellectual disability;
- psychiatric disability; and
- dwarfism.
If such a sub-goal is adopted in the final rule, OFCCP would prescribe the language and manner in which contractors would have to invite applicants and employees to self-identify that they have these particular disabilities (see next section, “Invitations to Self-Identify as Disabled”).

**OFCCP Assets Goal is “Not a Quota”** The OFCCP states in the NPRM that the 7% goal “is neither a hiring quota nor a restrictive hiring ceiling.” Yet, as previously noted, in announcing the proposal, OFCCP Director Shiu has indicated that good faith efforts “clearly are not working.” Thus, federal contractors will need to know what is required beyond “good faith efforts,” which is what has generally characterized the requisite affirmative action until now. Although a contractor’s determination that it has not met the seven percent goal during its annual utilization analysis does not necessarily constitute a finding or admission of discrimination, such a determination will not impede or prevent OFCCP from finding that one or more unlawful discriminatory practices caused the contractor's failure to meet the utilization goal. If proven, such a finding by OFCCP may result in various remedies for the affected persons with disabilities and sanctions for the contractor from withholding progress payments up to and including the termination of federal contracts and debarment from receiving future federal contracts.

**INVITATIONS TO SELF-IDENTIFY AS DISABLED**

Under the current regulations, once a job offer has been extended and before the applicants begin their employment duties (i.e., post-offer/pre-employment), contractors must invite applicants “to inform the contractor whether the applicant believes they may be covered by the act and wish to benefit under the affirmative action program.” It appears that contractors may, under very limited circumstances, invite self-identification prior to making a job offer (i.e., pre-offer). However, it should be noted that the Americans with Disabilities Act contains a general prohibition against asking disability-related questions in the pre-offer stage. The EEOC has explained that by prohibiting pre-offer disability-related questions “Congress established a process within the ADA to isolate an employer's consideration of an applicant's non-medical qualifications from any consideration of the applicant's medical condition.” Indeed, “an employer may not ask disability-related questions … even if the employer intends to shield itself from the answers to the questions or the results of the examination until the post-offer stage,” according the EEOC.

**Job Applicants** The NPRM makes significant and substantive changes to a contractor's responsibilities and the process through which applicants, including current employees who are applying for other positions in the company, are invited to voluntarily self-identify as disabled individuals. Under the proposal, contractors must:

- Provide to each job applicant an OFCCP prescribed invitation that is separable or detachable from the application prior to an offer of employment (pre-offer); and
- Use an OFCCP prescribed invitation for job applicants to self-identify post-offer/pre-employment.

**Existing Employees** The proposed rule also requires contractors to annually survey their employees in an anonymous manner with an OFCCP prescribed invitation to voluntarily self-identify as an individual with a disability.

**Consideration for Other Positions** If a job applicant identifies him/herself as having a disability, he/she must be considered for all available positions for which he/she may be qualified if the position(s) applied for is unavailable.
**Prescribed Form** The prescribed invitation, used with both applicants and employees, only provides for a “YES” response. The form reads, in part, as follows:

A person has a disability as defined in section 503 if that person either: (1) Has a physical or mental impairment which substantially limits one or more of that person's major life activities; or (2) has a history or record of such an impairment. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Major life activities also include major bodily functions such as functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal and reproductive functions.

Please indicate whether you have a disability as defined in section 503 by checking the box below.

[ ] YES, I HAVE A DISABILITY

There are no other boxes for the person to check if they do not have a disability or prefer not to disclose one.

**Elusive Definition of Disability** For the past several decades, Congress, the courts, federal agencies, employers and employees have all struggled with establishing a precise definition of “disability,” which, even after Congress further refined the definition in 2008, has been the subject of extensive litigation. Yet, the NPRM assumes that applicants and employees will know for certain whether they have a qualifying “disability” within the strict legal definition, simply by reading the lengthy and complicated regulatory language in the mandated, self-identification form. Moreover, for a variety of reasons individuals with disabilities may not want to identify themselves and unlike the OFCCP prescribed invitation above the self-identification form used by the federal government allows individuals to answer, “I do not wish to identify my disability status” and “I do not have a disability,” besides answering yes.

**Lack of Verification** The NPRM does not require applicants or employees to provide any evidence if they self-identify as an individual with a disability and there is no provision in the proposed rule that enables employers to verify the self-identification. In fact, other provisions of the Americans with Disabilities Act as well as Section 503 regulations limit a contractor’s ability to make inquiries and perform medical examinations of a claimed disability. In addition, contractors must keep all self-identification information confidential and in a data analysis file rather than in the medical files of the employees. Correspondingly, if the employer observes an obvious disability but the applicant does not check the “yes” box, the NPRM does not indicate whether that individual, if hired, may be counted towards the prescribed goal.

**Rationale for Self Identification** According to OFCCP, these changes are needed in order to collect data pertaining to the participation of individuals with disabilities in the contractor's applicant pools and workforces, and to allow OFCCP and the contractor to better identify and monitor the contractor's hiring and selection practices. The agency observes that the data related to the pre-offer stage will enable OFCCP and the contractor to assess the effectiveness of the contractor's recruitment efforts over time, and to refine and improve the contractor's recruitment strategies, where necessary.
REASONABLE ACCOMMODATION PLAN AND PROCEDURES

Existing Requirements  Under the ADA and current OFCCP regulations, contractors are required to provide reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. Indeed, federal contractors who comply with the ADA’s reasonable accommodation requirements are generally compliant with all but the reporting and record-keeping provisions of Section 503.27

Applicants with disabilities must be provided a reasonable accommodation with respect to the application process. As noted above, contractors may, under very limited circumstances, invite applicants to self-identify prior to making a job offer, and once a job offer has been extended and before the applicants begin their employment duties contractors must invite applicants to indicate whether they may have a disability and wish to benefit under the contractor's affirmative action program.

Employees with disabilities who request an accommodation must be provided a reasonable accommodation that permits the employee to perform the essential functions of their job. Examples of reasonable accommodations include modifications to work schedules, work stations, and work processes without jeopardizing the safety of the employee or others. As noted above, reasonable accommodation requests can be rejected if they impose an “undue hardship” on the employer. If no reasonable accommodation can be found that permits the employee to perform the essential functions of his or her job, the EEOC regulations state that a transfer to another job for which the employee is qualified must be considered as a last resort.

Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide a reasonable accommodation for applicants and employees of whose disability the contractor has actual knowledge.

Additional New Steps  The proposed regulation requires federal contractors to take several new steps beyond what is required of all other employers under the ADA. Specifically, the NPRM creates a new regulatory section that requires contractors to develop and implement written procedures for processing reasonable accommodation requests including the process by which the contractor renders a final determination. In addition to what is already required by the EEOC under the ADA, the new rules would:

- Require accommodation requests be processed as expeditiously as possible, but no longer than 10 business days when supporting medical documentation is not needed, and no longer than 30 days when supporting medical documentation or special equipment is needed;
- Require written notices be provided requesters when the processing of their accommodation requests will not be completed within the established timeframes including the reason(s) for any delay and a projected completion date;
- Provide that reasonable accommodation requests from job applicants are processed expeditiously, using timeframes tailored to the application process;
- Provide written confirmation of receipt of a request to the person who requested accommodation, either by letter or email; any denial or refusal must be provided in writing and include the reason for the denial, a statement of the requester's right to file a discrimination complaint with OFCCP, and information about any internal appeals process the contractor may have;
• Provide the circumstances under which medical documentation will be sought for an accommodation and describe how it must be limited to seeking information solely about an individual’s disability and functional limitations;

• Provide the contact information for the official designated as responsible for implementation of the reasonable accommodation procedures (the responsible official must have the authority, resources, support, and access to top management that is needed to ensure the effective implementation of the reasonable accommodation procedures);

• Disseminate the reasonable accommodation procedures to all employees by inclusion in an employee handbook and/or by email or electronic posting on a company web-page where work-related notices are ordinarily posted;

• Provide a notice of the reasonable accommodation procedures to employees who work off-site in the same manner that notice of other work-related matters is ordinarily provided to those employees; and

• Provide annual training for supervisors and managers regarding the implementation of reasonable accommodation procedures.28

AFFIRMATIVE ACTION PLAN

Current Requirements As with other protected classes, federal contractors and subcontractors are required to prepare written affirmative action programs (AAPs) for individuals with disabilities. Although the prescribed AAPs for persons with disabilities and veterans may be developed separately, many contractors combine the AAPs because of their similar elements. Currently, contractors and subcontractors are required to:

• Develop and post an equal employment opportunity policy statement;

• Periodically review their personnel processes to ensure the processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available;

• Periodically review their physical and mental job qualifications;

• Make reasonable accommodations to the known physical and mental limitations of otherwise qualified individuals or veterans with disabilities;

• Develop and implement procedures to prevent harassment;

• Disseminate the contractor’s EEO policy externally and perform outreach and positive recruitment;

• Disseminate the EEO policy internally;

• Design and implement an audit and reporting system;

• Designate a management official to direct and assume the responsibility for ensuring the implementation of their affirmative action program; and

• Train their personnel to ensure that EEO and affirmative action program commitments are implemented.29
Affirmative Action Plan Required to Include Reasons for Personnel Decisions. The proposed revision of the affirmative action plan (AAP) requirements under Section 503 includes a number of new requirements. Most significantly, contractors would be required to document the reasons for rejecting individuals with disabilities for vacancies and training programs, while also describing whatever reasonable accommodations were considered.

In addition, contractors would be required to annually, instead of periodically, review their personnel processes, and to document that review. Further, the NPRM mandates, instead of suggesting, certain specific steps contractors must take when reviewing their personnel processes, including:

- Identifying the vacancies, promotions, and training programs for which applicants and employees with disabilities are considered; and
- Documenting the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs.

New Accessibility Requirements. The proposal requires contractors to ensure that its information and communication technology is accessible to applicants and employees with disabilities. This includes adopting the Web Content Accessibility Guidelines of the World Wide Web Consortium Web Accessibility Initiative or implementing the accessibility requirements for federal agencies prescribed in Section 508 of the Rehabilitation Act. As a matter of affirmative action, contractors must ensure that their electronic or online job application systems are compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software.

New Review of Qualification Standards. The NPRM requires contractors to annually—instead of periodically—review their physical and mental job qualification standards and to document the results of the review. Contractors must document and retain the methods used to complete their annual review of all physical and mental job qualification standards, the results of their annual review, and any actions taken in response. The proposal also requires a contractor to contemporaneously create a written statement of reasons supporting its belief that a disabled individual poses a direct threat to the health or safety of the individual or others in the workplace.

New Requirement for Partnership Agreements. One of the most significant changes in the NPRM rule addresses the scope of the contractor's recruitment efforts and the dissemination of its affirmative action policies. Currently, the regulations recommend rather than mandate the specific methods for carrying out these obligations. Under the proposal, contractors would be required to:

- Promptly list all full-time, part-time, and temporary positions, with limited exceptions, with the nearest Employment One-Stop Career Center;
- Consider applicants who are known to have disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable;
- Establish a “linkage” (i.e., partnership) agreement with either the local State Vocational Rehabilitation Service Agency office or a local Employment Network organization listed in the Social Security Administration’s Ticket to Work Employment Network Directory;
- Establish a linkage agreement with a DOL funded recruitment or training service for individuals with disabilities;
• Establish one other linkage agreement with a veteran organization, local disability group, or private recruitment source;
• Document all linkage agreements and all outreach and recruitment efforts; and
• Send written notification of the company’s policy related to its affirmative action efforts to all subcontractors.32

The NPRM also requires contractors to annually review the outreach and recruitment efforts they have undertaken over the previous twelve months and evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities, and to document its review.33 Although the proposal recognizes that the effectiveness of an outreach or recruitment effort is not easily determined and allows contractors some flexibility in making the assessment, the primary indicator of effectiveness is whether qualified individuals with disabilities have been hired. Moreover, OFCCP reserves the right to determine the reasonableness of the contractor's assessment and conclusion.34

**New Data Collection and Reporting Requirements** As part of the affirmative action program, the NPRM also requires contractors to document and maintain the following computations or comparisons pertaining to applicants and hires on an annual basis:

• Number of referrals of individuals with disabilities from applicable employment service delivery system(s), such as State Vocational Rehabilitation Service Agencies and Employment One-Stop Career Centers;
• Number of referrals of individuals with disabilities that the contractor received from other entities, groups, or organizations the contractor has linkage agreements with;
• Number of applicants who self-identified, or who are otherwise known to be disabled;
• Total number of job openings, total number of jobs filled, and the ratio of jobs filled to job openings;
• Total number of applicants for all jobs;
• Ratio of applicants with disabilities to all applicants;
• Number of applicants with disabilities hired;
• Total number of applicants hired; and
• Ratio of individuals with disabilities hired to all hires.35

OFCCP is also considering a new annual reporting requirement under which contractors would be required to provide the agency with a report containing the measurements and computations listed above including the percentage of applicants, new hires, and total workforce for each EEO-1 category.36

The proposal also requires contractors to discuss their affirmative action policy thoroughly in any employee orientation. It would also require that contractors meet with union officials and/or employee representatives to inform them of the contractor's policy and request their cooperation if party to a collective bargaining agreement.
New Training Requirements for Recruiters, Supervisors And Managers  Although the current regulations require contractors to train their personnel who are involved in the recruitment, screening, selection, promotion, disciplinary, and related processes, the NPRM requires the training to cover specific topics, including but not limited to: the benefits of employing individuals with disabilities; appropriate sensitivity toward applicants and employees with disabilities; and the legal responsibilities of the contractor and its agents regarding individuals with disabilities, including the obligation to provide reasonable accommodation to qualified individuals with disabilities. Contractors would also be required to create contemporaneous records documenting the specific subject matter(s) covered in the training, who conducted the training, who received the training, and when the training took place.

CODIFICATION OF ENFORCEMENT MEASURES  
Although the NPRM does not substantially change the enforcement rules for individuals with disabilities, it does update the regulatory text to codify OFCCP’s current enforcement strategies. For example, OFCCP routinely expands the number of years involved in any desk audit beyond the number set forth in the scheduling letter (typically one year look back) if OFCCP deems it necessary to carry out its investigation of potential violations. The current regulations do not explicitly authorize more expansive audits; the NPRM makes this change. Further, the NPRM also adds regulatory language that codifies OFCCP’s current practice of including additional quantifiable benchmarks for a contractor's outreach, recruitment, hiring, or other employment activities in any conciliation agreement. The current regulations do not explicitly authorize these additional benchmarks in the agency’s conciliation agreements.
The required AAPs for individuals with disabilities and disabled veterans may be developed separately or combined. In practice today, many contractors prepare a combined, single veterans and Section 503 AAP because the elements that must be included in each are similar.


See discussion on job groups below in section on Utilization Goal of Seven Percent.

Federal contractors are required to establish affirmative action plan (AAP) job groups and compare their employment of minorities and women within those job groups to the availability of minorities and women who are "available" for employment. Job groups are jobs that are grouped based on three factors: 1) similar wages; 2) similar job duties and responsibilities; and 3) similar opportunities for training, promotion, transfer, and other employment benefits. Each job title that a contractor has must be placed into a job group.

In determining which jobs to gather together for job groups, contractors are to consider the following: 1) the Dictionary of Occupational Titles, position descriptions, and/or a collective bargaining agreement may be helpful in determining which jobs have similar content; 2) salaried and hourly jobs are generally not grouped together; 3) overtime exempt and non-exempt jobs are generally not grouped together; and 4) employees covered under different unions are generally not grouped together.

Smaller contractors (contractors with fewer than 150 employees), however, may formulate their AAP job groups according to EEO-1 job categories used by the Equal Employment Opportunity Commission.

Contractors with sufficiently large numbers of employees in the EEO-1 job categories may have job groups consisting of subgroups of those categories. For example, the officials and managers category may be subdivided into job groups entitled “Upper Management,” “Middle Management,” and “First-Line Supervisors;” or the professionals category may be subdivided into job disciplines such as “Engineers” and “Accountants.” However, AAP job groups generally do not contain jobs from more than one EEO-1 job category.

There are 10 EEO-1 job categories: Executive/Senior Level Officials and Managers; First/Mid Level Officials and Managers; Professionals; Technicians; Sales Workers; Administrative Support Workers; Craft Workers (skilled); Operatives (semi-skilled); Laborers and Helpers (unskilled); and Service Workers.

16 U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, Notice Number 915.002, October 10, 1995, available at: http://www.eeoc.gov/policy/docs/preemp.html. According to the EEOC, under the Americans with Disabilities Act of 1990, an employer may ask disability-related questions and require medical examinations of an applicant only after the applicant has been given a conditional job offer. However, in this sub-regulatory guidance document the EEOC also states that “[a]n employer may invite applicants to voluntarily self-identify [at the pre-offer stage] for purposes of the employer’s affirmative action program if: the employer is undertaking affirmative action because of a federal, state, or local law (including a veterans’ preference law) that requires affirmative action for individuals with disabilities (that is, the law requires some action to be taken on behalf of such individuals); or the employer is voluntarily using the information to benefit individuals with disabilities.”

17 Americans With Disabilities Act, 42 U.S.C. § 12112(d)(2); 29 C.F.R. § 1630.13(a). Specifically, 42 U.S.C. § 12112(d)(2) states: “Pre-employment – [employers] shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.”


20 76 Fed Reg 77094, proposed section 60-741.42(a).

21 76 Fed Reg 77094, proposed section 60-741.42(b). Under the current regulations, federal contractors “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 program.” (41 CFR 60-741.42(a)) However, they are not required to use an OFCCP prescribed invitation.

22 76 Fed Reg 77063.

23 Id.


25 Current and proposed 41 C.F.R. 60-741.23.

26 76 Fed Reg 77062.

27 Under 41 C.F.R. 60-741.80, federal contractors and subcontractors are required to keep “records relating to requests for reasonable accommodation” for a period two years, unless the contractor has fewer than 150 employees or has a contract of less than $150,000 in which case the record retention period is one year.

28 76 Fed Reg 77098-99, proposed section 60-741.45. Requests for reasonable accommodation, related documentation (such as request confirmation receipts, requests for additional information, and decisions regarding accommodation requests), and any medical or disability-related information provided to the contractor must be treated as a confidential medical record and maintained in a separate medical file.

29 41 C.F.R. 60-741.40 to 741.45 (Subpart C), and Appendix C to Part 60-741.

30 76 Fed Reg 77095, proposed section 60-741.44(b).

31 76 Fed Reg 77095, proposed section 60-741.44(c).
Although current 41 C.F.R. 60-741.44(g)(2)(v) requires contractors to discuss their affirmative action policy “thoroughly in both employee orientation and management training programs” and current 41 C.F.R. 60-741.44(j) requires contractors to train “all personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes,” the current rule does not prescribe what training must be provided or require contemporaneous records be created.

For example, proposed section 60-741.44(f)(2) lists several “suggested outreach efforts” that OFCCP could require a contractor to perform as part of any conciliation agreement, including formal briefing sessions with representatives from recruiting sources, participation in work-study programs for students, trainees, or interns with disabilities, and making individuals with disabilities available for participation in career days, youth motivation programs, and related activities in their communities.